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' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON STANDING, RIPENESS AND MOOTNESS**

Plaintiffs' summary judgment motion on standing, ripeness and mootness should be granted. Plaintiffs have standing and their claims are ripe because, at the time they filed their complaint, they suffered actual injuries to their ability to exercise the Band's inherent and federally delegated law enforcement authority, the injuries were traceable to defendants' actions (which had been formalized and felt in a concrete way), and the injuries would be redressed by the relief sought. Plaintiffs' claims have not been mooted by the 2018 Cooperative Agreement because it is an interim agreement that expires upon termination of this lawsuit. Because there is no genuine issue of material fact with respect

to these threshold issues, summary judgment is appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).[1]

I. Plaintiffs Have Standing.

A. Defendants Restricted the Band's Law Enforcement Authority.

Plaintiffs demonstrated that the County Attorney's Opinion and Protocol and Sheriff's actions restricted the Band's law enforcement authority under federal law, injuring plaintiffs in several ways. Pls. Mem. at 3-23. Walsh and Lorge do not deny prohibiting exercise of Band law enforcement authority on *fee* lands within the 1855 Reservation, including more than 6,000 acres of *Band-owned* fee lands. *See* Pls. Mem. at 3, 4-5 & n.10.[2] They argue only that the Opinion and Protocol did not "affect[] tribal police authority on *trust* land[,]" W&L Mem. at 16 (emphasis added), claiming "tribal police retained and exercised law enforcement powers on trust lands *over Band members* …[,] could work up investigations for prosecutions *in tribal court* if they chose … [and] could

[1] The County's argument [Doc. 175 at 2-4 & n.1] that there are factual disputes regarding the merits is misplaced. Standing "in no way depends on the merits …." *Warth v. Seldon*, 422 U.S. 490, 500 (1975); Pls. Mem. [Doc. 149] at 27.

[2] This prohibition remained after Band officers received SLECs, thereby restricting exercise of the Band's federally delegated authority. *See* Pls. Mem. at 14-15; Pls. Ex. GG [Doc. 150-33] at 169 (Rice's unrebutted testimony that, after receiving SLECs, Band officers continued to limit patrols to trust lands "per the Northern Protocol"); *see also* Walsh & Lorge (W&L) Mem. [Doc. 176] at 14 (Walsh concluded "no changes to the Protocol were needed" after issuance of SLECs); Pls. Ex. KK [Doc. 150-37] at 377-78 (Walsh's acknowledgement that Sheriff's Office assumed "*exclusive* responsibility for responding to calls and investigating violations on non-trust lands") (emphasis added). Walsh and Lorge's assertion (Mem. at 14) that plaintiffs "offered no admissible evidence" of interference with plaintiffs' federally delegated law enforcement authority is therefore mistaken.

detain someone until deputies could arrive" under the Opinion and Protocol. *Id*. at 9 (emphasis added; internal citations and footnote omitted). They further assert "[p]laintiffs produced over 3,000 police reports for the period from revocation until this lawsuit, so obviously, the tribal police were busy …." *Id*.

However, the Opinion and Protocol on their face prohibited Band officers from investigating state-law violations, such as by taking statements, making investigative stops or gathering evidence, *even on trust lands*. *See* Pls. Mem. at 4-5 & n.10. The Sheriff's Office enforced this prohibition by, *inter alia*, taking control of crime scenes to prevent Band officers from conducting investigations and treating Band officers as civilians. *See* Pls. Mem. at 7-8 & n.18. Defendants do not dispute this. *Cf.* Lindgren Decl. [Doc. 180] at ¶¶ 3, 12 (acknowledging Sheriff's Office followed Opinion and Protocol and asserted control of crime scenes). Indeed, Walsh expressly acknowledged the Sheriff's Office took over investigating state-law violations on trust lands. *See* Pls. Mem. at 13-14 & n.29.

