No. 20-3424

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RAYMOND CROSS, et al.,
Plaintiffs-Appellants,
v.
MARK FOX, et al.,
Defendants-Appellees

On Appeal from the United States District Court
for the District of North Dakota – Western Division
Case No. 1:20-cv-00177

APPELLANTS' BRIEF

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SUMMARY OF THE CASE

This case is about the "fundamental right" of Plaintiffs to fairly participate in the governance of the Three Affiliated Tribes (TAT). (Appendix "App" at 99) ("The failure [of the tribal court] to make a decision when the fundamental right of voting is involved raises the question of whether the MHA Tribal Court has a functioning court system.") The tribal court's unexplained and unjustified refusal, after two years of litigation by Plaintiffs in that court system, to render a final decision is what prompted Plaintiffs to commence their lawsuit in federal court one week before the scheduled TAT 2020 elections. ("App" at 99.) ("Shockingly, the MHA Tribal Court has not made a decision [on the issues of whether Plaintiffs have a fundamental right to vote in TAT elections] and we are less than one week before the TAT election…[therefore]…[t]his Court presumes that its lack of an answer is [its] answer.")

Defendants claim to be legally privileged to deny their non-resident TAT members any federally-based due process or equal-protection based right to participate in tribal governance. (See Doc. ID 21 at 5.) ("[T]ribes have historically been regarded as unconstrained [in dealing with their tribal members] by those constitutional provisions [that were] framed specifically as limitations on federal or state authority." (citations omitted)). They further claim their governmental actions are exempt from federal judicial scrutiny because they "ste[m] from a purely intra-tribal matter [that affects only tribal members[.]" *Id.*

Appellants waive oral argument.

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JURISDICTIONAL STATEMENT

The federal district court has subject matter jurisdiction over Plaintiffs' complaint and their federally created claims therein pursuant to the statutory prerequisites of 28 U.S.C. §1331 (Federal Question Statute).

This Court has jurisdiction over Plaintiffs' appeal pursuant to 28 U.S.C. §1291 which provides "[t]he courts of appeal…shall have jurisdiction of appeals from all final decisions of the district courts of the United States…except where a direct review may be had in the Supreme Court." The final judgment that is being appealed from disposed of all issues in this case and was entered on October 28, 2020. The Notice of Appeal was filed November 19, 2020. This is not an appeal from a decision of a magistrate judge.

STATEMENT OF THE ISSUES

Plaintiffs cite the following four questions for review by this Court:

1. Whether Judge Traynor erred in dismissing Plaintiffs' claims for lack of federal subject matter jurisdiction under the Federal Question Statute (28 U.S.C. §1331) despite their claims having met all of the statutory prerequisites for federal question jurisdiction including: a) they "arise under" federal law, given those claims are created by federal law and they will require the interpretation and application of federal law principles for their final resolution; b) they represent substantial claims that expressly allege the "actual or threatened invasion of [their] constitutional [or

statutory] rights by [Defendants' on-going and present-day enforcement of their 1956 and 1986 governmental decisions that severely restrict or destroy Plaintiffs' representational and voting rights within the TAT];" See, *Newbury Port Water Co. v. City of Newbury Port*, 193 U.S. 561, 576 (1904); and 3) they are "well-pleaded" claims because "[their] statement show they are based upon [the] the laws or Constitution [of the United States.]" See, *Beneficial National Bank v. Anderson,* 539 U.S. 1, 6 (2003).

2. Whether Judge Traynor erred by "ruling on the merits of [Plaintiffs'] case without first establishing that [he] had [subject matter] jurisdiction over…[Plaintiffs'] claims in the suit." See, *Sinochem Int'l Co., Ltd.v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-3 (2007); see also, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998) (The Court in both of these decisions resoundingly rejected the federal district courts' growing practice of exercising hypothetical jurisdiction whereby they would rule on substantive issues of law they believe are presented in a given case before they determine whether they have the requisite subject matter jurisdiction to do so.")

3. Whether Judge Traynor erred in barring federal judicial jurisdiction over Plaintiffs' claims through his misapplication of two judicially-created abstention or deference doctrines – the tribal sovereign immunity to suit doctrine and the internal tribal matters doctrine – regardless of whether they do, or should, apply to the facts

and issues of this case. See, *Burlington Northern Railroad Company v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 924 F.2d 899, 902 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1991) ("But sovereign immunity does not extend to [tribal] officials acting pursuant to an allegedly unconstitutional [tribal] statute [or law]"); see also, *Randall v. Yakima Indian Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988) (The internal tribal matters deference doctrine is triggered only when "the tribal [justice] standards under [federal judicial] scrutiny differ substantially from those 'commonly employed' in Anglo-Saxon society.")

4. Whether Judge Traynor erred in applying the Supreme Courts' *NFU* exhaustion of tribal remedies requirement to the facts and issues of this case so as to wrongfully bar Plaintiffs from access to federal district court given that: a) neither Defendants nor Judge Traynor identified or asserted any significant or compelling tribal interest that would justify the application of federal judicial abstention – pursuant to the Court's 1959 *Thibodaux* decision requiring the "[presence of] an important [tribal] governmental interest that is 'intimately involved' with the tribal government's acknowledged 'sovereign prerogative" – in this factual context; see, *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959); see also, Carlson, ftn. 44 at 576. (Given that judicial abstention "limits the ability of federal courts to decide issues before them even though [all of the] jurisdictional and justiciability requirements have been met," these courts' application of the abstention principle to

a given case must be adequately justified.); and b) Plaintiffs have, nonetheless, reasonably exhausted their available tribal administrative and judicial remedies herein.

STATEMENT OF THE CASE

This case is about Defendants' misuse of their governmental authority to deny equal representational rights to approximately 75% to 80% of today's enrolled TAT members. Defendants have done so since 1956 for the primary, if not exclusive, contemporary purpose of maintaining their control over, and use of, those communally owned monies, lands and assets that belong to all TAT members and not just the Defendants. See, Article VI, Powers, Section 5, TAT Constitution.

The record of this case includes these following four documents: 1) Plaintiffs' Complaint; 2) Defendants' Motion to Dismiss and their Memorandum of Law in Support of that Motion; 3) Judge Traynor's Ruling In This Matter; and 4) The MHA Supreme Court's decision in this matter.

Plaintiffs also ask this Court to take judicial notice of the certified TAT election results of its November 3, 2020 election because: a) Plaintiffs cite in their complaint to the substantially truncated and low – especially since the Defendants' 1986 governmental action that further restricted and burdened Plaintiffs' representational rights – tribal voter participation rates in contemporary TAT elections; and b) because Plaintiffs did not have the opportunity, as they had

expected, to provide this official information to Judge Traynor's Court because he unilaterally denied them the right to respond to Defendants' Motion To Dismiss. App. at 94, ftn 1.

Plaintiffs have organized their statement, to facilitate its readability and coherence, into three subsections: 1) Subsection One: Background Facts Relevant to the Creation of the Contemporary Three Affiliated Tribes and the Fort Berthold Indian Reservation; 2) Subsection Two: Facts Relevant to Defendants' Establishment in 1956 of the Segment-Based System of TAT Governance on the Fort Berthold Reservation; and 3) Subsection Three: Procedural History of the Case Before: a) the MHA Tribal Court; and b) Judge Traynor's Court.

Plaintiffs have also included, for readability and coherence purposes as well, the relevant TAT Constitutional provisions and Election Ordinance provisions.

1. Background Facts Relevant to the Creation of the Contemporary Three Affiliated Tribes and the Fort Berthold Indian Reservation.

Plaintiff Hudson is an eighty plus year old female who presently resides on the Reservation in Parshall, North Dakota. As an elderly woman, Hudson suffers from several diagnosed ailments. App. at 14, ¶ 22.

The TAT is a federally recognized Indian tribe that resides on the approximately one million acre (it is 988,000 acres in size, of which 457,837 acres are held in individually allotted or tribally owned trust status and the balance of that acreage is owned by non-Indians in fee status title) federally established Fort

Berthold Reservation. *See* Agreement between the TAT and the United States dated December 14, 1886 ratified March 3, 1891, 26 Stat. 1032. App. at 14, ¶ 23.

The federal government's decision to build one of the world's largest rolled-earth dams on the Reservation in the early 1950's – as part of its massive, multipurpose, water resources development program known popularly as the Pick-Sloan Program for the development of the Upper Missouri Basin or Garrison Taking – (a) flooded and physically took over 156,035 acres of the TAT's best and last remaining agricultural lands along the Missouri River; (b) destroyed nine (9) historic river bottom sited tribal communities, including Elbowoods and Independence, and geographically fragmented the Reservation into six (6) discrete and discontinuous segments; and (c) occasioned the exodus from the Reservation of the TAT's younger, most productive, educated, and job ready men and women who left to seek new lives and job opportunities in America's urban job centers such as the Bar Area, Phoenix, L.A., Chicago, and Denver under the BIA's touted Indian Relocation Program of the later 1950s and 1960s that intentionally sought to depopulate the Fort Berthold Reservation – as well as many other Reservations around the country – as part of the federal government's tribal termination program. App. at 14 and 15, ¶24.

2. Facts Relevant to Defendants' Establishment in 1956 of the Segment-Based System of TAT Governance on the Fort Berthold Reservation

Accordingly, the "return to the Reservation to vote" requirement as implemented by the TBC requires **only** Cross and his fellow non-resident TAT

voters to physically appear at the TBC established polling sites in order to cast a valid ballot in tribal elections, given that resident TAT voters can be, and are, easily exempted by the TBC's Election Board ("TEB") from this physical appearance requirement based on their mere assertion or allegation to the TEB that they will be absent from the Reservation on election day. Indeed, Cross, during the 2018 TAT elections, applied to the TEB for an absentee ballot due to his extreme and demonstrable physical disability that would make automobile and/or air travel from Tucson, AZ to the Reservation, roundtrip, very difficult and expensive. But the TEB summarily denied his request without even pausing to examine his proffered medical proof of his disability. *See* King Aff. Exhibit A (Election Board rejection letter). Likewise, Ms. Vanessa Price's request for an absentee ballot – based on extreme economic and social hardship – for the 2020 TAT elections submitted on April 27, 2020, has not even received the courtesy of an acknowledgement of its receipt. *See* King Aff. Exhibit E (Letter of Vanessa Price). App. at 18, ¶ 30.

In 1945, TAT life on the Fort Berthold Reservation was good: the younger men had returned from their service in WWII, agricultural production was growing, divorce was rare, most children lived in two parent households, all of the tribal children were enrolled in school, and less than 3% of TAT members – mostly the elderly or disabled – depended on BIA or county welfare assistance. But soon everything about the lives of these tribal people, who had lived for centuries on the

remnants of their once vast aboriginal lands, would be utterly and completely destroyed by the construction of the Garrison Dam and that 110 mile long flood control reservoir, Lake Sakakawea, on their federal treaty established and protected Reservation. App. at 18 and 19, ¶ 31.

Though the TAT fought hard and valiantly in the late 1940s – particularly though [sic] their TAT chairmen, Martin Cross and George Gillette, who made many trips to Washington, D.C. to speak to Congress to stop that injustice – against the forced taking of 156,035 acres of their last remaining and agriculturally valuable river bottomlands, they could not stop the Army Corps of Engineers from continuing to build the Garrison Dam on their Reservation. App. at 19, ¶ 32.

In 1953, the flood gates of the completed Garrison Dam were closed and the flood waters rose on the Reservation, thereby forcing many, if not most, of the younger, better educated and most vigorous of the TAT members – who were without any money or job prospects on the now fundamentally shrunken Reservation – to accept the uncertain promise of a better life and future via the BIA's Urban Indian Relocation Program that took them into America's burgeoning job centers like the Bay Area, Denver, Phoenix or Chicago. App. at 19, ¶ 33.

But not only did the Dam's rising flood waters end the hopes and dreams of many young TAT members from ever living a Reservation based way of life, they also ended the TAT people's age-old system of inclusive and equal political

governance and economic existence. Prior to the Dam virtually all the TAT's approximately 2400 enrolled members had lived in 9 river bottom communities of which Elbowoods, Independence and Sanish were the most important. Furthermore, the TAT people, the only Northern Great Plains tribe to accomplish this feat, lived a comfortable and economically independent way of life raising cattle and growing crops on their rich, sheltered bottomlands along the Missouri River. App. at 19 and 20, ¶ 34.

Unfortunately, the vast wrack and ruin inflicted on the TAT people by the Garrison Dam – on their pre-existing social, cultural, economically inclusive and most importantly, for our purposes, on their prior system of political governance – left them especially vulnerable to the federal governmental manipulation and influence of one man – Assistant Secretary Wesley D'Ewart – who was sent to Fort Berthold during the tribal relocation period in 1955 by the Department of the Interior (DOI) to persuade the TAT people and its TBC the ultimate federal termination of the TAT people's status as a federally recognized Indian tribe. App. at 20, ¶ 35.

As was articulated in DOI's "marching orders" on Indian termination embodied in Congress' 1953 House Concurrent Resolution (HCR) 108, D'Ewart's task was to implement the process of termination on Fort Berthold in discrete steps: a. Depopulate the Fort Berthold Indian Reservation; b. Restructure the political governance system on Fort Berthold so as to restrict future TAT political and

economic benefits to an expectedly significantly fewer reservation residents while intentionally excluding therefrom, those (expectedly) many more off-reservation TAT members who were to be intentionally created by the application of Secretary D'Ewart's termination policies on Fort Berthold; and c. Encourage North Dakota to take advantage of the federal jurisdictional transfer provisions of a 1953 federal statute known as P. L. 280 whereby that state would replace the federal government as the primary criminal law overseer of all of those tribal Indians who resided within Indian Country-including the Fort Berthold Reservation-that was located within that state. App. at 20 and 21, ¶ 36.

Secretary D'Ewart wielded extraordinary influence over the lives and futures of the TAT members in the mid-1950s: total control over their only remaining financial life line represented by the $7.5 million damage award that Congress had ordered paid directly to the TAT people for the taking of their treaty protected Reservation. App. at 21, ¶ 37.

But Secretary D'Ewart consciously and intentionally refused to give the TAT people access to their own monies until they agreed to accept termination of their status as a federally recognized Indian tribe which they steadfastly and adamantly refused to do. Here's an excerpt from a 1956 Congressional report regarding this continuing stalemate over termination on the Fort Berthold Reservation:

> Following the abandonment of the 1951 program and the refusal of the Department [of the Interior] to make per capita distribution of all of the

> funds, many discussions were held on the drafts of proposed bills which, over a period of years, would give the members of the [TAT] tribe control over the remaining [majority of the] funds and would **terminate** [emphasis added] Federal trusteeship and supervision over their affairs. Complete agreement was not reached on any of these proposed bills, and none was submitted to Congress by the Department.

Providing For The Segregation Certain Funds Of The Fort Berthold Indians On The Basis *Of* A *Membership Roll For Such Purpose,* S. Report 84-2, Accompanying S.B. 1251, March 9, 1956. App. at 21, ¶ 38.

D'Ewart ultimately succeeded in his major Indian termination goals on Fort Berthold of depopulating the Reservation as much as possible and of persuading the 1956 TBC to fundamentally restructure the TAT representational and governance system. His first goal was accomplished by his sending as many of the youngest, best educated and most vital TAT members as was possible to assertedly new jobs and lives in America's burgeoning industrial centers under the **BIA's** Urban Indian Relocation Program that flourished from the mid-1950s to the late 1960s. His second goal was accomplished by persuading the 1956 TBC – in exchange for his finally agreeing (on behalf of the DOI) to release DOl's long embargoed $7.5 million in Congressionally awarded treaty breach damages for the 1949 Garrison Taking for immediate "per capita" payments to each TAT member – to adopt a new system of TAT political governance known as segment-based political representation. In contrast to the TAT's prior inclusionary system of political governance – wherein no status distinction of any sort was drawn between presumptively co-equal TAT

members-this new TAT representational system was designed to be highly exclusionary. It drew sharp and wholly new distinctions between the political and economic rights of **residents** (emphasis added), on the one hand, and **non-residents** (emphasis added), on the other hand. The exclusionary character of the segment-based representational system is evident in the newly imposed (as of 1956) requirement that six out of the seven members of the TBC **must** (emphasis added) be elected from among the **residents** (emphasis added) of the six segments. *See* TAT Constitution, Article 111, Governing Body, Section 2 ("[O]ne council member is [to be] elected from each of the segments, by a majority of the ... votes cast for the office of Council representative from that respective segment.") Likewise, Plaintiff Cross, and his fellow non-resident TAT members, are expressly deprived of competing for the one "at large" elected TAT office: TAT Chairman. *See* TAT Constitution, Article IV, Nominations. Section 6 ("Any qualified [TAT] voter who is a bona fide **resident** (emphasis added) of [one of] the [six] segments ... may become a candidate for Tribal Chairman."). App. at 21-23, ¶ 39.

5. Procedural History of the Case Before a) the MHA Tribal Court; and b) Judge Traynor's Court.

a. Procedural History Before MHA Tribal Court. In the spring of 2018 (almost three years ago), Cross applied to the TBC election board for an absentee ballot that would have enabled him to vote in the 2018 election cycle. He

supported that request with an affidavit establishing he had an extreme and serious medical condition that, made it virtually impossible for him to travel from his residence in Tucson, Arizona to the reservation to vote. The board summarily and arbitrarily denied his request with no assessment of the underlying basis for the request. This started the journey that Cross and Hudson and, indeed, 12,000 other TAT members, have been on ever since.

Years before filing the action in federal court, Plaintiffs, on November 2, 2018, commenced an action in the Mandan Hidatsa Arikara District Court Case No. 2018-0530 in a further attempt to seek redress in the tribal forum. In the tribal court case, Plaintiffs sought a preliminary injunction requiring absentee ballots be sent to all tribal voters over the age of 18 in the 2018 tribal elections and enjoining any further action on the "return to the reservation to vote" requirement as well as a declaratory judgment invalidating the "return to the reservation to vote" requirement. Three days later, on November 5, 2018, tribal Judge Terry Pechota denied plaintiffs' request for a preliminary injunction.

Four months later, on March 8, 2019, defendants, through the TBC, moved to dismiss plaintiffs' complaint and attached extraneous documents to its opposition. Based on the documents attached, the court converted the motion to dismiss into a motion for summary judgment. Plaintiffs responded to the motion to dismiss that had been converted into a motion for summary judgment and Defendants replied.

On May 30, 2019, the tribal court heard oral argument at the Fort Berthold District Courthouse in New Town, North Dakota.

More than four months after oral argument and six months after the motion had been filed and, having received no order from the tribal district court, Plaintiffs' counsel, on September 19, 2019, inquired with the tribal court administrator, as well as the judge directly, as to the status of the pending motion to dismiss and whether the court was going to rule on it. In response, on September 20, 2019, Judge Pechota emailed counsel indicating that he had issued his decision some six weeks earlier, on August 5, 2019, and was not aware until Plaintiffs' counsel's email of September 19, 2019, that the tribal court clerk had never served a copy of the order on Plaintiffs' counsel. Judge Pechota's unserved opinion had dismissed Plaintiffs' case. On October 24, 2019, plaintiffs appealed the tribal district court decision to the MHA Supreme Court and requested an expedited oral argument. Approximately six months later, on April 20, 2020, plaintiffs renewed their request for oral argument to the MHA Supreme Court. On June 3, 2020, almost 7½ months after the appeal was initiated and expedited oral argument had been requested, the MHA Supreme Court heard oral argument via a Zoom video call. On July 28, 2020, the MHA Supreme Court rendered its opinion.

The MHA Supreme Court's decision denied Plaintiffs' challenge to the "return to the reservation to vote" requirement in its entirety. In a very limited ruling

regarding the equal protection challenges under ICRA, the court remanded the matter to the tribal district court for further proceedings and instructions to determine whether the absentee ballot provisions of the election ordinance found in Title VII of the Tribal Code violate the equal protections guaranteed under ICRA.

b. Procedural History Before Judge Traynor's Court. After an additional two months had passed and neither the MHA Supreme Court nor the tribal trial court took any additional action to address Plaintiffs' claims, this federal action was filed in the federal district of North Dakota, on September 29, 2020. Plaintiffs filed a detailed and comprehensive 37-page complaint at its core seeking to prevent the continued deprivation of their voting rights by Defendants (Doc. ID No. 1). Simultaneously, the plaintiffs/appellants filed a motion for declaratory judgment and injunctive relief and a supporting motion for a preliminary injunction (Doc. ID Nos. 5, 8 & 9). The plaintiffs/appellants asserted they are enrolled members of the Three Affiliated Tribe (TAT). They noted that Cross resides in Tucson, Arizona, off the reservation. And, they stated that Hudson resided on the reservation and was a resident of Parshall, North Dakota.[1] Plaintiffs asserted Defendants had violated their equal protection and due process rights protected under ICRA. The action also asserted equal protection and due process claims under the 14th Amendment, as well

[1] Ms. Hudson has recently passed away during the pendency of this litigation. To the extent necessary, any substitution of parties pursuant to Rule 25, Fed. R. Civ. P. will be filed.

as claims under the 5th, 14th and 15th Amendments to the United States Constitution. Lastly, Plaintiffs also asserted claims under the Voting Rights Act.

Defendants, in response, filed a motion to dismiss pursuant to Rule 12(b)(l), Fed. R. Civ. P., challenging the district court's subject matter jurisdiction as well as asserting Plaintiffs had not exhausted their tribal court remedies. As noted above, this motion was filed on October 26, 2020, at 5:24 PM CDT. Before Plaintiffs had an opportunity to respond and, less than 41 hours after it had been filed, the district court granted Defendants' motion to dismiss at 11:37 AM CDT on October 28, 2020.

Plaintiffs' notice of appeal was filed on November 19, 2020. The MHA Supreme Court amended its prior order on November 23, 2020. In its new order, the court affirmed its previous decision upholding the return to the reservation requirement (concluding that there was no conflict between Article V, §2(b) and Article IV, §3(b) of the Tribe's Constitution. However, the MHA Supreme Court, which had previously remanded the case on a very limited basis to assess the equal protection challenges based on the disparate absentee ballot process, now ruled that issue had not been raised in the underlying action. Accordingly, the MHA Supreme Court remanded the case to the lower court for further proceedings to determine whether Plaintiffs would be permitted to file an amended complaint, or whether they would be required to file a new complaint to raise the allegations relevant to the absentee ballot provisions of Title XII of the Tribal Election Ordinance. This order

is, in fact, a complete dismissal of the tribal claim, as there is no independent basis to "remand" to provide Plaintiffs an opportunity to file a new complaint, or even amend the complaint and, effectively, start the entire process over again. This "remand" would retrigger another two-year litigation process in the tribal courts, effectively making that "remedy" futile. If Plaintiffs' claims regarding the deprivation of their voting rights are ultimately held to be successful, they will have been deprived of the opportunity to vote in the 2018 and 2020 elections and, absent this court's intervention, will also be denied that opportunity in the 2022 elections and potentially longer. The exhaustion of tribal remedies never envisioned a five-year process in tribal court before a litigant has an opportunity to have the merits of their claims reviewed in federal court, especially when those claims involve fundamental voting rights.

SUMMARY OF THE ARGUMENT

Plaintiffs present four arguments regarding errors in Judge Traynor's ruling:

1. He erred by dismissing Plaintiffs' complaint for lack of federal subject matter jurisdiction although their asserted claims met all three jurisdictional prerequisites for federal question jurisdiction (28 U.S.C. §1331) given they: a) "arise under" federal law because they are created by federal law and because they require the interpretation and application of federal law for their judicial resolution; see, 28 U.S.C. §1331 ("The [federal] district courts shall have original jurisdiction of all

civil actions arising under the Constitution, laws or treaties of the United States."), see also, 15 *Moore's Federal Practice* ¶103.02 (noting Article III and the statutory character of this jurisdictional grant); b) represent substantial federally created claims that expressly allege the "actual or threatened invasion of constitutional [and statutory] rights [by Defendants' present-day enforcement of their 1956 and 1986 decisions that severely restrict or destroy Plaintiffs' representational or voting rights within the TAT]"; see, *Newbury Port Water Co. v. City of Newbury Port,* 193 U.S. 561, 576 (1904); and c) they are "well-pleaded" claims because the "statement of... [their claims]...show [they] are based upon [the] laws or Constitution [of the United States]." See, *Beneficial National Bank v. Anderson,* 539 U.S. 1, 6 (2003)[2];

[2] Judge Traynor's and Defendants' contention "tribes are not states" within the meaning of Section 2 of the VRA is simply not relevant to the jurisdictional determination regarding "whether [Traynor's Court] has subject matter jurisdiction" over this case. App. at 103 ¶ 105 ("It is well established that a court has a special obligation whether it has subject matter jurisdiction in every case." (citations omitted)).

It's not relevant because: 1) Section 2 of the VRA is not regarded as a "stand alone" federal jurisdictional statute, but as a federal remedial statute. See, The U.S. Department of Justice (DOJ), Statutes Enforced By The Voting [Rights] Section Of The DOJ, Official Website ("Section 2 of the VRA is a nationwide prohibition against voting practices and procedures (including redistricting plans and at-large election systems and voter registration procedures) that discriminate on the basis of race, color or membership in a language minority group. Section 2 prohibits not only election-related practices that are intended to be racially discriminatory, but also those that are shown to have a discriminatory result."); see also, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 502 (2006). (The *Arbaugh* Court established a "readily administrable bright-line" rule that threshold limitations should be treated as non-jurisdictional unless specified as jurisdictional by Congress); and 2. The TAT people expressly repudiated in 1985 any effort by their delegated entity – the Tribal

2. He erred by "rul[ing] on the merits of [Plaintiffs'] case without first establishing that [his Court] had (subject matter] jurisdiction over...[Plaintiffs'] claim[s] in the suit." See, *Sinochem Int'l* Co., *Ltd v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 430-3(2007); see also, *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 93-102 (1998). (The Court in both of these cited decisions resoundingly rejected the federal district courts' practice of exercising hypothetical jurisdiction whereby they rule on substantive issues of law they believe are presented by a given case before they determine whether they have the requisite subject matter jurisdiction to do so.);

3. He erred by barring federal judicial jurisdiction over Plaintiffs' claims through his misapplication of several judicially created Indian law abstention doctrines—including the tribal sovereign immunity to suit doctrine; the internal tribal matters doctrine; and the exhaustion of tribal remedies doctrine – regardless of whether those principles do, or should, apply to the facts and issues of this case. See, e.g., *Burlington Northern Railroad Company v. Blackfeet Tribe of the Blackfeet*

Business Council (TBC) – to attribute that entity's on-going illegal or unconstitutional action – taken in violation of the due process and equal protection clauses of federal law – to the tribal people themselves. See, Article VI, Powers, Section 3(b). ("The people of the Three Affiliated Tribes, in order to achieve a wise and responsible administration of the sovereignty delegated by this Constitution to the Tribal Business Council, hereby specifically grants to the Tribal Court the authority to enforce the [due process and equal protection] provisions of the Indian Civil Rights Act…(citations omitted)…[against] the Tribal Business Council[.]"

Indian Reservation, 924 F.2d 899 (9th Cir. 1991), *cert. denied,* 505 U.S. 1212 (1991), *overruled on other grounds by Big Horn Electric Co-op, Inc. v. Adams,* 219 F.3d 944 (9th Cir. 2000) ("But sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute. No reason has been suggested for not applying this rule to tribal officials, and the Supreme Court suggested its applicability in *Santa Clara Pueblo v. Martinez*, 439 U.S. 49 (1978). "We strongly implied, without deciding, that *Ex Parte Young* does apply to tribal officials in *Cal. State Board of Equal. v. Chemehuevi Tribe*, 474 U.S. 9 (1985)]. We now reach the issue, and conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officials allegedly acting in violation of federal law." (citations omitted); and

4. He erred in applying the Supreme Court's *NFU* exhaustion requirement to bar Plaintiffs from access to federal court because: a) neither Defendants nor Judge Traynor identified or asserted any compelling tribal interest or tribal prerogative that justifies federal judicial abstention in this factual context. See, Carlson, ftn. 44 at 576 (Given that judicial abstention "limits the ability of federal courts to decide issues before them even though [all of the] jurisdictional and justiciability have been met," those courts' application of judicial abstention (including the tribal exhaustion requirement) must be justified by [the presence of] "an important [tribal] governmental interest that is 'intimately involved' with the

[tribal] government's acknowledged 'sovereign prerogative' [authority]; (pursuant to the Supreme Court's 1959 *Thibodaux* standard); and b) Plaintiffs have reasonably exhausted their available tribal administrative and judicial remedies as is required by the *NFU* standard.

ARGUMENT

Standard of Judicial Review for All of Plaintiffs' Arguments

Judge Traynor's ruling dismissing Plaintiffs' complaint for lack of federal subject matter jurisdiction is subject to *de novo* review by this Court. See, *Corfield v. Dallas Glen Hills LLP*, 355 F. 3d 853, 857 (5th Cir. 2003) ("We therefore review the district court's dismissal for lack of subject matter jurisdiction de novo."); see also, *In re, Ashi/America Inc.*, 68 F.3d 442, 445 (Fed. Cir. 1995) ("[Q]uestions of law are subject to full and independent review (sometimes referred to as '*de novo*' or 'plenary' review)."); see further, *Comair Rotron Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1536 (Fed. Cir. 1995) ("We conduct plenary review of the grant of summary judgment.")

Plaintiffs' four arguments on these issues are as follows:

A. Argument One: Judge Traynor erred in dismissing Plaintiffs' federally based claims for lack of subject matter jurisdiction given their claims meet all of the relevant statutory jurisdictional prerequisites of the Federal Question Statute (28 U.S.C. §1331).

Plaintiffs' asserted claims are within the subject matter jurisdiction of the federal district courts because: 1) They "arise under" federal law; 2) They are

substantial in nature and they will require the interpretation and application of federal law for their judicial resolution; and 3) They are well pleaded claims.

Settled federal jurisdictional principle holds "[t]he test for dismissal is a rigorous one and if there is any foundation or plausibility to the claim, federal jurisdiction exists; see, 13D Wright & Miller §3564 at 244-5; see also, *Steel Co. v. Citizens For a Better Env't*, 523 U.S. 83, 89 (1998) (A federal court lacks jurisdiction over a claim involving federal law "only when the claim is so insubstantial, implausible, foreclosed by prior decision of this Court or otherwise completely devoid of merit so as to not involve a federal controversy.")

The facts and issues of this case, as well, show that Plaintiffs' claims meet all of the three prerequisites of federal subject matter jurisdiction:

1. Plaintiffs' claims "arise under" the Federal Question Statute, 28 U.S.C. §1331, because they are created by federal law and because their judicial resolution will require the interpretation and application of federal law principles.

Defendants and Judge Traynor acknowledge that Plaintiffs' voting and representational rights claims arise under the due process and equal protection provisions of the federal constitution. Defendants do so by explicitly arguing "[Defendants' actions] do not raise a federal question [given their actions] ste[m] from a purely internal tribal matter [that affects only tribal members and regar[d] only tribal governance." See Doc. ID 21 at 4. Defendants, furthermore, assert they

are, or should be, "unconstrained [in dealing with their tribal members] by [federal] constitutional provisions." *Id.*

While Judge Traynor never once mentions the Federal Question Statute in his fourteen-page ruling in this matter, he nevertheless implicitly acknowledges that it governs this case. He does so through his explicit adoption of Defendants' invoked Indian law doctrines – tribal sovereign immunity from suit and the internal tribal matters doctrine – as his abstention or deference-based rationale for his ultimately declining judicial jurisdiction over Plaintiffs' claims. App. at 100 ¶ 102.

Moreover, Plaintiffs' claims arise under federal constitutional and statutory law because they are created by that law. For example, their claims also arise under relevant federal statutory law – including the Indian Civil Rights Act of 1968 and federal remedial statutes such as Section 2 of the VRA of 1965. While these particular statutes are themselves non-jurisdictional in nature, because they help explicate those constitutional provisions' purpose and meaning in today's legal and social context, they are regarded as part and parcel of the "arising under" framework.

Plaintiffs' claims also arise under those relevant federal judicial decisions that interpret and apply these federal laws in factually and legally similar jurisdictional contexts. See, *American Well Works Co. v. Layne & Bower Co.*, 241 U.S. 257, 260 (1916).

Furthermore, Plaintiffs' claims "arise under" federal law because their resolution requires the application and interpretation of federal law. See, *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 643 (2002). ("The [federal] district court has jurisdiction [over a plaintiff's claim] if 'the rights 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 [plaintiff's] claim 'clearly appears to be immaterial and made solely for the purpose of obtaining [federal] jurisdiction or where such a claim is wholly insubstantial and frivolous.")

2. Plaintiffs' claims also arise under 28 U.S.C. §1331 because they are substantial in nature, given they assert an "actual or threatened invasion of their [federal] constitutional [or federal statutory] rights by [Defendants' ongoing enforcement of their 1956 and 1986 voting and representational standards and practices] and, therefore, they clearly meet the substantiality requirement that is imposed by that federal jurisdictional statute. See, *Newbury Port Water Co. v. City of Newbury Port*, 198 U.S. 561, 576 (1904); see also, *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933).

Plaintiffs' claims are, furthermore, substantial in nature because Judge Traynor characterized them as asserting violations of their fundamental rights by Defendants. He, indeed, chastises the MHA Nation Court for its long-standing

failure or refusal to render a decision regarding the nature and scope of Plaintiffs' fundamental representational rights in today's TAT governance. App. at 99.

Furthermore, Defendants expressly admit their governmental invasion of Plaintiffs' due process and equal protection rights via their unjustified and arbitrary denial of non-resident TAT members' right to hold public office within the TAT, to nominate and/or elect TAT council representatives, or to obtain absentee ballots that are otherwise made freely available to reservation resident TAT members. See Doc. ID 21 at 2.

Therefore, because Plaintiffs' claims assert the actual or threatened invasion of their fundamental representational rights within contemporary TAT governance, their claims clearly meet the substantial claim requirement that is imposed by 28 U.S.C. §1331.

3. Plaintiffs' claims further arise under the Federal Question Statute because their "statement…[of their]…cause[s] of action show that [they] are based upon [specific federal] laws or [the U.S.] Constitution" and they, therefore, represent "well pleaded" claims within the meaning of that jurisdictional stature. See, *Beneficial National Bank v. Anderson*, 539 U.S. 1, 6 (2003).

Plaintiffs, therefore, respectfully submit that their claims are within the subject matter jurisdiction conferred upon the lower court by federal constitutional and statutory law.

B. Argument Two: Judge Traynor erred in exercising hypothetical jurisdiction over the merits of Plaintiffs' claims by assuming, *arguendo*, that he had sufficient subject matter jurisdiction to do so without first deciding that issue.

Judge Traynor's fourteen-page ruling is, from start to finish, an exercise in the practice of hypothetical jurisdiction whereby he "bypasse[d] tough questions of subject matter jurisdiction [in order to dismiss Plaintiffs' case] on [hypothetically] eas[ier] merit [based] grounds." See, Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 62 Ala. L. Rev. 491, 495 (2016).

Additionally, while it may be easier to assume away Plaintiffs' "right to respond [that is conferred upon them by Local [Court] Rule 7.1(A)(1)] to [Defendants'] motion to dismiss…because…[Judge Traynor wanted to give Plaintiffs]…time to vote [in the November 3, 2020 TAT elections]" he should have, perhaps, asked them if they wanted to waive their right to respond. App. at 94.[3]

Judge Traynor expounds upon the substantive merits of Plaintiffs' claims for thirteen of the fourteen pages of his ruling without ever mentioning the issue of

[3] He further assumes these exigent circumstances in direct contradiction to his cited and acknowledged record facts wherein he states Plaintiff Cross has been "diagnosed with a malignant [Category Two] spinal tumor in 2015 [and] is severely limited in mobility" to such extent that he cannot reasonably comply with Defendants' mandatory requirement that he return to Fort Berthold Reservation (a one-way distance of 1,500 miles from his home in Tucson, AZ) in order to vote in any TAT election. App. at 95.

subject matter jurisdiction until the next-to-the-last page of his ruling. App. at 106. He thereby chose to ignore the threshold federal statutory requirement that he must first establish subject matter jurisdictional authority before he may rule upon the merits of the case. See, *Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 577 (1999). ("[A] federal court may not hypothesize [its] subject matter jurisdiction [over a case] for the purpose of deciding [that case's] merits."); see also Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power* at 540. (That court, citing the *Steel Co.* decision, concluded "that [a federal court's] jurisdiction [over a case's merits] must [first] be established as a threshold matter is inflexible and without exception…[because] jurisdiction is the power to declare the law and [w]ithout jurisdiction the court cannot proceed in *any cause* (italics in original).")

Not surprisingly, Judge Traynor does finally conclude that his Court lacks subject matter jurisdiction over Plaintiffs' claims, but not before deciding – in the first twelve pages of his ruling – the following merit-based issues without first establishing clear jurisdictional warrant to do so:

1. By his characterizing "voting [in TAT elections as] a fundamental right" he is implicitly contending that Defendants cannot unduly and discriminatorily burden Plaintiffs' representational rights in the absence of a compelling governmental interest to do so; he indeed bemoans the MHA Court's

steadfast refusal to decide this issue for two years as evidence of a "non-functioning" tribal court system. App. at 99 ("The [MHA Court's] lack of a [decision on this issue] becomes its **answer** (emphasis added).

2. He likewise recites the disconcerting fact "that Plaintiffs…have been…pursu[ing] a remedy in the MHA Tribal Court since November of 2018…[and they] are American citizens who…should not [be required to] live with [the] disfunction [sic in original] and [the] denial of rights from their own [Tribe];" App. at 99.

3. He further takes the opportunity to warn "Defendants should hereby be on notice…[that] the failure to provide a functioning court system may invite intervention by the United States Courts;" App. at 99 (Citing *Johnson v. Gila River Indian Community*, 174 F. 3d 1032, 1036 (9th Cir. 1999) stating "a dismissal of a federal court action was not appropriate where a two-year failure to consider an appeal of a tribal court decision by a tribal appeal[s] court was sufficient to conclude a functioning [tribal] appellate court did not exist and exhaustion would be futile.") (citations omitted).

4. He nonetheless concludes, contrary to his prior findings, that the "MHA Tribal Court is currently addressing…[Plaintiffs' grievances]…[and therefor] this Court will **not** (emphasis added) interject itself into a purely intra-tribal dispute [such as this case presents.]" (citations omitted). App. at 99.

5. He concludes his exegesis of the facts and issues of this case by concluding "[T]here are more significant reasons [Judge Traynor asserts] as to why the [T]ribe…[and not his Court] must make this decision…['because allowing] the potential participation of off-reservation [TAT members to participate] in tribal self-governance…may result in off-reservation [TAT] members…[expressing their]…differ[ing] policy preferences [from those that are held by resident TAT members.]" (citations omitted), App. at 99.

Plaintiffs, rather than adding other and potentially cumulative examples of Judge Traynor's jurisdictionally unwarranted judicial conclusions regarding the tribal sovereign immunity and internal tribal matters doctrine, will rest on the above cited examples of Judge Traynor's unwarranted frolic into the realm of hypothetical jurisdiction.

Whatever the supposed benefits of allowing federal judges – such as Judge Traynor – to engage in the practice of hypothetical jurisdiction, those asserted benefits are offset by the costs of "unexpected jurisdictional dismissals" and litigants' increased uncertainty as to which statutory requirements are jurisdictional in nature. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power* at 55. Indeed, commentator Stillman concludes that "any efficiency [based benefits] of hypothetical subject matter jurisdiction focuses [primarily] on the immediate benefits to be gained by the judge[.]" See, ibid.

Furthermore, because the S*teel Co.* Court held 'a federal court may not hypothesize subject matter jurisdiction for the purpose of deciding the merits,' there's little reason to allow Judge Traynor to do so here. To do so would only encourage other federal judges to once again ignore those "subject matter limitations… [that] keep the federal courts within the bounds the Constitution *and Congress* (italics in original) have prescribed.' See, *Steel Co.* at 94. And to do so would likewise encourage federal judges to avoid "[t]he requirement that jurisdiction be established as a threshold matter [because that rule] is inflexible and without exception…for [j]urisdiction is the power to declare the law and [w]ithout jurisdiction the court cannot proceed at all in *any cause* (emphasis in original)." See, *Id.*

C. Argument Three: Judge Traynor erred in barring Plaintiffs from federal district court based upon his misapplication of two judicially created abstention or deference doctrines – the tribal sovereign immunity to suit and the internal tribal matters doctrines – to the facts and issues of this case.

1. Defendants Cannot Assert Tribal Sovereign Immunity As A Bar To Plaintiffs' Lawsuit:

The big Indian law circuit courts – including the Eighth and Ninth Circuit Courts of Appeals – now hold that tribal officials cannot claim the defense of tribal sovereign immunity in those cases where their actions are alleged to be either in excess of their legal authority or in violation of federal law. See, *Burlington Northern Railroad Company v. Blackfeet Tribe of the Blackfeet Indian Reservation*,

924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1991), *overruled on other grounds by Big Horn Electric Co-op, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). ("But sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute. No reason has been suggested for not applying this rule to tribal officials, and the U.S. Supreme Court suggested its applicability in *Santa Clara Pueblo*…[citations omitted]…We strongly implied, without deciding, that *Ex Parte Young* does apply to tribal officials in *Chemehuevi (*citations omitted)…. We now reach the issue and conclude tribal sovereign immunity does not bar a suit for prospective relief against tribal officials allegedly acting in violation of federal law."). See also, *Northern States Power Co. v. Prairie Island Midewakaton Sioux Indian Community*, 991 F.2d 458, 460 (8th Cir. 1993). ([S]overeign immunity…[does]…not protect the tribal officials [involved] because they acted beyond the scope of authority the tribe was capable of bestowing upon them.")

2. Defendants Cannot Assert The Internal Tribal Matters Doctrine As A Bar To Plaintiffs' Lawsuit:

Those same Indian Country courts of appeal now hold the internal tribal matters doctrine is triggered only when "the tribal [justice] standards under [federal judicial] scrutiny differ significantly from those 'commonly employed' in Anglo-Saxon society." See, *Randall v. Yakima Indian Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988).

A *Randall* type analysis of Defendants' 1956 and 1986 governmental actions establishing the contemporary system of TAT governance on the Reservation shows clearly that the internal tribal matters doctrine does not apply to the facts and issues of this lawsuit. This brief historical analysis demonstrates these two governmental actions – far from protecting any TAT traditional or historic values of the TAT people – represented prospective oriented governmental initiatives to purposively disrupt and undermine the TAT people's much earlier covenant or social agreement that was intended to bind together three disparate, epidemiologically decimated and vulnerable tribal peoples – the Mandan, the Hidatsa and the Arikara – into a singular tribal people.

Given Defendants' two contemporary governmental actions seek to disrupt and destroy – not preserve and protect – the TAT people's long-standing and agreed-upon goal of their joining together for their mutual protection and betterment as a people, the federal courts should not now protect Defendants' actions from judicial scrutiny under the highly deferential doctrine that has been articulated by Judge Traynor in his ruling.

There are four reasons for not according Defendants' twin governmental actions any judicial deference under the *Randall* standard: a) their 1956 prospective oriented governmental action was intended to blindly disenfranchise an unknown and unknowable number of TAT members – prospectively labelled as non-resident

TAT members – even though, as of 1956, all 2700 TAT members then resided on the Reservation; and b) their 1956 and later 1986 governmental actions were intended to break apart the TAT people's historical goal of constructing a unified tribal people pursuant to the principles and purposes they articulated in their 1886 treaty with the United States; c) their two governmental actions sought to: 1) undo the TAT people's 1936 sovereign action and vote to become a federally reorganized tribal government – under Sections 16 and 17 of the Indian Reorganization Act (IRA) of 1934 – that is committed to a democratically elected and constitutionally governed form of representative governance; and 2) undo the TAT people's sovereign action and vote that protected each TAT member's individual rights – including Plaintiffs' – to an equal share of the TAT people's communally owned lands, monies and other assets pursuant to their adoption of a 1937 federally-issued, for-profit, tribal corporate charter by now subjecting those communally owned assets to administration by, since 1956, an unrepresentative tribal council; and d) Defendants' intentional restriction of TAT voting, post 1956, to a small group of Reservation residents by imposing a 'hard cap' or stringent upper-bound limit on the number of legally educated TAT voters who are now permitted to vote in TAT elections.[4]

[4]This fact of TAT electoral life on Fort Berthold Reservation is amply illustrated by the electoral results of the recently concluded 2020 TAT election. See, MHA Nation Certified Election Results of November 4, 2020, Addendum at 15. (Plaintiffs

3. Further Analysis of Judge Traynor's Rulings on Defendants' Asserted Defenses of Tribal Sovereign Immunity to Suit and the Internal Tribal Matters Doctrine as Applied to the Facts and Issues of This Case.

Judge Traynor nonetheless grants significant credence to Defendants' claimed exemptions from federal jurisdictional or constitutional authority wherein they assert that: a) "[t]ribal election disputes [because their outcomes affect only tribal members] do not raise a federal question and [therefore] such disputes are the exclusive domain of tribal forums…[because]…the[se] matter[stem from…purely internal tribal matters [affecting only tribal members and] regarding [only] tribal governance;" and b) "[t]ribes have been regarded as unconstrained [in dealing with

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request this Court to take judicial notice of these TAT election results given Plaintiffs were barred by Judge Traynor's ruling from responding to Defendants' motion to dismiss and were, therefore, unable to attach those now available results as part of their response herein. See, *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364 (7th Cir. 1983) (holding Court of Appeals could take judicial notice). In the first of two TAT electoral contests held on November 3, 2020 regarding the Mandaree Segment Council Representative, candidate Ms. Gladys Sherry Turner-Lone Fight prevailed over candidate Ms. Harriet Good Iron by a vote of 239 to 178. In the second contest, also held on that date, for the White Shield Segment Council Representative, candidate Mr. Fred Fox prevailed over candidate Mr. Gary Dickens by a vote of 281 to 225. The total vote cast in the Mandaree Segment election was 417. The total vote cast in the White Shield Segment election was 506 votes. The total number of votes cast in the 2020 TAT General Election was 921. There are an estimated 12,000 plus constitutionally eligible TAT voters (those enrolled TAT members who are 18 years of age or older) out of a 2020 estimated TAT enrollment of 16, 700 members. Therefore, simple arithmetic division yields a 2020 TAT voter participation rate of 0.076916666. While this is a snapshot of a single election's results, Plaintiffs anticipate a broader, longitudinal, mean regression analysis of post-1956 voter participation rates would confirm that snapshot's results.

their tribal members] by those constitutional provisions [that were] framed specifically as limitations on federal or state authority." Doc. ID 21 at 5.

But Judge Traynor's interpretation and application of these cited doctrines goes beyond even Defendants' extravagant and excessive claims of unbridled tribal authority over tribal Indians given his assertion that federal district courts either are, or should be, prohibited from "intreven[ing] in any tribal members' claims arising from "an intra-tribal controversy, which is what we have…[here]…absent a congressional mandate [to do so]." App. at 102-103 (Judge Traynor cites with approval the federal district court's decision in *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194, 1199 (D.S.D. 1975).

Moreover, Judge Traynor concludes that even a practically "non-functioning" tribal court (as he described the MHA Tribal Court) and a presumptively self-interested tribal government (as are Defendants) are ineluctably better positioned than are federal district courts to decide whether "tribal [member] non-residen[t] [Indians] should be treated differently [in terms of according them the legal and political rights to participate in contemporary tribal governance]…[because] enfranchising [non-resident tribal member Indians would only encourage them to express their potentially] differ[ing] policy preferences [from those that are held by their on-reservation tribal brethren]." App. at 102.

Accepting Judge Traynor's or Defendants' archaic and frankly anti-democratic views of how contemporary federal Indian law tribal governance does, or should, function would needlessly result in barring tribal Indians alone – and not non-Indian litigants – from judicial access to federal district courts to challenge those tribal governmental actions that illegally and unconstitutionally intrude on the fundamental due process and equal protection rights that are conferred on all American citizens.

D. Argument Four: Judge Traynor erred in remanding this matter to tribal court for further proceedings because: 1) Neither Defendants nor the MHA Court – which steadfastly declined or refused to do so when presented with that opportunity – have articulated or demonstrated any compelling tribal sovereign interest that justifies or merits such a remand and, therefore, in the absence of such a significant tribal prerogative or interest, serves only to deny Plaintiffs and other tribal Indians access to federal district court; 2) it is practically futile to require Plaintiffs to litigate further in tribal court regarding the legally and logically subordinate issue of whether Defendants may deny Plaintiffs access to otherwise freely available absentee ballots, given the MHA Supreme Court's studied refusal to, in its July 28, 2020 decision in this matter, decide the primary and overriding issue of whether Defendants have a compelling governmental interest in continuing to deny Plaintiffs any meaningful right to participate in TAT governance on the Fort Berthold Reservation.

1. Remand is not justified in this context given that it would serve no important or compelling tribal sovereign prerogative and it would, therefore, only serve to deny tribal Indians alone access to federal court.

Given the *NFU* Court's motivating rationale for the tribal exhaustion of remedies requirement is to ensure that private litigants accord due respect to tribal sovereign and jurisdictional interests, it is therefore incumbent upon the reviewing

federal district court to inquire into: a) whether a tribal sovereign prerogative or interest exists – as is required in other similar or analogous federal judicial abstention contexts – or whether this requirement is being invoked by Defendants as a mere federal jurisdiction avoidance ploy for a similar unintended purpose; or b) whether the Court's exhaustion requirement has already been adequately served or fulfilled by the litigants' prior tribal administrative or judicial endeavors that have practically accorded the tribal governmental and judicial authorities the fair opportunity to resolve this matter short of federal court intervention. See, *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); see also, Carlson, ftn. 44 at 576 ("The] [t]ribal exhaustion doctrine requires [tribal] plaintiffs [to] exhaust their available [judicial] remedies in tribal [trial and] appellate courts' before they may sue in federal courts."), see further, Ryan Dreveskracht, *Doing Business in Indian Country: A Primer*, Business Law Today, at 5, (Jan. 2016). (The author argues the tribal exhaustion requirement "is akin to the well-known rule of [federal and state] administrative law as announced in *Smoke v. City of Seattle* (citations omitted)…[requiring] litigant[s] to first pursue [any administrative] remedies before the courts will intervene.")

The *NFU* Court made it clear "that [the 28 U.S.C. §] 1331 [jurisdiction of the federal district court] encompasses [both] the federal question of whether…[Defendants herein]…have exceeded the lawful limits of…[their tribal

authority]…[and whether] exhaustion is required before such a claim may be entertained by the federal court." See, 471 U.S. at 857. The Court likewise made clear that tribal "exhaustion…[is not] required…where such exhaustion would be futile[.]" See, *Id.*

Defendants and the MHA Supreme Court have steadfastly and obstinately refused or declined to – over the course of Plaintiffs' three-year long effort to resolve this matter via the tribal Constitutional and Administrative system – assert any compelling tribal sovereign prerogative or other significant interest that would justify the tribal government's continuing denial of Plaintiffs' voting and representational rights in TAT governance and, therefore, federal judicial abstention is not justified – consistent with the Supreme Court's 1959 *Thibodaux* decision, which requires the actual presence of such an important or compelling inter-governmental interest before federal judicial abstention or deference will be accorded to another government's asserted sovereign prerogative.

There is simply no significant tribal sovereign prerogative or interest present in this case that would trigger the application of the *NFU* exhaustion requirement. The *NFU* tribal exhaustion requirement – given its federal jurisdiction deferring or limiting character – is appropriately analogized to its better known and longer established federal jurisdictional cousins. Furthermore, the panoply of judicially-created federal abstention or inter-sovereign deference principles that have evolved

over decades of judicial interaction between federal and state court systems can be beneficially applied to the federal district courts' administration of the tribal exhaustion requirement as well. See, Kristen M. