UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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I. Introduction.

Plaintiffs submit this memorandum in opposition to Defendants Walsh and Lorge's Motion for Summary Judgment [Doc. 162]. In the parties' Joint Motion for Leave to File Early Dispositive Motions at 1-2 [Doc. 132] (Apr. 24, 2020), Walsh and Lorge stated they sought to file motions for summary judgment on their immunity defenses and the Court's subject-matter jurisdiction. The Court granted the parties' motion, but *only* with respect to the matters outlined in their Joint Motion. *See* Third Amended Pretrial Scheduling Order at 6 [Doc. 138] (Apr. 27, 2020) ("[t]he parties have leave to file early dispositive motions *only* so far as are outlined in their Joint Motion for Leave to File Early Dispositive Motions (Docket No. 132)") (emphasis added).

Walsh and Lorge's summary judgment motion strays far beyond the early dispositive motions outlined in the parties' Joint Motion and authorized by the Court. In addition to addressing their immunity defenses and the Court's subject-matter jurisdiction, Walsh and Lorge seek summary judgment that plaintiffs lack a valid cause of action, that plaintiffs' claims are barred by the Tenth Amendment and principles of federalism, that plaintiffs' claims are barred by the Eleventh Amendment (which was not one of the immunity defenses pled by Walsh and Lorge in their Answers), that plaintiffs' claims against Walsh and Lorge in their official capacities are redundant and should be dismissed, and that plaintiffs have not identified a statutory basis for their attorney's-fee claim. Plaintiffs respond to these improperly raised arguments on the merits should the Court choose to address them.

II. Statement of the Case.

Although thoroughly stated in plaintiffs' prior submissions to this Court and restated by this Court in its earlier orders, Walsh and Lorge misapprehend the gist of plaintiffs' claims. This is not a tort case. Plaintiffs seek no money damages from any defendant. Plaintiffs ask this Court to declare the extent of the Band's inherent and federally delegated law enforcement authority. The two principal questions are: (1) whether those authorities extend throughout the 1855 Mille Lacs Reservation or are limited to trust lands; and (2) whether those authorities include the authority to investigate violations of State law. *See, e.g.,* Complaint [Doc. 1] at 7-8, ¶¶ 1.A, 1.B.; Pltfs.' Mem. in Supp. of Mot. for Protective Order [Doc. 98] at 30; Order on Discovery Motions [Doc. 130] at 11 (April 13, 2020) ("[T]he two controlling issues to be resolved in this case are (1) the geographical limits of the Reservation and (2) the scope of the Band's law enforcement authority within those limits under applicable law.") (emphasis in original). Plaintiffs also seek an injunction to prevent future interference with the Band's authority as declared by the Court. Complaint at 8 ¶ 2.

As detailed in plaintiffs' summary judgment motion and their supporting memorandum [Docs. 146 & 149], plaintiffs' claims arise from: (1) Defendant Walsh's issuance of an opinion and protocol that asserted that: (a) Band police officers have no inherent law enforcement authority on non-trust lands within the 1855 Reservation and no inherent authority to investigate violations of state law, even on trust lands; and (b) the exercise of such authority could give rise to criminal and civil liability; (2) his subsequent assertions that he expected Band police officers to follow his opinion and protocol and that

the authority delegated to Band officers by the BIA did not extend to non-trust lands within the 1855 Reservation; and (3) actions taken by Defendant Lindgren (for whom Lorge later substituted) to enforce the limitations on Band police authority in the opinion and protocol (including by not referring calls to and taking over investigations from Band officers). *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment on Standing, Ripeness and Mootness [Doc. 149] at 4-15 ("Plaintiffs' SJ Mem.")

The claims against Walsh and Lindgren are not a "sideshow" to the Reservation boundary issue, *see* Walsh and Lorge Memorandum Supporting Motion for Summary Judgment [Doc. 164] at 1 ("Walsh and Lorge SJ Mem."); they are at the heart of the case. Plaintiffs filed this case because Walsh and Lindgren developed and enforced Mille Lacs County law-enforcement policies that limited plaintiffs' inherent and federally delegated law enforcement authority to trust lands and prohibited them from investigating state-law violations, even on trust lands. Although the limitation of plaintiffs' law enforcement authority to trust lands raises the Reservation boundary issue, that issue would not need to be decided but for Walsh and Lindgren's actions to limit Band law enforcement authority. Lorge is now a defendant because he substituted for Lindgren. The County is a defendant because Walsh and Lindgren's actions were taken on its behalf. But the actions of Walsh and Lindgren remain central to this case.

Plaintiffs dispute many of the assertions in Walsh and Lorge's "statement of facts." *See* Walsh and Lorge SJ Mem. at 1-13. For the most part, these disputes are not material to the issues raised in Walsh and Lorge's summary judgment motion, but it is important to note them for the record.

First, Walsh and Lorge's assertions regarding the existence of the Reservation, *id*. at 2, are heavily disputed. *See* Plaintiffs' SJ Mem. at 2 n.2. However, because those disputes are not material to the issues raised in Walsh and Lorge's summary judgment motion (and are far beyond the scope of the early dispositive motions authorized by the Court), plaintiffs do not address them here.

Second, plaintiffs dispute defendants' characterization of Minn. Stat. § 626.90 as granting the Band "the powers of a law enforcement agency if the Band agrees to four requirements in *a cooperative agreement* with the Sheriff." Walsh and Lorge SJ Mem. at 3-4 (emphasis added). The Band's position is that, under the plain language of § 626.90, a cooperative agreement is not required for it to have the powers of a [state] law enforcement agency as long as the Band has met the four statutory requirements. *See* Declaration of Beth Baldwin in Opposition to Walsh and Lorge's Summary Judgment Motion ("Baldwin SJ Opp'n Decl.," *filed herewith*) Ex. A (6/28/2016 letter from Band Solicitor General Matha to State Auditor Otto, which was included with Walsh's letter to Attorney General Swanson as referenced in Walsh Decl. ¶ 9 and Ex. 3). However, that dispute turns on interpretation of state law and is not relevant to the issues presented in this case.

Third, defendants appear to assume that plaintiffs' claims are based on the County's termination of the 2008 County-Band cooperative agreement in 2016. *See* Walsh and Lorge SJ Mem. at 4-7 (alleging facts regarding termination); Defs.' Mem. in Support of Mot. to Compel [Doc. 88] at 9-10 ("The Band blames Defendants for its law enforcement problems—including specifically the County's cancellation of the Cooperative

Agreement."). However, plaintiffs assert no claims based on termination of the cooperative agreement. Instead, plaintiffs' claims arise from actions Walsh and Lindgren took *after* the agreement was revoked. Those actions restricted the Band's inherent and federally delegated law enforcement authority to trust land and prevented Band police from investigating state-law violations, even on trust lands, in violation of the law enforcement authority plaintiffs possess under federal law. *See* Pltfs.' Mem. in Supp. of Mot. for Protective Order [Doc. 98] at 9-13.[1]

Fourth, Walsh mischaracterizes the Minnesota Attorney General's reasons for not accepting his request for an opinion on the Band Police Department's status as a "state law

[1] The various allegations in the County's revoking resolution, repeated in Walsh and Lorge's brief at pp. 4-5, are disputed, as illustrated by the following examples. First, while the resolution contends the Band failed to inform the County of its efforts to seek an amendment to Minn. Stat. § 626.90, Band representatives met with the County Board to explain their interest in amending the statute and shared specific language with the County before it was introduced. *See* Baldwin SJ Opp'n Decl. Ex. B (Walsh Deposition 62-69, 100-106, 117-119 (acknowledging discussions between Band and County about the legislation in late 2015 and early 2016); *id.* 253: 6-25; 254 (admitting that proposed statutory changes were discussed but Walsh "thought they should have been discussed [sooner]")). Second, while the resolution contends that the M-Opinion improperly cited the 2008 Cooperative Agreement, the M-Opinion (which was drafted by the Interior Solicitor's Office, not the Band) never mentions that agreement. Baldwin SJ Opp'n Decl. Ex. B (Walsh Deposition 231:1-11; 255:11-21(M-Opinion refers to Minn. Stat. § 626.90 but never refers to cooperative agreement)). Third, while the resolution alleges that the Band Police Department limited access to its case files in the County's Record Management System (which was being used by Band police before revocation), Band police had legitimate reasons for limiting access to certain cases and explained those reasons to the County Attorney in December 2015. *See* Baldwin SJ Opp'n Decl. Ex. C (Naumann Deposition 70:12-25); *id.* Ex. D (Dieter Deposition 65:12-25; 67-68); *see also id.* Ex. B (Walsh Deposition 327: 1-18) (Sheriff's Office had ability to unseal cases, even prior to July 2016).

enforcement agency." In her response, Deputy Attorney General Eller explained that the County Attorney's request "relate[d] to the authority of the Band, not the County, and involves an ongoing dispute between the Band and the County. *It also implicates provisions of federal law regarding the sovereignty of the Band* . . . ," in addition to implicating potential litigation and various fact-dependent scenarios. Walsh Decl. Ex. 3 [Doc 165-1, p. 22] (emphasis added).

Fifth, Walsh and Lorge fail to mention the Band's actual responses to Walsh's "overtures" regarding a new cooperative agreement in June and July 2016. Walsh and Lorge SJ Mem. at 7-8. On June 30, 2016, the Band's Solicitor General told Walsh that "[the Band's] efforts remain focused on transitioning to the law enforcement environment that will result from the County's decision to terminate the existing agreement," noting that the Band was "blindsided by the June 21, 2016 [termination] notice" and that, "if the County wishes to propose a new agreement, please send it to us in writing . . . ." Walsh Decl. Ex. 4 [Doc. 165-1 at 40]. Solicitor General Matha wrote again to Mr. Walsh on July 8, 2016, again informing him that "the unexpected revocation of the Cooperative Agreement has necessarily compelled the Band, first and foremost, to prepare for its aftermath" and that the Band "remain[ed] focused upon ensuring public safety for Band members and others within its territorial jurisdiction." *Id.* at 38. Matha again asked the County to "submit a proposed successor agreement for the Band's consideration" and proposed that the County "rescind its revocation notice [so] the Band and County could engage in meaningful discussion without the specter of a looming deadline." *Id.*

Walsh asserts that the email exchanges between him and Solicitor General Matha between June 21, 2016, and July 8, 2016, demonstrate that Walsh's "first priority following revocation was negotiating a new cooperative agreement pursuant to [Minn. Stat. §] 626.90." Walsh Decl. ¶ 11. This claim is contradicted by Walsh's simultaneous actions to, in Mr. Matha's words, "degrade, if not destroy, the Band's Police Department and its various law enforcement partnerships . . . ." Walsh Decl. Ex. 4 [Doc. 165-1 at 38]; *see, e.g.*, Pltfs.' Mem. in Supp. of Mot. for Protective Order [Doc. 98] at 8-10 and Baldwin Decl. in Supp. of Mot. for Protective Order, Exs. F-H [Doc. 99-1 at 29-43] (describing Walsh's letters to Pine County, the POST Board and over 90 state and federal agencies stating that the Band Police Department will no longer have the powers of a law enforcement agency).

Sixth, Walsh and Lorge appear to agree that Walsh's July 18, 2016, opinion and protocol (Walsh Decl. Ex. 5) ("Opinion and Protocol") are central to plaintiffs' claims but dispute Walsh's reasons for issuing them and the legal consequences that flowed from them. *See* Walsh and Lorge SJ Mem. at 8-12. As to the first issue, Walsh's reasons for issuing the Opinion are not germane to this case because plaintiffs seek only declaratory and injunctive relief on the grounds that the limitations his Opinion imposed on plaintiffs' law enforcement authority violated federal law. *See, e,g*, Plaintiffs' SJ Mem. at 1-2; Part IV, *infra.* Although Walsh attempts to establish that he issued the Opinion and Protocol purely to resolve a question of the Band's "state law enforcement authority" within Mille Lacs County, *see* Walsh Decl. ¶¶ 8, 9, 12-14, or "to comprehensively state the effect of the revocation pursuant to established Minnesota law," *id.* ¶ 16, the entire Opinion and

Protocol is premised on the County's position that the 1855 Reservation no longer exists and, thus, there is no inherent tribal law enforcement jurisdiction within the County except on trust lands and no authority to investigate state-law violations, even on trust lands. Baldwin SJ Opp'n Decl. Ex. B (Walsh Deposition 27: 8-15; 294: 4-20; 297: 13-25; 299: 15-24; 300: 1-25; 360: 2-5; 384: 21-25; 385: 1-8). Walsh asserts that his Opinion "acknowledged the differences of opinion between Mille Lacs County and the Mille Lacs Band, but did not make a determination regarding the existence of Indian Country in Mille Lacs County." Walsh Decl. ¶ 17. However, his Opinion and Protocol unambiguously asserted and gave effect to the County's position that inherent tribal jurisdiction is limited to Indian country and that Indian country is limited to trust lands; indeed, in deposition testimony, Walsh acknowledged that the Protocol was specifically intended to limit the exercise of inherent tribal authority to trust lands and to Indians. Baldwin SJ Opp'n Decl. Ex. B (Walsh Deposition 22-27); *see also* Plaintiffs' SJ Mem. at 5 nn. 10 & 11.

As to the second issue, plaintiffs' motion for summary judgment on standing, ripeness and mootness thoroughly described how the County Attorney, an Assistant County Attorney, the Sheriff, the Band's Solicitor General, the Band's Chief and Deputy Chief of Police, and other Band police officers interpreted the Opinion and Protocol. *See* Plaintiffs' SJ Mem. at 4-15. The Opinion asserted that Plaintiffs lacked *tribal* law enforcement authority outside of tribal trust lands or over non-Indians. Walsh Decl. Ex. 5 at 6, 14 [Doc. 165-1 at 49, 58]. The Opinion stated that a Band Police officer exercising authority outside of tribal trust lands in Mille Lacs County could do so only as an out-of-jurisdiction state peace officer or as a private citizen and warned of the "risks inherent in

the practice of conducting citizens' arrests." *See id.* at 6-11 [Doc. 165-1 at 49-54]. Those "risks" included possible civil sanctions for false imprisonment, felony-level criminal sanctions based on false imprisonment and assault, and lesser criminal sanctions for "pretending to be a peace officer," unauthorized practice of a law enforcement officer and obstructing or interfering with a peace officer. *See id.* at 11-12 ("When acting as a private citizen making a citizen's arrest within Mille Lacs County …. a Mille Lacs Band Police Officer's use of firearms to cause fear in another of immediate bodily harm or death would be a felony offense that would result in a presumptive mandatory three year prison sentence ….").

The Protocol asserted that it was the County's position that the Band's "*inherent tribal criminal authority doesn't extend (1) outside of trust lands or (2) to non-members of the Mille Lacs Band*," Walsh Decl. Ex. 6 [Doc. 165-1 at 61] (emphasis in original), and that Band police officers "**May Not Lawfully**…Conduct investigations regarding violations of state law…." *Id*. (emphasis in original). Walsh and Lorge appear to admit that the Protocol was meant to "guide law enforcement operating within the township[s]" comprising the 1855 Reservation; that it "states *within that area*, in the opinion of the County Attorney, what Band police officers may or may not do and what state peace officers may not do," and that the County Sheriff "instructed his deputies and staff to follow" it. Walsh and Lorge SJ Mem. at 10 (emphasis added). Thus, it is undisputed that the County Attorney's Opinion and Protocol were legal advice to law enforcement officers meant to guide their investigations, and Band Police officers were expected to follow it. *See also* Baldwin SJ Opp'n Decl. Ex. B (Walsh Depo. 278: 6-13; 282: 19-25; 283).

Walsh asserts that he sought "'discussion and clarification regarding the authority sought to be enforced by the Mille Lacs Band of Ojibwe going forward,' an invitation to dialogue that was never accepted." Walsh Decl. ¶ 17. This is demonstrably false. *See* Baldwin SJ Decl. Ex. G [Doc. 150-7] (12/22/2016 letter from Band counsel to Walsh describing Band's asserted law enforcement authority "on lands that both the Band and County agree are Indian country," p. 1, and asserting at p. 7 that "[w]e are aware of no authority for the proposition that the results of lawful investigations by commissioned federal officers are inadmissible in a state-court prosecution." Walsh admitted that he never responded to this letter. Baldwin SJ Opp'n Decl. Ex. B (Walsh Deposition 381: 3-9).

III. The Court Has Subject Matter Jurisdiction.

Plaintiffs' Complaint alleges this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1362 because this is a civil action arising under the Constitution, laws and treaties of the United States, and it is brought by an Indian band with a governing body duly recognized by the Secretary of the Interior. Complaint [Doc. 1] ¶ 3. In his Answer, Walsh admitted this "case is a civil action for declaratory and injunctive relief and that this Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 1362." Amended Answer of Joseph Walsh [Doc. 21] ¶ 3. Sheriff Lindgren likewise admitted that "this is a civil action for declaratory and injunctive relief, and the Court has jurisdiction under 28 U.S.C. §§ 1331 and 1362." Lindgren Answer [Doc. 19] ¶ 3. And *all* defendants admitted that federal law may define and regulate scope of tribal law enforcement authority. Walsh Answer ¶ 5.H; Lindgren Answer ¶ 5.H.; County Answer [Doc. 17] ¶ 5.H.

Without mentioning these admissions, Walsh and Lorge reverse course and now argue the Court lacks subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362 because: (1) the scope of inherent tribal law enforcement authority is not a question of federal law[2]; and (2) plaintiffs do not have a cause of action against them. *See* Walsh and Lorge SJ Mem. at 16-31. These arguments lack merit.

A. The Scope of Inherent Tribal Law Enforcement Authority Is a Question of Federal Law.

The scope of inherent tribal law enforcement authority is undeniably a question of federal law.[3] In a case involving the scope of a tribe's inherent authority to prosecute non-member Indians, the Supreme Court made clear that the scope of a tribe's inherent authority is a matter of federal law, including treaties, statutes and federal common law. *See United States v. Lara*, 541 U.S. 193, 200-207 (2004). The Court particularly noted the "'federal common law' component of Indian rights, which 'common law' federal courts develop as 'a 'necessary expedient' when Congress has not 'spoken to a *particular* issue.'" *Id.* at 207

[2] Defendants do not dispute that the scope of plaintiffs' federally delegated law enforcement authority is a question of federal law. *See* Walsh Answer ¶ 5.K and County Answer ¶ 5.K (admitting final sentence of Complaint ¶ 5.K, which alleged "[t]he authority possessed by Band police officer under the Deputation Agreement and the SLECs is an issue of federal law.").

[3] Walsh and Lorge implicitly acknowledge as much, citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), for the proposition that "Indian tribes lack inherent criminal jurisdiction over non-Indian people within their own territories." Walsh and Lorge SJ Mem. at 16. They also aver that they are entitled to qualified immunity because "the United States Supreme Court has not determined the scope of inherent tribal authority over criminal matters," *id.* at 54, again recognizing that the scope of such "rights" is a federal question.

(paraphrasing *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233-37 (1985) (*Oneida II*) (emphasis in original).

Similarly, in a case involving the scope of a tribe's inherent authority to compel a non-Indian to submit to the tribal court's civil jurisdiction, the Court held that the scope of the tribe's authority "must be answered by reference to federal law, and is a 'federal question' under § 1331." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985). The Court explained that § 1331's statutory jurisdiction will support claims founded upon federal common law as well as those of statutory origin, and that federal common law as articulated by court decisions are "laws" as that term is used in § 1331. *Id*. at 850. The Court noted that the inherent authority of Indian tribes is a frequent subject of federal court decisions, and in all such cases the governing rule has been provided by federal law. *Id*. at 851-53.

The scope of a tribe's inherent law enforcement authority in Indian country has also been determined as a matter of federal law, including federal common law. *See*, *e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997); *Duro v. Reina*, 495 U.S. 676, 696-97 (1990); *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005).[4] Indian country itself

[4] The Band provided a detailed discussion of these and related cases to Defendant Walsh on December 22, 2016. *See* Baldwin SJ Decl. Ex. G [Doc. 150-7]. Although defendants assert that ¶ 5.H of plaintiffs' complaint makes allegations, "sans any authority," regarding the Band's inherent authority, Walsh and Lorge SJ Mem. at 19, plaintiffs provided numerous sources for that authority in counsel's December 22, 2016 letter. *See also* Baldwin SJ Opp'n Decl. Ex. E at 15, 17 (Plaintiffs' Responses to Defendants' Interrogatory Nos. 12 and 16[a], provided to defendants on June 6, 2019, pointing to the 12/22/2016 letter as "describ[ing] the law enforcement and criminal prosecutorial authority that the Band claims it may exercise within Indian Country under federal and tribal law.").

has been defined by Congress, *see* 18 U.S.C. § 1151, and its existence and extent are governed by federal treaties and statutes as interpreted in accordance with federal law. *See*, *e.g.*, *McGirt v. Oklahoma*, No. 18-9526, 2020 U.S. LEXIS 3554 at *8-*9 (U.S., July 9, 2020).

Consistent with this body of law, in a closely analogous case, the Ninth Circuit held that a tribe's allegation that a County Sheriff and District Attorney interfered with the tribe's federal common law authority to investigate violations of tribal, state and federal law and to detain and transport or deliver a non-Indian violator to proper authorities, "alleged violations of federal common law" and "adequately pleaded a federal question that provides federal courts with subject matter jurisdiction pursuant to 28 U.S.C. § 1331." *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1152 (9th Cir. 2017). Plaintiffs' allegations in this case also plead violations of federal law governing the scope of plaintiffs' inherent and federally delegated law enforcement authority and thus plead federal questions that provide the court with subject-matter jurisdiction under §§ 1331 and 1362, just as Walsh and Lindgren admitted in their Answers.

B. Defendants Incorrectly Conflate the Question of a Valid Cause of Action with Subject Matter Jurisdiction and Fail to Establish that Plaintiffs Lack a Valid Cause of Action.

Whether plaintiffs have a valid cause of action does not implicate the Court's subject-matter jurisdiction. "It is firmly established in [the Supreme Court's] cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 642-43 (2002) (quoting *Steel Co. v. Citizens for*

Better Environment, 523 U.S. 83, 89 (1998)) (emphasis in original). As the Court explained:

> [T]he district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Id. at 643 (internal quotation marks omitted). Here, because plaintiffs will be entitled to relief if "the laws of the United States are given" the construction for which plaintiffs contend and will be defeated if they are given the construction for which defendants contend, this Court has jurisdiction to adjudicate the case.

Moreover, defendants are incorrect that plaintiffs do not have a valid cause of action, because claims seeking to enforce rights protected by treaties are actionable. In *Mille Lacs Band v. Minnesota*, 853 F. Supp. 1118, 1124-1125 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999), this Court held that the Band had "a direct claim for relief" under an 1837 treaty based on defendants' alleged interference with the Band's rights under the treaty, notwithstanding the absence of treaty language creating a private cause of action. *See also id.* at 1125 ("[c]laims brought directly under a treaty are distinct and independent from Section 1983 claims"). The Ninth Circuit recently reaffirmed that Indian treaty rights are "self-enforcing" and do not require implementing legislation to form the basis for a lawsuit. *See Swinomish Indian Tribal Cmty. v. BNSF Ry. Co*. 951 F.3d 1142, 1154 (9th Cir. 2020) (citing *Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n. 33 (1979); *United States v. Winans*,

198 U.S. 371, 377 (1905); *United States v. Washington*, 853 F.3d 946, 961 (9th Cir. 2017); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 513 (9th Cir. 2005) (*en banc*); *United States v. Washington*, 157 F.3d 630, 657 (9th Cir. 1998)). The Tenth Circuit reached the same conclusion in a case involving Indian rights under a statute and executive order, notwithstanding the absence of statutory language creating a private cause of action. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002). The Tenth Circuit "found no case in which a tribe asserting Indian rights under the treaty or statute guaranteeing them was required to satisfy the requirements of *Cort v. Ash* [422 U.S. 66 (1975)], and … decline[d] to impose such a requirement …." *Id*. at 1205.

In a case in which Alaska Native villages alleged "that the defendants' actions deprived [them] of rights secured under the 'federally-protected inherent right of self-governance,'" the Ninth Circuit held that the villages "have alleged a valid cause of action." *Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 552-53 (9th Cir. 1991)[5]; *see also Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474-75 (9th Cir. 1989) (Alaska native villages' allegation of sovereign power, as a "matter of federal statute and 'reserved powers,'" was a cognizable question under federal common law).

In *Venetie*, the Villages asserted a claim under the Indian Child Welfare Act's full faith and credit provision just as, here, plaintiffs assert a claim under federal laws providing for the delegation of federal law enforcement authority to tribal police officers. *See*

[5] The *Venetie* court's statement that "the failure to state a federal cause of action necessarily implicates this court's subject-matter jurisdiction," *id.* at 552, is no longer good law. *See Verizon*, 535 U.S. at 642-43, *supra*.

Complaint ¶ 5.K. (citing 25 U.S.C. §§ 2801 & 2804). The *Venetie* court held that the plaintiffs might "not be able to obtain the particular relief they desire" under their ICWA claim "if Congress specifically intended that a federal cause of action *not* accrue under the … Act's full faith and credit clause." 944 F.2d at 553 (emphasis added). However, applying the canons of construction applicable to Indian tribes, the court found "no reason that Congress would not have intended to give Indian tribes access to federal courts to determine their rights and obligations under the [ICWA]." *Id*.

The court also found that "Congress's intention to create a tribal cause of action under the [ICWA] can be inferred from Congress's understanding of the law at the time the Act was enacted." *Id*. at 554. Specifically, "Congress can be presumed to know that statutes passed for the benefit of Indian tribes will be liberally construed in favor of such tribes" and that "the federal courts routinely resolve questions of tribal sovereignty as they are implicated by various acts of Congress." *Id.* The court reasoned that, "[i]f Congress did not seek to have such principles applied to the interpretation of the [ICWA], we presume that it would have said so," and "conclude[d] that the villages may seek determination of their rights under the Act in federal court." *Id*.

In this case, as in *Mille Lacs Band*, plaintiffs have a direct right of action to enforce the Band's treaty rights.[6] The Complaint alleges that an 1855 Treaty established a reservation for the Band, that 1863 and 1864 Treaties preserved that reservation for the

[6] Because Plaintiffs Rice and Naumann sue in their official capacities, they can join the Band in asserting its rights in this case. *See*, *e.g.*, *Karcher v. May*, 484 U.S. 72, 78 (1987) (real party in interest in official-capacity suit is the entity represented).

Band, and that no subsequent treaty or act of congress disestablished or diminished the boundaries of the 1855 Reservation. *See* Complaint ¶¶ 5.A & 5.B. Under *Mille Lacs Band*, *Swinomish Indian Tribal Community*, *Timpanogos Tribe*, *Venetie I.R.A. Council*, and the "legion" of cases on which they relied,[7] plaintiffs have a direct cause of action to enforce the Band's rights under those federal laws and treaties, including its inherent law enforcement authority within the Reservation's boundaries. Walsh and Lorge's argument that no provision in the treaties creates a right of action against them, *see* Walsh and Lorge SJ Mem. at 28-31, is foreclosed by these cases.

Similarly, plaintiffs have a direct right of action to enforce the Band's delegated law enforcement authority under 25 U.S.C. § 2804. Defendants argue there is no private right of action under § 2804 on four grounds: (1) the Band can seek "recourse" with the U.S. Attorney's Office; (2) the Tribal Law and Order Act "did not create an enforcement mechanism for tribes or tribal police officers to sue the County Attorney or the Sheriff for any purported interference with any federally delegated law enforcement authority"; (3) a separate title in Public Law 111-211 expressly created a cause of action for tribes and individual Indians to sue for violations of the Indian Arts and Crafts Amendments Act; and (4) the deputation agreement between BIA and the Band provides that it does not create a private right of action by a law enforcement officer or any other person. Walsh and Lorge SJ Mem. at 22-26.

[7] *See Timpanogos Tribe*, 286 F.3d at 1204.

Section 2804 was initially enacted as part of the Indian Law Enforcement Reform Act of 1990, Public Law 101-379 (104 Stat. 473-483, Aug. 18, 1990). Section 5(a) authorized but did not require the Secretary of the Interior to "enter into an agreement for the use … of the personnel or facilities of a Federal, tribal, State, or other government agency to aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe that has authorized the Secretary to enforce tribal laws." *See* 104 Stat. 476. Nothing in the Act imposed any limitation on the ability of a tribe to bring suit to prevent interference with its rights under such an agreement. To the contrary, the Act affirmatively recognized each tribe's interest in and jurisdiction over its Indian country by providing, in section 5(c), that the Secretary could not use the personnel of a non-Federal agency in an area of Indian country "if the Indian tribe having jurisdiction over such area of Indian country has adopted a resolution objecting to the use of the personnel of such agency." *Id.*

Section 231(b) of the Tribal Law and Order Act of 2010 ("TLOA"), Title II of Public Law 111-211 (124 Stat. 2261-2301, July 29, 2010), strengthened these provisions in several ways. First, Congress replaced the Secretary's discretionary authority to enter into agreements to aid in the enforcement of federal or tribal law in Indian country with a *mandatory* duty to establish procedures for entering into such agreements. *Id*. § 231(b)(1) (124 Stat. 2273). Second, it added a new subsection *requiring* the Secretary to develop "a plan to enhance the certification and provision of special law enforcement commissions to tribal law enforcement officials," and, again subject to tribal approval, State and local law enforcement officials. *Id*. § 231(b)(3). The new subsection further *requires* the Secretary,

"in consultation with Indian tribes and tribal law enforcement agencies, [to] develop minimum requirements to be included in special law enforcement commission agreements" and, after all applicable requirements are met, "*to enter into a special law enforcement commission agreement with the Indian tribe*." *Id*. (emphasis added). These provisions were enacted as part of Subtitle C of the TLOA, entitled "Empowering Tribal Law Enforcement Agencies and Tribal Governments," *see* 124 Stat. 2272, and are now codified at 25 U.S.C. § 2804.

In enacting the TLOA, Congress found that "the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country," that "tribal law enforcement officers are often the first responders to crimes on Indian reservations," and that "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country." Pub. L. 111-211, § 202(a)(1) & (2) (124 Stat. 2262, codified at 25 U.S.C. § 2801 note). One of the purposes of the Act was "to empower tribal governments with the *authority*, resources, and information necessary to safely and effectively provide public safety in Indian country." *Id*. § 202(b)(3) (emphasis added). Nothing in the Act "establish[es] a comprehensive remedial plan for dealing with violations of" tribal authority under deputation agreements,[8] and nothing in the Act prohibits a tribe from bringing suit to prevent interference with the authority of tribal law enforcement officers pursuant to a deputation agreement entered into under 25 U.S.C. § 2804.

[8] *See Timpanogos Tribe*, 286 F.3d at 1204 (quoting *Oneida II*, 470 U.S. at 237) (discussing the Nonintercourse Act).

Against this backdrop, Walsh and Lorge's arguments that plaintiffs do not have a cause of action to prevent interference with the authority delegated to tribal police officers under § 2804 lacks merit. First, nothing in the Act requires a tribe to seek "recourse" with the U.S. Attorney's Office. In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472-473 (1976), the Court stated that it appeared that, in 28 U.S.C. § 1362, Congress "contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, or treaties' would be, at least in some respects, as broad as that of the United States suing as the tribe's trustee." *See also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983) (Congress contemplated that § 1362 would be used when the United States was unwilling to bring suit as trustee for the Indians). There is nothing in the TLOA that flips § 1362 on its head and *requires* a tribe to defer to enforcement action by the U.S. Attorney's Office.

Second, it was not necessary for Congress to include an express provision creating a private right of action in either the Indian Law Enforcement Reform Act or the TLOA. As the *Venetie* court explained, applying the canons of construction applicable to Indian tribes, there is "no reason that Congress would not have intended to give Indian tribes access to federal courts to determine their rights and obligations under the [Acts]." 944 F.2d at 553. Moreover, "Congress's intention to create a tribal cause of action under the [Acts] can be inferred from Congress's understanding of the law at the time [they were] enacted." *Id*. at 554. Because "Congress can be presumed to know that statutes passed for the benefit of Indian tribes will be liberally construed in favor of such tribes" and that "the federal courts routinely resolve questions of tribal sovereignty as they are implicated by

various acts of Congress," *id.*, the Band can "seek a determination of its rights under the [Acts] in federal court." *Id.* This conclusion is reinforced here by Congress's express finding that the TLOA was intended to fulfill the United States' trust obligations to the tribes and to "empower tribal governments with the authority … to safely and effectively provide for public safety in Indian country." *See* 25 U.S.C. § 2801 note.

Third, the creation of a private cause of action in *Title I* of Public Law 111-211 (the Indian Arts and Crafts Amendments Act of 2010), which is now codified at 25 U.S.C. § 305e, does not demonstrate that Congress did not intend to authorize tribes to sue to prevent interference with their sovereign or statutory rights under *Title II*.[9] The private cause of action created in Title I allows, in addition to claims for equitable relief, the recovery of treble damages or an amount not less than $1,000 per day, punitive damages, costs and attorney's fees for selling or offering for sale a good that falsely suggests it is Indian produced. 25 U.S.C. §§ 305e(b)(2) & (c). An action can be brought by an Indian tribe (including a tribe that is *not* federally recognized if it is recognized by a state legislature, commission or similar organization), an individual Indian, or an Indian arts and crafts organization. *See* 25 U.S.C. §§ 305e(a) & (d). This is a far cry from a direct suit by a federally recognized tribe for equitable relief to enforce its sovereign treaty or statutory rights, as recognized in *Mille Lacs Band*, *Swinomish Indian Tribal Community*,

[9] The Indian Arts and Craft Amendments Act of 2010 was prepared in the House as a stand-alone bill, while the Senate separately drafted and attached the much larger tribal law and order act as an amendment to that bill. Thus, while enacted together, the two bills were independently drafted. *See* Rep. Hastings, *Congressional Record* 156:156 (July 21, 2010), p. H5863.

Timpanogos Tribe, *Venetie I.R.A. Council* and the "legion" of cases on which they relied.[10] Congress's creation of a far-different cause of action in Title I of Publ. L. 111-211 does not demonstrate that it intended to prohibit the type of direct tribal action under Title II that has long been recognized and entertained by the courts.

Finally, the deputation agreement does not – and could not – alter the Band's right to bring a direct cause of action to enforce its rights under 25 U.S.C. § 2804. The deputation agreement is between the Band and the BIA Office of Justice Services. *See* Baldwin SJ Decl. Ex. MM [Doc. 150-39] at 1. Section 3, "Scope of Powers Granted," paragraph D, states that "[t]he Agreement does not create any rights in *third parties*" and that the "[i]ssuance and revocation of SLECs pursuant to this agreement are at the sole discretion of the BIA." *Id*. at 5 (emphasis added). While the final sentence in that paragraph – that "[n]othing in this agreement is intended to create or does create an enforceable legal right of private right of action by a law enforcement officer or any other person" – may prevent *a Band officer* (*i.e.*, a third party) from making an individual claim arising from the issuance, failure to issue, or revocation of an SLEC, it does not purport to prevent the Band, as a sovereign and a party to the agreement, from suing to prevent interference with its rights under the statute.

IV. The Tenth Amendment Does Not Bar Plaintiffs' Claims.

Walsh and Lorge argue that plaintiffs' claims are barred by the Tenth Amendment because they are founded upon Walsh's failure to prosecute certain cases and seek a court

[10] *See Timpanogos Tribe*, 286 F.3d at 1204.

order directing him to prosecute particular individuals. *See* Walsh and Lorge SJ Mem. at 33-36. This argument, which mischaracterizes plaintiffs' claims and the relief they seek, *see* Plaintiffs' SJ Mem. at 4-15, lacks merit.

Walsh's statements that he would not prosecute, and his decisions not to prosecute, individuals apprehended by Band police officers who exercised inherent or federally delegated authority beyond that allowed in his Opinion and Protocol are not the gravamen of plaintiffs' claims. While those actions reinforced the limitations Walsh and Lindgren imposed on the Band's law enforcement authority, the limitations themselves were set forth in the Walsh's Opinion and Protocol and enforced by Lindgren's actions. Accordingly, plaintiffs do not seek judicial review of Walsh's charging decisions as in *ICC. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). Instead, they seek judicial review of the *limitations* Walsh imposed on plaintiffs' inherent and federally delegated law enforcement authority in his Opinion and Protocol and the actions Sheriff Lindgren took to enforce those limitations.

Moreover, the Band does not seek an order directing Walsh "to prosecute a particular individual or class of individuals" as in *In re Aiken County*, 725 F.3d 255, 264 n.8 (D.C. Cir. 2013), but a declaration of the scope of plaintiffs' inherent and federally delegated law enforcement authority and an order preventing Walsh and Lorge from interfering with the exercise of that authority. Although the order may need to be framed to avoid interference with the County Attorney's discretion to prosecute cases, it is simply incorrect to state that plaintiffs are "using the federal courts to control the County Attorney's prosecutorial discretion" or putting the Court "in the untenable position of

dictating to a state prosecutor how and when to prosecute state-law crimes." *See* Walsh and Lorge SJ Mem. at 36.

Correctly understood, plaintiffs' claims and the relief they seek are not barred by the Tenth Amendment. Notably, Walsh and Lorge cite no authority for the proposition that a judicial declaration of the scope of a tribe's inherent and federally delegated law enforcement authority or an order prohibiting interference with such authority runs afoul of the Tenth Amendment. The only cases they cite involve attempts to compel States to enact and enforce a federal regulatory program or to control the exercise of prosecutorial discretion, neither of which plaintiffs seek here. Instead, what plaintiffs seek is declaratory and injunctive relief to prevent defendants from interfering with plaintiffs' authority under federal law.

It is well established that the Tenth Amendment does not foreclose federal courts from preventing state (or local) officials from infringing upon rights secured by federal law. *See, e.g., Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007); *Mille Lacs Band v. Minnesota*, 124 F.3d 904, 928 n.44 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999). In *Prairie Band*, a federally recognized Indian tribe sought a court order requiring the State of Kansas to recognize motor vehicle registrations and titles issued by the tribe. 476 F.3d at 820. In rejecting the argument that this relief ran afoul of the Tenth Amendment, the court distinguished the cases on which defendants rely here – *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997):

> *Printz* and *New York* are easily distinguishable from the facts at hand, for here the government is not attempting to compel the state to enact or enforce a federal program. Rather, plaintiff is merely asking the Court to enjoin the

> defendants from enforcing a state law that allegedly infringes on rights guaranteed to plaintiff by federal law.

Prairie Band, 476 F.3d at 828 (quoting District Court's opinion). Similarly, when the Mille Lacs Band and four of its members sought to prevent Minnesota officials from interfering with the Band's treaty hunting, fishing and gathering rights, the Eighth Circuit rejected a Tenth Amendment defense because the "case [was] about state law infringing on rights guaranteed by federal law, and there is no question that federal courts have the power to order state officials to comply with federal law." *Mille Lacs*, 124 F.3d at 928 n.44.

Because the rights asserted by plaintiffs in this case are secured by federal law, the enforcement of those rights does not implicate the Tenth Amendment. As the Ninth Circuit explained recently, the Tenth Amendment "reserves to the states those powers not expressly delegated to the federal government." *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1152 (9th Cir. 2020). However, "'[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States[.]'" *Id.* (quoting *New York*, 505 U.S. at 156). Thus, "[b]ecause Congress has plenary authority to regulate Indian affairs," *id.*, the enforcement of plaintiffs' rights under federal law does not run afoul of the Tenth Amendment.

Nor does the fact that plaintiffs seek relief against officials charged with discretionary authority to enforce state law implicate the Tenth Amendment or mean that plaintiffs' only remedy is at the ballot box (where the Band itself cannot vote). *Cf.* Walsh and Lorge SJ Mem. at 35. As the Supreme Court has explained, state and local officials with law enforcement authority are proper defendants in suits for declaratory and injunctive

relief to enforce rights secured by federal law. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736 (1980). Indeed, while "[p]rosecutors enjoy absolute immunity from *damages liability*, … they are *natural targets* for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law." *Id.* (emphasis added). There is "a myriad of … cases" in which courts have held "that suits against state officials in federal courts are not barred by the Eleventh Amendment." *Id.* at 737. "If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the initiation of state-court proceedings against them in order to assert their federal constitutional claims[,]" but "[t]his is not the way the law has developed …." *Id.*

We discuss Walsh and Lorge's Eleventh Amendment argument in more detail below, but cite *Consumers Union* here because it is clearly at odds with their suggestion that prosecutors and law enforcement personnel are protected by the Tenth Amendment from suits for declaratory and injunctive relief to enforce federal rights. If they were, there would not be a "myriad of such cases" allowing those suits to proceed. *See id.*

V. There is No Basis for *Younger* Abstention.

Walsh and Lorge argue that the "principles of *Younger v. Harris*, 401 U.S. 37 (1971), warrant dismissing the County Attorney and Sheriff Lorge from this case." Walsh and Lorge SJ Mem. at 36. This argument lacks merit.

The principles articulated in *Younger* are an exception to the general rule that "federal courts are obligated to decide cases within the scope of federal jurisdiction." *Sprint Communs. Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). Pursuant to the *Younger*

abstention doctrine, federal courts must "abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002) (citing *Younger*, 401 U.S. at 43-44). *Younger* abstention is required when: "(1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims." *Id.* (citation omitted). "Circumstances fitting within the *Younger* doctrine … are 'exceptional'; they include . . . 'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Communs*, 571 U.S. at 73 (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367-68 (1989)). When a case "presents none of the circumstances the Court has ranked as 'exceptional,' the general rule governs: '[T]he pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id*. (quoting *Colorado River Water Conservation Dist. v. United States*, 42 U.S. 800, 817 (1976)).

Here, Walsh and Lorge make no argument that there is any pending state court proceeding in which the scope of the Band's inherent and federally delegated law enforcement authority will be adjudicated, let alone one presenting circumstances the Supreme Court has identified as exceptional. Thus, as in *Sprint*, the general rule governs and there is no bar to proceedings in this Court.

In *Mille Lacs Band*, 853 F. Supp. at 1132, this Court held that abstention would be inappropriate in a case seeking a determination of the existence and extent of the Band's treaty hunting, fishing and gathering rights. In that case, there *were* pending state criminal prosecutions of Band members for violating state fish and game laws. *See id*. at 1131. Despite the pendency of those cases, this Court rejected the State's argument that it should abstain from adjudicating the Band's federal treaty rights:

> The Band is not a party to the pending criminal prosecutions and has no basis to intervene in them, it is not seeking to enjoin those proceedings, and there is evidence that the interests of the defendants in those actions differ from the Band's interests. Moreover, the central issue in this action is interpretation of the 1837 Treaty, raising issues of federal law. The State's interest in this suit is more minimal because the central issue does not involve state law.

Id. at 1132.

The Court's holding demonstrates that, even if there was a pending state criminal prosecution in which the scope of the Band's inherent or federally delegated law enforcement authority might be adjudicated, abstention would be inappropriate here. Although it is possible that such issues might arise in a state criminal prosecution against an individual investigated or apprehended by a Band police officer, plaintiffs are not parties to and have no basis for intervening in such a prosecution. Moreover, plaintiffs are not seeking to enjoin state court prosecutions against individuals investigated or apprehended by Band police officers, and plaintiffs' interests in such a prosecution would not only differ from the charged individuals but likely would be opposed to them. And, as in *Mille Lacs*, the central issues in this action – the scope of the Band's inherent and federally delegated law enforcement authority – are issues of federal not state law.

Walsh and Lorge cite *Rizzo v. Goode*, 423 U.S. 362, 380 (1976), and *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974), for the proposition that "[t]he principles of federalism and comity recognized in *Younger* likewise preclude Plaintiffs' requested relief against the Sheriff." Walsh and Lorge SJ Mem. at 37. However, contrary to their claims, *see id.* at 38, the relief plaintiffs seek would not force the court "to referee jurisdictional disputes between the Sheriff and tribal police regarding the same incident" or "require continuous supervision by the federal courts over the administration of state executive functions." Instead, the relief plaintiffs seek would simply define the scope of the Band's inherent and federally delegated law enforcement authority and prevent defendants from interfering with it. Nothing in *Rizzo* or *O'Shea* bars such relief.

In *Rizzo*, the district court found that the evidence did not establish the existence of any policy on the part of the named defendants to violate the legal and constitutional rights of the plaintiffs. 423 U.S. at 368. Thus, while "[i]individual police officers *not named as parties* to the action were found to have violated the constitutional rights of particular individuals, … there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the named defendants]." *Id.* at 371 (emphasis in original). Accordingly, the Supreme Court distinguished the case from *Hague v. CIO*, 307 U.S. 496 (1939), where "the pattern of police misconduct upon which liability and injunctive relief were grounded was the adoption and enforcement of deliberate policies by the defendants …." *Id.* at 373-74.

This case, like *Hague*, involves "the adoption and enforcement of deliberate policies by" defendants – here, Walsh's Opinion and Protocol limiting the authority of Band police

officers and Lindgren's directives to his deputies to follow the Opinion and Protocol. As the Supreme Court made clear, there is no bar to injunctive relief in such a case. *See also Rizzo*, 423 U.S. at 376-77 (discussing school desegregation cases, which established that, once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad).

In the portion of *Rizzo* on which Walsh and Lorge rely, the Court addressed a "novel claim" that plaintiffs had "a right to mandatory equitable relief in some form when those in supervisory positions do not institute steps to reduce the incidence of unconstitutional police misconduct." *Id.* at 377-78. As the Court described it, this claim would extend "federal equity power … to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees." *Id.* at 378. The Court held that, "on the facts of this case," this novel claim was at odds with a settled equity rule that the nature of the violation determines the remedy, and that "important considerations of federalism [were] additional factors weighing against it." *Id.* As to the latter, the Court noted that the district court's order "revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department's 'latitude in the dispatch of its own internal affairs.'" *Id.* at 378-79 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)). It further noted that principles of federalism "have applicability" in cases involving state criminal proceedings and in cases in which relief is sought against those in charge of an executive branch of an agency of state or local government. *Id.* at 379-80.

However, to say that such considerations "have applicability" in such cases is not to say that they are a bar to injunctive relief in every such case. *See, e.g., Hague v. CIO*, *supra*; *Melendres v. Maricopa Cnty*., 897 F.3d 1217, 1221 (9th Cir. 2018) (federalism principles articulated in *Rizzo* made tailoring injunctive relief particularly important in cases against a state or local government, but district courts retain broad discretion to fashion such relief and exceed their discretion "only if the injunctive relief is aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation") (internal quotation marks omitted); *Chambers v. Marsh*, 675 F.2d 228, 232, n. 6 (8th Cir. 1982) (federalism principles articulated in *Rizzo* apply in "quite narrow circumstances," and do not bar federal challenge to "official, formal legislative [prayer] policy"), *rev'd on other grounds*, *Marsh v. Chambers*, 463 U.S. 783 (1983); *Bolding v. Holshouser*, 575 F.2d 461, 466 (4th Cir. 1978) ("*Rizzo* does not preclude recourse to broad injunctions when a clear pattern of unconstitutional conduct has been established."); *Youakim v. Miller*, 562 F.2d 483, 491 (7th Cir. 1977) (rejecting argument that injunction ordering state agency to comply with federal law runs afoul of *Rizzo*; "[a]lthough the federal courts must be constantly mindful of the adjustment to be preserved between federal equitable power and State administration of its own law, they must, and do, retain power to enforce compliance with federal statutes."); *Welsch v. Likins*, 550 F.2d 1122, 1124, 1131-32 (8th Cir. 1977) (acknowledging federal concerns articulated in *Rizzo* while upholding orders "directing that affirmative steps be taken to bring [a state mental health hospital] up to a standard of constitutional acceptability").

Moreover, as the Ninth Circuit has explained, "a federalism-based injunction enforcing Indian treaty rights should not be viewed in the same light as an objection to a more conventional structural injunction." *United States v. Washington*, 853 F.3d 946, 978 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018). In that case, the State of Washington cited *Rizzo* but "fail[ed] to cite the Supreme Court case directly on point – [*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*], 443 U.S. 658 (1979) – in which the Court affirmed detailed injunctions requiring Washington to comply with the very Treaties at issue in this case." *Id.* at 978-79. Walsh and Lorge likewise fail to cite *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999), in which the Court upheld a detailed injunction enforcing the Mille Lacs Band's treaty hunting, fishing and gathering rights.

Here, unlike *Rizzo*, plaintiffs do not seek an order "revising the internal procedures" of the County Attorney or the Sheriff's Office as a prophylactic measure to prevent violations that were not caused by either the County Attorney or the Sheriff; they seek targeted relief to define and prevent interference with their federal rights that resulted directly from the actions of the County Attorney and the Sheriff. This type of relief, which has been the subject of "myriad" cases against those charged with enforcing state law, *Consumers Union*, 446 U.S. at 737, is not foreclosed by *Rizzo*.

This case is also unlike *O'Shea*, where the Court held that principles of federalism prohibited an injunction aimed at state judicial officers (a county magistrate and judge), which did not seek to enjoin any criminal prosecutions but instead sought to control and prevent certain events that might take place during the course of such prosecutions,

resulting in "an ongoing federal audit of state criminal proceedings." 414 U.S. at 491, 500. Here, plaintiffs seek to prevent defendants from threatening to arrest or prosecute, and from arresting or prosecuting, Band police officers for impersonating a peace officer or other violations of state law based on the exercise of the Band's inherent or federally delegated law enforcement authority. They do not seek any relief with respect to the conduct of state criminal proceedings, let alone an ongoing federal audit of such proceedings. As discussed above, the relief plaintiffs seek is analogous to that provided in myriad cases notwithstanding the federalism concerns articulated in *O'Shea*. *See also McPherson v. Lamont*, Civil No. 3:20cv534 (JBA), 2020 U.S. Dist. LEXIS 79620 at *38 n.11 (D. Conn. May 6, 2020) (denying motion to dismiss based on *O'Shea* where plaintiffs did not seek relief against state court judges and did not ask the court to control, prevent or audit state court proceedings); *Neroni v. Zayas*, No. 3:13-CV-0127 (LEK/DEP), 2014 U.S. Dist. LEXIS 44522 at * 33 n.10 (N.D.N.Y., Mar. 31, 2014) (rejecting argument for abstention based on *O'Shea* and *Rizzo* where plaintiff sought "an injunction against the enforcement of a discrete set of statutory provisions against a single individual" and not "wide-ranging structural relief."). Thus neither *Younger* nor principles of federalism bar the relief plaintiffs seek in this case.

VI. The Eleventh Amendment Does Not Bar Plaintiffs' Claims.

A. Because Walsh and Lorge Are Not State Officials, They Are Not Protected by the State's Eleventh Amendment Immunity.

Walsh and Lorge argue that plaintiffs' claims are barred by the Eleventh Amendment. Walsh and Lorge SJ Mem. at 51-52. They assert that, because they have been sued in their official capacities, "a judgment against them in that capacity will bind

the State of Minnesota," *id.* at 52, and would "restrain the State of Minnesota, through a political subdivision, and through the County Attorney and Sheriff . . . from carrying out their offices' state-law duties on non-trust lands and non-Band fee lands." *Id.* at 53. They also argue that because they act on behalf of the State in their duties, they are "not only" an attorney and a law enforcement officer "for the County." *Id.* at 54-55. And, they argue that a finding that the 1855 Reservation is "intact would effectively enjoin the State itself from enforcing a variety of state laws in the disputed territories. . . . State sovereignty itself is imperiled in this action." *Id.* at 55-56.

The first problem with Walsh and Lorge's argument is that they are not State officials.[11] Eleventh Amendment immunity generally stands for the premise that a State's sovereignty precludes an action against the State in federal court absent the State's consent, unless Congress has abrogated the State's immunity. *Allen v. Cooper*, 140 S. Ct. 994, 1000-1001 (2020). However, a state's sovereign immunity is not available to counties or county officials, "even when . . . such entities exercise a slice of state power." *N. Ins. Co. v. Chatham Cnty.*, 547 U.S. 189, 193-94 (2006) (internal citations omitted).[12] "[W]hether a particular state agency is an arm of the State, and therefore 'one of the United States'

[11] Neither defendant included a sovereign or Eleventh Amendment immunity defense in the numerous affirmative defenses pleaded in their answers. *See* Docs. 19 and 21 (collectively pleading qualified, absolute, prosecutorial, official, statutory, and quasi-judicial immunities only).

[12] Although Walsh lists several areas of law beyond criminal prosecutions where he asserts that he has "state-imposed duties," such as enforcing water laws, fish-and-game-related civil forfeitures, environmental-law violations and petroleum discrimination laws, Walsh and Lorge SJ Mem. at 41, none of those laws is at issue in this case.

within the meaning of the Eleventh Amendment, is a question of federal law." *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997)). "In answering that federal question, however, courts must consider the provisions of state law that define the agency's character." *Id.* (internal quotation marks omitted). "Specifically, courts assess the agency's degree of autonomy and control over its own affairs and, more importantly, whether a money judgment against the agency will be paid with state funds." *Id.*

Other than reciting their statutory duties to enforce state law, SJ Mem. at 41-42, Walsh and Lorge fail to present evidence that they are subject to State control in their duties or that a money judgment against them would be satisfied with State funds. As to their "degree of autonomy and control over their own affairs," *Thomas*, 447 F.3d at 1084, Walsh and Lorge are independently elected County officials subject to little, if any, oversight or control by the State (or, for that matter, the County). The positions of County Attorney and County Sheriff were created and their duties defined in Minnesota statutes. *See* Minn. Stat. §382.01 (creating offices of County Attorney and Sheriff); Minn. Stat. § 388.051 (setting County Attorney's duties); Minn. Stat. § 387.03 (setting Sheriff's powers and duties). As elected County officials, the County Attorney and County Sheriff can only be removed from office if the removal process is started by petition of 25 percent of the number of registered voters who voted in the preceding election for the office. *See* Minn. Stat. §§ 351.14 subd. 5 (including County Attorney and Sheriff as "elected County officials"); 351.16 *et seq.* (setting forth county official removal procedure). The County Board determines both the departmental budgets and the salaries of the County Attorney

and Sheriff. Minn. Stat. §§ 388.18 and 388.22 (County Attorney's salary and budget); Minn. Stat. § 387.20 (County Sheriff's salary and budget). There is nothing in Chapters 387 or 388 of the Minnesota Statutes putting either the County Attorney or County Sheriff under the State's (or even the County Board's) direction or control.

Walsh and Lorge also fail to show that a money judgment against them (which plaintiffs do not seek in this case) would be satisfied by the State of Minnesota. Notably, a state court recently rejected their claim that the State was required to indemnify them for their legal fees in *this* federal case. *See* Order and Mem., *Walsh and Lorge v. State of Minnesota*, No. 62-CV-19-8709 (Minn. 2d Dist., June 16, 2020) (Baldwin SJ Opp'n Decl. Ex. F). The state court held that County Attorneys and County Sheriffs do not act on behalf of the State "simply by virtue of performing their local duties. . . . Simply stated, the fact that the legislature has given [Walsh and Lorge] the power to enforce state laws *does not authorize them to act on behalf of the state in an official capacity.*" *Id.* at 4 (emphasis added) (citing Minn. Stat. chs. 387 and 388—the same statutes Walsh and Lorge rely on to make their argument to *this* Court). Accordingly, the state court held that the State is not liable for Walsh and Lorge's attorney fees in this case. *Id.* at 5.[13]

Under these circumstances, Walsh and Lorge are not State officials and a suit against them in their official capacities is not tantamount to a suit against the State. *Accord Thomas*, 447 F.3d at 1085 ("The Board of Police Commissioners . . . does not share the

[13] Although plaintiffs seek no money damages, if they did, the County would be liable for them: judgments against a county officer in the officer's official capacity are to be paid from the County treasury, or "levied and collected as other county charges," and "only the property of the county shall be liable on it." Minn. Stat. § 373.12.

immunity of the State of Missouri [because] the city of St. Louis is responsible for the board's financial liabilities, . . . and the board is not subject to the State's direction or control in any other respect.").

B. *Ex Parte Young* Applies If Walsh and Lorge are State Officials.

Even if Walsh and Lorge were State officials protected by Eleventh Amendment immunity, plaintiffs' claims against them would not be barred because they fall within the *Ex Parte Young* exception to such immunity. *See Ex Parte Young*, 209 U.S. 123 (1908); *Randolph v. Rodgers*, 253 F.3d 342, 345 (8th Cir. 2001).

> Under the *Ex Parte Young* doctrine, a private party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law. In determining whether this exception applies, a court conducts "a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."

281 Care Comm. v. Arneson, 638 F.3d 621, 632 (8th Cir. 2011) (quoting *Verizon*, 535 U.S. at 645). Inquiring "whether suit lies under *Ex Parte Young* does not include analysis of the merits of the claim"; rather, an "'*allegation* of an ongoing violation of federal law … is ordinarily sufficient.'" *Verizon*, 535 U.S. at 646 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)) (emphasis in original). The inquiry concerning whether the relief sought is properly characterized as prospective should focus not merely on how the requested relief is captioned in the pleading, but also on its substance. *See Verizon*, 535 U.S. at 645-46.

In *Bishop Paiute Tribe v. Inyo County*, 15-cv-00367-DAD-JLT, 2018 U.S. Dist. LEXIS 4643 at *22-27 (E.D. Cal. Jan. 10, 2018), the court concluded *Ex Parte Young*

would apply to a tribe's complaint against a county attorney and other county defendants where the tribe sought prospective declaratory and injunctive relief to restrain the defendants from continuing conduct that interfered with the tribe's inherent law enforcement authority, including threatening to arrest and prosecute tribal police officers for exercising that authority. As to the first prong of the inquiry, the tribe's complaint alleged "defendants violated the law in the past … but it also alleges that the threat of future prosecution of tribal officers violates federal law." *Id*. at *24. The court concluded that the complaint alleged an ongoing violation of federal law, noting that "[b]y requesting an injunction, plaintiff seeks to address and remove this threat of future arrest and criminal prosecution." *Id*. at *25. As to the second prong, the court concluded that, because the substance of the relief sought was not "'tantamount to an award of damages for a past violation of federal law,'" the relief sought was prospective. *Id*. at *26 (quoting *Papasan v. Allain*, 479 U.S. 265, 278 (1986)).

Plaintiffs' claims and prayer for relief in this case are closely analogous to those in *Bishop Paiute*. As to the first prong, plaintiffs' complaint alleges that defendants had violated and were continuing to violate federal law by interfering the Band's inherent and federally delegated law enforcement authority, which conduct was ongoing when plaintiffs filed their complaint. Complaint ¶¶ 5.M, 5.N. As to the second prong, plaintiffs seek prospective declaratory and injunctive relief defining the scope of the Band's inherent and federally delegated law enforcement authority and ordering defendants not to interfere with that authority as defined by the Court. Complaint at 7-8, ¶¶ 1(A-B), 2. Because the requested relief is not tantamount to an award of damages for past violations of federal law,

it is properly characterized as prospective. Accordingly, plaintiffs' claims are squarely within the *Ex Parte Young* exception to Eleventh Amendment immunity. *See also Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 987-88 (10th Cir. 1987) (holding that the Eleventh Amendment did not bar an action against a county district attorney to enjoin enforcement of state regulations "because the claim alleges the violation of federal law and seeks only to enjoin the District Attorney's future conduct").

Walsh and Lorge's argument that the State is "'the real, substantial party in interest'" under *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984), does not render *Ex Parte Young* inapplicable here. *See* Walsh and Lorge SJ Mem. at 39. First, *Pennhurst* only bars "suits in which a federal court awards retroactive monetary relief" against state officials or in which it grants relief against state officials, whether prospective or retrospective, based on state law. *Dover Elevator Co. v. Ark. State Univ.*, 64 F.3d 442, 447 (8th Cir. 1995) (citing *Pennhurst*, 465 U.S. at 101, 106; *Edelman v. Jordan*, 415 U.S. 651, 667-669 (1974); *Ex Parte Young*, 209 U.S. at 160). Thus, under *Pennhurst*, "a suit can be brought in federal court against officials in their official capacity for prospective injunctive relief to which any state expenditures are merely ancillary," as long as the relief is based on federal law. *Id*. Because plaintiffs seek prospective relief based on federal law, and do not seek retroactive monetary relief, their claims are not barred by *Pennhurst*. *See also Mille Lacs Band*, 124 F.3d at 914 (suit to bring State regulatory scheme into compliance with federal law falls within *Ex Parte Young* exception to Eleventh Amendment immunity).

Second, the relief plaintiffs seek is not, in any event, an attack on the State's sovereignty. To the extent the Court agrees with the Band that lands within the 1855 Reservation boundary are Indian country, that will not diminish the State's sovereignty because the State itself agrees that such lands comprise Indian country. *See Walsh and Lorge v. State*, Order and Mem. (Minn. 2d Dist., June 16, 2020) at 5, n.1; *see also* Plaintiffs' SJ Mem. at 2 n.2; Baldwin SJ Decl. Ex. F [Doc. 150-6] at 10 (the State's brief in *Walsh and Lorge v. State*).[14]

Furthermore, to the extent that the Court agrees with the Band regarding the scope of the Band's inherent and federally delegated law enforcement authority within Indian country, that will have no effect on the State's law enforcement authority. Under Public Law 83-280, Minnesota has criminal jurisdiction over Indians and non-Indians within the Band's Indian country. *See* 81 Fed. Reg. 4,335-4,336 (Jan. 26, 2016) (granting Band's request for concurrent federal jurisdiction within the Band's Indian country does not "eliminat[e] or affect[] the State's existing criminal jurisdiction."); *accord* Order on Pltfs.' Mot. to Dismiss Counterclaim [Doc. 46] at 16 ("The County concedes that the Band's desired police powers would not displace the County's criminal jurisdiction.") (citing County Answer and Counterclaim [Doc. 17] ¶ 52 ("[A]ll state crimes committed by Indians or non-Indians within Indian country in Minnesota are prosecuted by the state and local

[14] Walsh and Lorge do not show they have standing to assert defenses based on alleged infringement of the State's sovereignty. *See City of Roseville v. Norton*, 219 F. Supp. 2d 130, 148 (D.D.C. 2002) ("Rights under the Tenth Amendment are … properly raised by the states and their officers, and by them alone."), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003).

government officials *without reference to reservation status.*")) (emphasis added). Because plaintiffs' claims are limited to law enforcement authority, no other aspect of the State's sovereignty is at issue:

> In the Complaint, . . . the Band does not ask the Court to enjoin the County from enforcing civil infractions against Band members on the 1855 Reservation. Its request for injunctive relief is limited to protecting *its own* policing power, as recognized in the federal agreements.

Order on Pltfs.' Mot. to Dismiss Counterclaim [Doc. 46] at 19 (emphasis in original).

In sum, even if the Court determines the County Attorney and Sheriff are State officials protected by the Eleventh Amendment, plaintiffs' claims are not barred by the Eleventh Amendment because they seek solely prospective relief to prevent future violations of federal law.

VII. Prosecutorial Immunity Does Not Protect Walsh and Lorge from Claims for Declaratory and Injunctive Relief When No Money Damages Are Sought.

Walsh and Lorge argue that because the "County Attorney's conduct of which Plaintiffs complain relates to Walsh's criminal-charging activities," it "fall[s] within the scope of prosecutorial immunity." Walsh and Lorge SJ Mem. at 43. As such, they assert that Walsh is protected by "absolute immunity," *id.* at 42-46, rather than qualified immunity. They assert that because Walsh "intended his Opinion and Protocol to guide his prosecutorial function," *id*. at 45, and "his alleged, threatened prosecution of them" is "[t]he heart of Plaintiffs' claims against the County Attorney," Walsh's actions in drafting his Opinion and Protocol were "part of his prosecutorial function and . . . entitled to absolute immunity," *id.* at 44. They assert that Lorge is likewise entitled to absolute immunity "for following that same legal advice" from the County Attorney. *Id.* at 46.

These arguments lack merit. Prosecutorial immunity is not available to Walsh and Lorge because plaintiffs seek no money damages. Those exercising prosecutorial functions are absolutely immune *from damages* but may be sued for prospective relief. *See* Parts IV and VI.B, *supra*. We have been unable to locate a single case where qualified immunity or prosecutorial immunity were successfully invoked to defeat a claim seeking *only* prospective declaratory or injunctive relief. *Cf. Pearson v. Callahan*, 555 U.S. 223, 242-43 (2009) (qualified immunity "is not available" in cases "against individuals where injunctive relief is sought instead of or in addition to damages."); *Consumers Union*, 446 U.S. at 736 (prosecutors do not enjoy absolute immunity from injunctive suits); *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) ("[A] prosecutor enjoys absolute immunity from § 1983 suits *for damages* when he acts within the scope of his prosecutorial duties.") (emphasis added); *Hamner v. Burls*, 937 F.3d 1171, 1175 (8th Cir. 2019) ("Qualified immunity does not apply to a claim for injunctive relief . . . ."); *Myers v. Morris*, 810 F.2d 1437, 1450 (8th Cir. 1987) ("*Imbler v. Pachtman* absolutely shields a prosecutor from having to answer *in damages* for injuries flowing from the initiation of criminal proceedings.") (emphasis added); *Bishop Paiute Tribe*, 2018 U.S. Dist. LEXIS 4643 at *20-22 (rejecting District Attorney's prosecutorial immunity defense to claims for declaratory and injunctive relief similar to those in this case). Accordingly, because plaintiffs seek only declaratory and injunctive relief to prevent interference with their rights under federal law, prosecutorial immunity does not bar their claims.

Furthermore, the actions taken by defendants that gave rise to plaintiffs' claims were not within the scope of any prosecutorial immunity. "Prosecutors enjoy absolute immunity

for their decisions to prosecute." *Reichle v. Howards*, 566 U.S. 658, 668 (2012) (emphasis added). Other actions by prosecutors are not necessarily entitled to any immunity. *See*, *e.g., Van de Kamp v. Goldstein*, 555 U.S. 335, 343 (2009); *Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76 (1993) (scope of prosecutor's immunity depends on whether prosecutor acted in administrative or judicial function); *id.* n.7 (under *Imbler*, some of "a prosecutor's actions in obtaining, reviewing and evaluating evidence . . . may fall on the administrative, rather than the judicial, end of the prosecutor's activities . . . ."). In particular, absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation. *Burns v. Reed*, 500 U.S. 478, 496 (1991).

In *Burns*, a state prosecuting attorney asserted absolute immunity from liability for damages for giving legal advice to police officers who requested clarification whether hypnosis was "an unacceptable investigative technique" and whether subsequent statements by a person while under hypnosis provided probable cause to arrest that person. 500 U.S. at 482. The *Burns* Court did "not believe . . . that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process' that it qualifies for absolute immunity." *Id.* at 493 (quoting *Imbler*, 424 U.S. at 430). "Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Id.* at 495. In holding that absolute immunity could not be asserted by prosecutors to defeat claims based on giving legal advice to police, the Court observed that "one of the most important checks" that is normally available "to prevent abuses of

authority by prosecutors" is "the judicial process," which "will not necessarily restrain out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution, such as providing legal advice to the police. This is particularly true *if a suspect is not eventually prosecuted*." *Burns*, 500 U.S. at 496 (emphasis added).

The County Attorney admitted that he prepared the Opinion and Protocol pursuant to Minn. Stat. § 388.051 subd. 1(2). *See* Baldwin SJ Opp'n Decl. Ex. G at 4 (Walsh Resp. to Plaintiffs' Interrogatory No. 1). Minn. Stat. § 388.051 subd. 1(2) provides that the County Attorney "shall . . . give opinions and advice, upon the request of the county board or any county officer, upon all matters in which the county is or may be interested, or in relation to the official duties of the board or officer." This is not a prosecutorial function because it is not "intimately associated with the judicial phase of the criminal process" in which the County Attorney was acting as "an officer of the court." *See Van de Kamp*, 555 U.S. at 342.

The County Attorney also admitted that he provided such advice "at the request of the Sheriff to provide the Sheriff and his deputies with guidance regarding the impact of the County's revocation of the 2008 Cooperative Agreement." Baldwin SJ Opp'n Decl. Ex. G at 4 (Walsh Resp. to ROG No. 1); *id.* Ex. B (Walsh Depo. 229: 3-13). Such general advice to police officers is likewise not a prosecutorial function entitled to absolute immunity. *Burns*, 500 U.S. at 493. As Walsh and Lorge readily admit, *see* SJ Mem. at 46, Walsh was giving legal advice to the Sheriff and his deputies when he distributed his Opinion and Protocol and that advice pertained to how he expected police officers—both County and Tribal—to conduct criminal investigations. Baldwin SJ Opp'n Decl. Ex. B

(Walsh Depo. 298-299; 300: 4-11). His Opinion and Protocol were not "[d]ecisions about a witness's credibility [or] the evaluation of evidence for trial," Walsh and Lorge SJ Mem. at 44, but involved instructions and legal advice to police officers on how to conduct investigations in particular circumstances. *See* Part II, *supra*.

Although threats of prosecution may be protected by prosecutorial immunity, *see* Walsh and Lorge SJ Mem. at 44, plaintiffs are not seeking to hold Walsh liable in money damages for such threats. The cases Walsh and Lorge cite for that proposition involved § 1983 claims for money damages. *See Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987) and cases cited therein;[15] *Chandler v. Sorrell*, No. 1:07-CV-251, 2008 U.S. Dist. LEXIS 40741, at *18 (D. Vt. May 21, 2008) (involving a § 1983 claim against a County Attorney and State Attorney General "that they have suborned perjury in an effort first to blackmail him through threatened prosecution, and then to retaliate against him by filing criminal charges against him in state court."). Plaintiffs ask the Court to determine whether Walsh's interpretation of the scope of plaintiffs' law enforcement authority on which such threats were based comports with federal law, and to prevent future threats if it does not; no money damages are sought. In an analogous situation where no prosecutions were ever brought, the "important check" of the "judicial process" would remain unavailable if absolute immunity prevented a court from testing defendants' interpretations of federal law. *See Burns*, 500 U.S. at 496.

[15] At least one holding of *Myers*—that a county attorney was entitled to absolute immunity when "providing advice to law enforcement officials concerning the existence of probable cause and the prospective legality of arrests"—is no longer good law. *See Burns*, 500 U.S. at 483 n.2.

As to the Sheriff, reliance on advice of counsel can be one factor in determining whether *qualified* immunity is available in a money damages case. *See Kincade v. City of Blue Springs*, 64 F.3d 389, 399 (8th Cir. 1995). However, as discussed above, there is no absolute or qualified immunity in a case seeking declaratory and injunctive relief. Accordingly, the Sheriff is not entitled to absolute immunity for following the County Attorney's advice in this case.

VIII. The Official-Capacity Claims Against Walsh and Lorge Are Not Redundant.

Walsh and Lorge argue that plaintiffs' claims against them in their official capacities are redundant because they are, in effect, claims against the County and, as County "employees," they would be bound by any "injunctive relief against the County." Walsh and Lorge SJ Mem. at 47-48. There are several problems with this argument.

First, in their Eleventh Amendment argument, Walsh and Lorge argue they were acting (at least in part) on behalf of the State. *See* Part VI.A, *supra*. If the official-capacity claims against them are claims against the State (even in part), the claims are not redundant because the State is not a party.

Second, the official-capacity claims against Walsh and Lorge are best understood as claims against the County Attorney and Sheriff as independently elected officials, not claims against the County. *See* Walsh and Lorge SJ Mem. at 48 ("[t]he relief sought by Plaintiffs may only be imposed on the individual defendants in their official capacities as Mille Lacs County Attorney and Sheriff"). This is because, as independently elected officials whose offices were created by the State Legislature, they exercise independent

prosecutorial and law enforcement authority free of County supervision or control. *See* Part VI.A, *supra*.[16]

The County itself has no power to exercise the State's law enforcement authority. *See* Minn. Stat. § 373.01 (listing county powers). Rather, it is the County's position that the County Sheriff and the County Attorney are the elected "senior officials in charge of public safety and law enforcement within the County." County's Mem. in Opposition to Motion to Dismiss Counterclaim [Doc. 35] at 20.

"The Sheriff's Office" – *not* the County – "is responsible for keeping and preserving the peace throughout the County." Lorge Decl. [Doc. 166] ¶ 2; Minn. Stat. § 387.03 ("sheriff shall keep and preserve the peace of the county"); *see Gramke v. Cass Cnty.*, 453 N.W.2d 22, 26 (Minn. 1990) (statutory duty to keep and preserve the peace is "a broad grant of authority to the county sheriff"). Sheriff Lorge admitted that it is the Sheriff that sets his office's law enforcement policy, without interference from the County Board. *See* Baldwin SJ Opp'n Decl. Ex. H (Lorge Deposition 8: 2-21, 21: 5-25, 22: 1-8).

The County Attorney likewise enjoys broad autonomy from the County. *See* Minn. Stat. § 388.051 subd. 3 (County Attorney to adopt own charging and plea negotiation policies and practices); *St. James v. City of Minneapolis*, No. 05-2348 (DWF/JJG), 2006

[16] The County Attorney and Sheriff are not treated as County employees under Minnesota law. *Spaulding v. Bd. of Cnty. Comm'rs*, 306 Minn. 512, 514 (1976) ("There is a well-recognized distinction between county employees and county officers. . . The sheriff is a county officer.") (citing Minn. Stat. §382.01); Minn. Op. Atty. Gen. 390a-6, 1994 Minn. AG LEXIS 7, *8 (Oct. 31, 1994) (distinguishing between "the sheriff as an elected county officer and . . . other peace officers who are employed by units of government"); *see also* Minn. Stat. § 179A.03 subd. 14(a)(1) (elected public officials are not employees of a public entity).

U.S. Dist. LEXIS 68036, at *12 (D. Minn. June 12, 2006) ("[T]he county board has no authority to hire or fire an elected county attorney or to set policies related to prosecution of felonies within the county."). Notably, Walsh has never suggested he was required to obtain County Board approval to adopt his Opinion and Protocol. He declares that his "obligations to prosecute crimes" are "subject to standards [of] professional responsibility" applicable to attorneys and guided by his "office's prosecutorial discretion," not the oversight of the County Board. Walsh Decl. ¶ 15. Because they occupy independently elected offices and exercise the authority at issue in this case free of County supervision or control, the official capacity claims against Walsh and Lorge are not redundant of the claim against the County.

Third, the cases in which courts have dismissed official-capacity claims as redundant of claims against an entity, *e.g. Veatch v. Bartels Lutheran Home*, 627 F.3d 1254 (8th Cir. 2010), are distinguishable from this case. In those cases, the plaintiffs sought money damages, which would be paid by the employing entity and would not be affected by the presence of the official-capacity defendants. Here, plaintiffs do not seek money damages; they seek declaratory and injunctive relief directed specifically to the County Attorney and Sheriff as the officials whose actions gave rise to plaintiffs' claims. As discussed above, *see* Parts IV and V, injunctive relief may need to be tailored to avoid interference with the County Attorney and Sheriff's discretionary authority to prosecute and enforce the law. Because the County exercises no control over their exercise of such discretionary authority, Walsh and Lorge's presence as defendants, in their official capacities, will be important to shape the relief and is not redundant.

Fourth, during nearly three years in which this case has been pending, Walsh and Lorge have taken different positions than the County. Their Answers and Affirmative Defenses, while similar, are not the same; they did not file a Counterclaim as did the County; they provided separate discovery responses, producing thousands of pages of official documents from their respective offices that were not produced by the County; and they have moved for summary judgment on grounds not advanced by the County. These differences indicate that the claims against them are not redundant of the claims against the County.

IX. The Individual-Capacity Claims Against Walsh and Lorge Arise Under *Ex Parte Young*.

Walsh and Lorge seek dismissal of plaintiffs' individual-capacity claims against them. Walsh and Lorge SJ Mem. at 48-51. The Supreme Court has explained that, in an *Ex Parte Young* suit, the officer is "'stripped of his official or representative character and [is] subjected in his person to the consequences of his individual conduct.'" *Pennhurst*, 465 U.S. at 102 (quoting *Ex Parte Young*, 209 U.S. at 160). Accordingly, an "[a]ction in violation of valid federal law is necessarily beyond the scope of any official authority." *United States ex rel. Hixson v. Health Mgmt. Sys.*, 657 F. Supp. 2d 1039, 1058 (S.D. Iowa 2009) (citing *Ex Parte Young*, 209 U.S. at 159-160). If a court agrees that "the complaint alleges violations of state and federal law carried out by individual officials not pursuant to any state policy[,] then it would have no trouble finding that the allegations were sufficient to show that the individual defendants acted outside their official duties." *Id*.

Based on these principles, plaintiffs believed it was necessary to name Walsh and Lindgren (for whom Lorge substituted) in their individual capacities. However, if that is not necessary to trigger application of *Ex Parte Young*, plaintiffs have no objection to dismissal of the individual-capacity claims against them.

X. Qualified Immunity Is Not a Defense to a Claim for Attorney's Fees and Costs, and It Is Premature to Consider Plaintiffs' Prayer for Attorney's Fees and Costs on the Merits.

Walsh and Lorge argue that they should be immune "in their personal capacities from Plaintiffs' demand for costs and attorney's fees" because such relief "should be construed as a request for damages for qualified immunity purposes." Walsh and Lorge SJ Mem. at 52-53. As discussed above, plaintiffs' individual-capacity claims against Walsh and Lorge arise under the *Ex Parte Young* doctrine and were made to ensure that plaintiffs' request for declaratory and injunctive relief would survive an assertion of Eleventh Amendment immunity. Plaintiffs do not seek to recover attorney's fees and costs from Walsh and Lorge in their individual capacities.

Nevertheless, it should be noted that Walsh and Lorge cite no applicable law equating immunity from damages with immunity from costs and attorney's fees. In *Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 792-93 (8th Cir. 2008), the issue was whether the court was required to hear the case or whether it could exercise its discretion under the Declaratory Judgment Act to abstain. The court held it had discretion under the Act because plaintiff's request for "other monetary damages" in the form of "attorneys' fees, costs and interest" comprised "'further necessary or proper relief' based on the requested declaratory judgment." *Id.* at 794. Accordingly, it held that "the essence of this lawsuit is

one for declaratory judgment." *Id.* Whether the monetary relief "should [have been] construed as a request for damages for qualified immunity purposes," Walsh and Lorge SJ Mem. at 52-53, was not at issue.

Courts that have considered the issue have held that immunity does not bar an award of attorney's fees and costs. For example, in *Tonya K. v. Board of Education*, 847 F.2d 1243, 1245 (7th Cir. 1988), plaintiffs sought fees under 20 U.S.C. § 1415(e)(4)(B). The court rejected the State of Illinois's argument that an award of fees was barred under the Eleventh Amendment because: (1) the statute authorized an award of fees as part of the costs of prosecuting the case; and (2) states have not had an historical immunity from awards of costs. *Id.* at 1246. Among the cases the court cited for the second proposition was *Pulliam v. Allen*, 466 U.S. 522 (1984), in which the Supreme Court held that, when injunctive relief is available, a court may award attorneys' fees under 42 U.S.C. § 1988 even though the defendant is *absolutely immune* from an award of damages. In other § 1988 cases, the courts have held that qualified immunity also is not a defense to an attorney's-fees claim. *See Helbrans v. Coombe*, 890 F. Supp. 227, 231-32 (S.D.N.Y. 1995) (qualified immunity defense has no application to suit for injunctive relief or to a request for attorney's fees under § 1988); *L.K. v. Gregg*, 425 N.W.2d 813, 820 (Minn. 1988) (in an action exclusively for injunctive and declaratory relief, "defenses such as discretionary or qualified immunity are unavailable either in the original action or in an action for attorney fees").

These cases reflect the general rule that attorney's fees cannot "fairly be characterized as an element of 'relief' indistinguishable from other elements." *White v.*

N.H. Dep't of Emp't Sec., 455 U.S. 445, 452 (1982). "As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action." *Budinich v. Becton Dickinson & Co*., 486 U.S. 196, 200-01 (1988). The same is true for costs. Under Fed. R. Civ. P. 54(d)(1), costs other than attorney's fees "should be allowed to the prevailing party" unless prohibited by federal statute, the Federal Rules of Civil Procedure or a court order. "A prevailing party is presumptively entitled to recover all of its costs." *Thompson v. Wal-Mart Stores, Inc*., 472 F.3d 515, 517 (8th Cir. 2006). Accordingly, while plaintiffs do not seek an award of attorney's fees or costs against Walsh and Lorge in their individual capacities, there is no basis for dismissing plaintiffs' payer for attorney's and costs against them in their official capacities.[17]

Walsh and Lorge also assert that there is "no statutory basis to award Plaintiffs attorney's fees," because "Plaintiffs cite no authority for these demands and Defendants are aware of no such authority." Walsh and Lorge SJ Mem. at 52. The Court should decline to address this argument because, not only is it outside the scope of the early dispositive motions authorized by the Court, it is premature as no judgment has issued and

[17] Notably, even if a qualified immunity defense were available to plaintiffs' prayer for fees and costs, it would be unavailing here because, at the time Walsh and Lorge issued and enforced the opinion and protocol, it was clearly established that the Band had inherent law enforcement authority to investigate violations of state law, at least on trust lands, which all parties concede are Indian country. *See United States v. Terry*, 400 F.3d at 579-80; *see also* Doc. 150-7 (12/22/2016 letter from Band counsel to Defendant Walsh discussing applicable law); Walsh Decl. Ex. 5 at 7 [Doc. 165-1] (County Attorney Opinion citing *Terry*).

no motion for fees and costs has been proffered. "Regardless of when attorney's fees are requested, the court's decision on entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" *White*, 455 U.S. at 451-52. "A plaintiff's demand for attorney's fees, pre and post-judgment interest and costs are addressed by the court once a plaintiff has prevailed in an action." *Murray v. Miron*, No. 3:11 CV 629 (JGM), 2015 U.S. Dist. LEXIS 85260, at *12 (D. Conn. July 1, 2015). Federal Rule of Civil Procedure 54(d)(2) provides in relevant part that "[a] claim for attorney's fees . . . must be made by motion[,] unless the substantive law requires those fees to be proved at trial as an element of damages," and that such a "motion must . . . be filed no later than 14 days after the entry of judgment."

XI. Conclusion.

Defendants Walsh and Lorge's motion for summary judgment should be denied. Plaintiffs do not object to dismissal of their individual-capacity claims against Walsh and Lorge if those claims are not necessary to invoke the *Ex Parte Young* doctrine, and do not seek to recover attorney's fees or costs against Walsh or Lorge in their individual capacities.

DATED: July 29, 2020

Respectfully submitted,

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