It is, therefore, undisputed, that defendants restricted Band officers from exercising a significant component of the Band's claimed authority – the authority to investigate state-law violations – on trust lands. *See* Complaint [Doc. 1] at 4 (¶ 5.H), 7 (¶ 1.A).[3] That the

[3] Although plaintiffs' standing does not depend on the merits, there is substantial support for this claimed authority. *See*, *e.g.*, *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005); *see also* Baldwin SJ Decl. Ex. G [Doc. 150-7] (discussing additional cases). *United States v. Cooley*, 919 F.3d 1135 (9th Cir. 2019), *rehearing denied*, 947 F.3d 1215 (9th Cir. 2020), *petition for certiorari pending*, S. Ct. No 19-1414 (filed June 2020), is not to the contrary. That case involved a public right-of-way on which a tribe lacked the power to exclude non-Indians. *See* 919 F.3d at 1141. The Ninth Circuit recognized that, on tribal lands where a tribe has the power to exclude (including trust and Band-owned fee lands as in this case), "tribal officers can *investigate* crimes committed by non-Indians … and deliver non-Indians who have committed crimes to state or federal authorities." *Id*.

Opinion and Protocol did not prohibit Band officers from exercising *other* authority on trust lands, and that Band officers continued to exercise such authority and file reports, does not create a genuine dispute of material fact regarding the restriction on plaintiffs' authority to investigate state-law violations on trust lands.

B. Plaintiffs Suffered Cognizable Injuries.

1. Infringement on Law Enforcement Authority.

Walsh and Lorge assert (Mem. at 31) that restrictions on tribal law enforcement authority are not "cognizable injuries." That is not the law. *See* Pls. Mem. at 28-30; *see also Confederated Tribes and Bands of the Yakama Nation v. Yakima Cty.*, 963 F.3d 982, 2020 U.S. App. LEXIS 20353 at *13-14 (9th Cir. 2020). Magistrate Judge Brisbois previously rejected this argument and held this injury *alone* suffices to establish injury-in-fact for standing. *See* Order on Discovery Motions [Doc. 130] at 14.

2. Injuries to Rice and Naumann's Ability to Practice Their Chosen Profession and to Band Law Enforcement.

Rice and Naumann suffered injuries to their ability to practice their chosen profession, and the Band was injured by a decline in morale among, and the departure of, Band officers. Pls. Mem. at 16 n.43, 30-31. Contrary to Walsh and Lorge's assertion (Mem. at 39-40), these undisputed injuries are legally cognizable.

For standing, "a right to practice [one's] chosen profession is … legally cognizable[.]" *Sammon v. New Jersey Bd. of Med. Examiners*, 66 F.3d 639, 642 (3d Cir.

(emphasis added). As to public rights-of-way, *Cooley* is inconsistent with *Terry*. *See* 947 F.3d at 1220 (Collins, Bea, Bennett, and Bress, JJ., dissenting from denial of rehearing).

1995); *accord Meese v. Keene*, 481 U.S. 465, 473 (1987); *Middleton v. Lewis*, 2020 U.S. Dist. LEXIS 65630 at *6 (E.D. Ky., April 15, 2020); *Gorenc v. Klaasen*, 421 F. Supp. 3d 1131, 1153-54 (D. Kan. 2019). It matters not whether invasion of that right violated the First or Fourteenth Amendments, as in the foregoing cases, or a tribe's sovereign rights under federal law, as here. In either circumstance, invasion of a legally cognizable right is an injury-in-fact for standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546-48 (2016).[4]

Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 488-89 (9th Cir. 1996), held Viceroy had standing without addressing or overruling the district court's finding that decreased employee morale supported Viceroy's standing by "jeopardiz[ing] Viceroy's ability to operate its mining venture," *Viceroy Gold Corp. v. Aubry*, 858 F. Supp. 1007, 1014 (N.D. Cal. 1994). Here, decreased morale and the departure of Band officers indisputably impaired the Band's ability to provide effective law enforcement services and establish an injury-in-fact. *See*, *e.g.*, Pls. Ex. EE [Doc. 150-31] at 209-10 (former Chief Rosati's unrebutted testimony that, after revocation, some Band officers left to work for other agencies, leaving Band police short-handed).

[4] Under the zone-of-interests test, "plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Injuries to the Band's sovereignty fall well within the zone of interests protected by the treaties, statutes and federal common law at issue here. *See* Pls. Mem. in Opp. to W&L SJ Mot. [Doc. 173] at 12-24. The same is true of tribal employees whose chosen profession is to provide law enforcement in a tribal community. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (plaintiff is outside statute's "zone of interests" only if "plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit") (internal quotation omitted).

3. Injuries to Public Safety.

Walsh and Lorge argue (Mem. at 7-12, 16-22) there was no decline in public safety because Band officers continued patrolling trust lands and the Sheriff's Office assigned additional deputies to the Reservation. However, they submit no evidence to create a genuine issue as to whether there was a decline in effective, proactive policing by Band officers. Plaintiffs cited multiple Band officers' deposition testimony and declarations demonstrating that the restrictions imposed on them reduced their effectiveness as law enforcement officers and led to a decline in proactive police work. *See* Pls. Mem. at 16-18 & n.44. In response, Walsh and Lorge (Mem. at 7-8) cite an article by the Band's Chief Executive that was intended to reassure Band members in the immediate aftermath of revocation; however, the article does not create a genuine issue regarding the effect of the Opinion and Protocol on Band officers because it was written *before* Walsh issued and the Sheriff enforced the Opinion and Protocol. Walsh and Lorge also assert (*id*. at 8-9) that Band officers continued to respond to calls for service and were able to communicate on the Sheriff's main channel, but neither assertion addresses their effectiveness as police officers in the field. The substantial, detailed testimony of Band officers that their effectiveness was compromised and they were deterred from proactive policing is undisputed.

Plaintiffs also submitted evidence that, even considering additional County deputies assigned to the Reservation, by mid-to-late 2017 there was an overall decline in policing that had observable consequences. *See* Pls. Mem. at 18-23 & nn. 45-55. This included testimony from multiple Band officers, a former Assistant County Attorney, and Wade

Lennox, a state corrections officer who reported that he did "not see the same type of law enforcement taking place anymore and it has resulted in a much less safe area[,]"and that, while he saw County deputies patrolling, it was "not even remotely close to what was being done" by Band officers. *Id.* at 21-22. Band member Colin Cash, who described an influx of gang members and drug dealers and the resulting despair in the community, corroborated Lennox's observations. *Id.* at 22 n.53.[5]

In response, Walsh and Lorge (Mem. at 10-11) point to the hiring of additional deputies and Deputy Mott's testimony. However, Mott was not assigned to the Reservation between January 13, 2017, and August 3, 2018, so his testimony could not reflect the situation as it developed in 2017. *See* Decl. of Craig Nguyen (filed herewith), ¶¶ 5-6. Mott's conclusory testimony does not create a genuine issue of fact because it does not address specific observations made by multiple Band officers, Lennox or Cash, such as lack of patrols in the Reservation's obscure areas, new gang members and drug dealers appearing, suspects informing Band officers that they weren't cops, specific incidents when suspects in possession of drugs were not arrested, and the development of an open-air drug market on the Reservation. *See*, *e.g.*, *Yearns v. Koss Constr. Co.*, 964 F.3d 671, 2020 U.S. App. LEXIS 20698 at *11 (8th Cir. 2020) (conclusory allegations insufficient to create genuine issue of fact).

[5] Walsh and Lorge argue (Mem. at 16-22) there is no evidence defendants caused an increase in drug overdoses, but plaintiffs made no such claim in their summary judgment motion; plaintiffs asserted only that the restrictions defendants imposed on plaintiffs' police authority occurred against a backdrop of significant drug and gang activity, including overdoses, on the Reservation. *See* Pls. Mem. at 15-16.

Walsh and Lorge do not dispute Lennox's testimony,[6] but argue (Mem. at 15) that, because the open-air drug market Lennox observed was on trust lands near Grand Market, Band officers could have used their inherent or federally delegated authority to respond to it. However, as discussed above, there is unrebutted evidence that defendants' actions impaired Band officers' authority and reduced their effectiveness. *See* Pls. Mem. at 16-18 & n.44.[7] Plaintiffs also submitted unrebutted evidence that Sheriff's deputies failed to arrest drug suspects apprehended by Band officers in front of Grand Market. *See* Gadbois Decl. [Doc. 158] ¶¶ 30-36. On this record, there is no *genuine* issue of material fact that effective law enforcement and public safety on the Reservation declined.

Walsh and Lorge also argue (Mem. at 41) that plaintiffs' standing cannot rest on these injuries because plaintiffs did not "assert the rights and interests of community members in the Complaint" and "the purported interests of those citizens are not legally cognizable." However, the Band has its own, sovereign interest in the safety and well-being of its members, and an injury to that interest is cognizable for standing purposes.

In *Rosebud Sioux Tribe v. United States*, No. 3:16-CV-03038-RAL, 2017 U.S. Dist. LEXIS 49969 at *14 (D.S.D. Mar. 31, 2017), the court held a tribe did "not necessarily have to establish *parens patriae* status … to have standing … because Indian tribes have

[6] Walsh testified he had no reason to question Lennox's observations. *See* Pls. Mem. at 22 & n.54.

[7] The Band's federally delegated authority was no panacea because the U.S. Attorney's Office limits the number and types of cases it accepts for prosecution. *See* Pls. Ex. JJ [Doc. 150-36] (Walsh letter asserting U.S. Attorney's Office anticipated taking approximately five cases per year).

standing to sue in their governmental capacity to protect their sovereign interests." The tribe's complaint invoked its sovereign interests by alleging it was a federally recognized tribe and by seeking relief that would protect its "entitlement to health care services." *Id*. at *14-15. The court held that "[t]he health and safety of all its members is part of the Tribe's sovereign governmental interests." *Id*. at *15 (citing *Montana v. United States*, 450 U.S. 544, 566 (1981)).

Here, plaintiffs invoked the Band's sovereign interests throughout their Complaint and specifically alleged defendants' actions "deterred Band police officers from responding to criminal activity… that threatens the safety, health, welfare and well-being of Band and non-Band members who live and work within, and visit, the Reservation." Doc. 1, ¶ 5.T. The Complaint thus alleges injury to the Band's sovereign interests under *Rosebud* and *Montana*, and injury to the Band's quasi-sovereign interests under the *parens patriae* doctrine. *See Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982) (State has "quasi-sovereign interest in the health and well-being … of its residents in general").[8] This is reinforced by the Tribal Law and Order Act, in which Congress sought "to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country." 25 U.S.C. § 2801 note, 124 Stat. 2262, § 202(b)(3); *cf. Oglala Sioux Tribe v. Hunnik*, 993 F. Supp. 2d 1017, 1028

[8] Quasi-sovereign interests "are not … private interests pursued by the State as a nominal party"; rather, they "consist of a set of interests that *the State has* in the well-being of its populace." *Id.* at 602 (emphasis added). Walsh and Lorge's attempt to equate these interests with the individual interests of Band members (Mem. at 41) is mistaken.

(D.S.D. 2014) (finding tribal *parens patriae* standing in light of congressionally declared purposes of the Indian Child Welfare Act).[9]

Walsh and Lorge's reliance (Mem. at 41-42) on *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), is misplaced. In *Deshaney*, the Court emphasized that the defendant did not "do anything to render [the injured party] more vulnerable to [the dangers he faced]." 489 U.S. at 201. Here, plaintiffs demonstrated that defendants rendered Band members more vulnerable to criminal activity through restrictions defendants imposed on Band law enforcement. Moreover, *Deshaney* did not involve a sovereign or quasi-sovereign interest in the public safety of the sovereign's citizens. Invasion of such an interest is a cognizable injury for standing. *See Quapaw Tribe of Okla. v. Blue Tee Corp*., 653 F. Supp. 2d 1166, 1178 (N.D. Okla. 2009).

C. Plaintiffs' Injuries Are Fairly Traceable to Defendants' Actions.

Standing requires that plaintiffs' injuries be "fairly traceable" to defendants' actions. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). Where a plaintiff eliminates an imminent threat of harm by refraining from doing what it claims the right to do, that does not defeat standing if "the threat-eliminating behavior was effectively coerced." *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 129 (2007).[10]

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[9] The Eighth Circuit's reversal of a *subsequent* summary judgment order in *Oglala Sioux* on abstention grounds (*see* W&L Mem. at 41) did not disturb the district court's earlier ruling that the tribe had *parens patriae* standing. *See Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018).

[10] As *MedImmune* makes clear, these principles are not limited to First Amendment cases. While the First Amendment overbreadth doctrine departs from traditional standing principles by allowing a litigant to rest its claims on rights or interests of third parties, *see*

Because there is undisputed evidence that plaintiffs' injuries were "fairly traceable" to and "effectively coerced" by defendants, Walsh and Lorge's assertion that the Sheriff's Office did not arrest or threaten to arrest any Band officer, and that Sheriff Lindgren told then-Deputy Chief Rice that no Band officer would be arrested (W&L Mem. at 22-25, 46-49; *cf.* Pls. Mem. at 11-12), does not defeat plaintiffs' standing.

Walsh and Lorge argue (Mem. at 33) that the Opinion and Protocol were mere "viewpoint[s]" and not the type of "conduct" that can cause injury for purposes of standing. They cite no authority for this proposition and simultaneously claim the Opinion and Protocol were: "mandatory" under state law, *id.*; intended "to guide law enforcement"; "disseminated throughout the Sheriff's Office" and Sheriff's deputies and staff were "instructed … to follow [them]"; and drafted "as part of [the County Attorney's] prosecutorial function[.]" W&L Mem. in Supp. of SJ [Doc. 164] at 10, 44. These claims confirm the Opinion and Protocol were official policies and not mere "viewpoint[s]." Law enforcement policies that violate a plaintiff's rights "constitute[] ongoing harm, and thereby support[] standing to seek an injunction." *E.g., Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 985 (D. Ariz. 2011).

Walsh and Lorge also argue (Mem. at 34-36) the Opinion and Protocol were not the equivalent of a state statute, and that there is no evidence Band officers were told "to stop doing something," "that they would likely be prosecuted," or that they were threatened

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United States v. Sineneng-Smith, 140 S. Ct. 1575, 1586 (2020) (Thomas, J., concurring), plaintiffs have not invoked that doctrine here and rest their claims on their *own* rights and interests.

with prosecution under a state statute. However, it is undisputed that the Opinion and Protocol stated that Band officers "**May Not Lawfully** … [c]onduct investigations regarding violations of state law[,]" and that violations could give rise to criminal and civil liability. Pls. Ex. J [Doc. 150-10] (emphasis in Protocol); *see also* Pls. Mem. at 4-6 & nn. 9-12. It is also undisputed that, after Sheriff Lindgren stated no Band officer would be arrested, Walsh wrote to the Band's Police Chief complaining about Protocol violations, and stated they "could … constitute obstruction of justice and the unauthorized practice of a law enforcement officer." Pls. Ex. N [Doc. 150-14] at 2. The threat of criminal liability was further reinforced by the Sheriff's directive to his deputies to monitor and report violations of the Protocol. *See* Pls. Mem. at 7 n.16; *accord* Lindgren Decl. ¶ 4. And, when taking control of crime scenes, Sheriff's deputies repeatedly told Band officers to stop conducting investigations. *See* Pls. Mem. at 7-9 & n.18.[11]

Together, these actions "effectively coerced" compliance with the restrictions imposed by the Opinion and Protocol. Like the police officers' statements in *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), defendants' statements and actions here created legitimate concern among Band officers that they could be prosecuted for violating state

[11] Walsh and Lorge argue (Mem. at 33) the Sheriff's actions did not "rise to the level of taxation or ticketing that precedent recognizes as a concrete injury sufficient to confer standing." However, Sheriff's deputies *directly* interfered with the exercise of the Band's claimed law enforcement authority by taking over Band officers' investigations and treating them as civilians, satisfying the injury *and* causation elements of standing. *See Arkansas Right to Life State Political Action Comm. v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998) ("when government action … is challenged by a party who is a target or object of that action … there is ordinarily little question that the action … has caused him injury") (internal quotations omitted).

law, exposed to civil liability, and lose their licenses and careers. *See* Pls. Mem. at 9-13 & nn. 20-27. Because these concerns were not "wholly speculative," *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006), Band officers did not need to expose themselves to these perils before seeking relief from this Court. *MedImmune,* 549 U.S. at 128-29; *Arkansas Right to Life*, 146 F.3d at 560. That an arrest was made in other cases, *see, e.g.*, *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144 (9th Cir. 2017), does not mean it was required here any more than in *Gaertner* or *Arkansas Right to Life*.

Walsh and Lorge provide no authority for their suggestion (Mem. at 34) that, because Band officers acted "on the advice of [their] own counsel," defendants' actions did not cause their injuries. It is undisputed that the Band's Solicitor General provided such advice based on his concerns about potential criminal and civil liability as described in the Opinion and Protocol. *See* Pls. Mem. at 9-10. Walsh and Lorge do not argue (*see* Mem. at 34) that the advice was unreasonable or misconstrued the Opinion and Protocol. Accordingly, the restrictions on the Band's law enforcement authority remain fairly traceable to the actions of the County Attorney and Sheriff. "[W]here the Supreme Court has found that an injury is not fairly traceable, the intervening, independent act of a third party has been a *necessary condition of the harm's occurrence*, or the challenged action has played a minor role." *Texas v. United States*, 787 F.3d 733, 752-53 (5th Cir. 2015) (emphasis added). Neither circumstance is present here.

D. Plaintiffs' Injuries Are Redressable.

The relief plaintiffs seek would redress their injuries by confirming the Band's police authority extends throughout the 1855 Reservation and includes authority to

investigate state-law violations. Pls. Mem. at 35; *accord Rosebud Sioux Tribe v. United States*, No. 3:16-CV-03038-RAL, 2020 U.S. Dist. LEXIS 54323, at *41-45 (D.S.D. Mar. 30, 2020) (discussing efficacy of declaratory relief), *appeal pending*, No. 20-2062 (8th Cir., May. 28, 2020). Walsh and Lorge's arguments regarding the availability of *injunctive* relief (Mem. at 43-45) do not address plaintiffs' claim for declaratory relief and thus provide no basis for concluding plaintiffs' injuries are not redressable. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 185 (2000) (standing to seek injunctive relief distinct from standing to seek declaratory relief). Moreover, for the reasons discussed in plaintiffs' memorandum in opposition to Walsh and Lorge's summary judgment motion [Doc. 173 at 24-43], plaintiffs' claims for injunctive relief are not barred by the Tenth or Eleventh Amendments or principles of federalism. Accordingly, there is no basis to conclude that plaintiffs' claims are not redressable.

II. Plaintiffs' Claims Are Ripe.

Ripeness requires that the challenged action was formalized and its effect felt in a concrete way. *See* Pls. Mem. at 35. It is undisputed that defendants' policies were formalized in the Opinion and Protocol and implemented by the Sheriff. Contrary to Walsh and Lorge's assertion (Mem. at 46-49), the absence of an arrest does not mean the restrictions imposed in the Opinion and Protocol were not felt in a concrete way. *See* Part I, *supra*.

III. Plaintiffs' Claims Are Not Moot.

Defendants' Joint Statement of the Case [Doc. 50 at 6] asserts defendants "believe[] the new Cooperative State Law Enforcement Agreement has mooted the claims against the

County Attorney and the Sheriff."[12] Parties asserting mootness have the burden to establish it. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 102 (2013) (Kennedy, J., concurring); *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 2020 U.S. App. LEXIS 19768, *4-*9 (3d Cir. 2020); *Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012). Plaintiffs' summary judgment motion does not relieve defendants of this burden. *See Celotex*, 477 U.S. at 322-23.

Defendants assert (W&L Mem. at 54) this is not a voluntary-cessation case. However, they do not suggest their signing the 2018 agreement was involuntary or "dictated by the actions of a non-party." *Eagle Air Med Corp. v. Martin*, 377 F. Appx. 823, 829 (10th Cir. 2010). The agreement itself does not address the scope of the Band's inherent or federally delegated law enforcement authority and can be terminated by defendants without cause. *See* Pls. Ex. AAA [Doc. 150-51] ¶¶ 18, 25(b). Accordingly, it is not a "complete [or even partial] settlement" of the issues in this case, *Aulenback, Inc. v. FHA*, 103 F.3d 156, 161 (D.C. Cir. 1997), or a "binding, judicially enforceable agreement" by defendants not to interfere with plaintiffs' law enforcement authority now or in the future. *Stokes v. Wurtsboro*, 818 F.2d 4, 5 (2d Cir. 1987). Thus, to the extent defendants

[12] Walsh and Lorge's complaint (Mem. at 54 n.18) that "use of the 2018 Cooperative Agreement in the lawsuit is improper and prohibited by the agreement[,]" disregards that they invoked the agreement to assert mootness.

have refrained from interfering with plaintiffs' law enforcement authority since signing the agreement, they have done so voluntarily.[13]

In a voluntary-cessation case, "subsequent events [must make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1037 (8th Cir. 2004) (internal quotation marks omitted). Entering into an agreement that avoids injury to plaintiff during the pendency of litigation does not meet this test. *See Lucini Italia Co. v. Grappolini*, 288 F.3d 1035, 1038 (7th Cir. 2002). Government actors that voluntarily cease their offending actions via methods that are "discretionary[] and easily reversible" must rely on "significantly more" than "bare solicitude" to establish mootness. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019). Timing of the cessation, especially when it comes after litigation begins, is also relevant. *Id.* at 769.

Defendants argue (W&L Mem. at 55) there is no "reasonable probability that the complained of harm will recur." However, they do not deny that, if this case is dismissed, the 2018 agreement will terminate unless the parties negotiate a new agreement, that the reservation boundary dispute was a principal reason the County revoked the prior agreement, and that the County and Sheriff insisted that judicial resolution of the boundary issue was essential to their entry into the 2018 agreement. *See* Pls. Mem. at 23-24. Nor do they deny that defendants have not altered their position regarding the boundary or the

[13] An intent to moot this case (W&L Mem. at 54) is not required. *See Hartnett*, 2020 U.S. App. LEXIS 19768, *7-*8 ("*why* the defendant ceased its behavior" matters not for voluntary-cessation analysis) (emphasis in original).

scope of plaintiffs' law enforcement authority (on trust or fee lands). *Id.* They focus instead (W&L Mem. at 55-56) on a "speculative" chain of events to establish that the harm will not recur but have never affirmatively stated that they would not re-enact the same policies again.

A case is not moot where, as here, "a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed[,]" defendants "continue[] to defend the legality" of the challenged policies, and "it is not clear why [defendants] would necessarily refrain" from re-imposing similar policies in the future,. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012); *accord United States v. Mercy Health Servs*., 107 F.3d 632, 636 (8th Cir. 1997) (case not moot where defendants "are free to return to their old ways") (internal quotations omitted). Because defendants have not met their burden to establish that "subsequent events [have made] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *McCarthy*, 359 F.3d at 1037, this case is not moot.

IV. Conclusion.

The Court should grant plaintiffs' summary judgment motion on standing, ripeness and mootness.

DATED: August 12, 2020

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.
s/ Charles N Nauen
Charles N. Nauen (#121216)
David J. Zoll (#0330681)

Arielle S. Wagner (#0398332)
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981
cnnauen@locklaw.com
djzoll@locklaw.com
aswagner@locklaw.com

ZIONTZ CHESTNUT
s/ Marc Slonim
Marc Slonim, WA Bar #11181
Beth Baldwin, WA Bar #46018
Wyatt Golding, WA Bar #44412
Anna Brady, WA Bar #54323
2101 Fourth Ave., Suite 1230
Seattle, WA 98121
Phone: 206-448-1230
mslonim@ziontzchestnut.com
bbaldwin@ziontzchestnut.com
wgolding@ziontzchestnut.com
abrady@ziontzchestnut.com

Attorneys for Plaintiffs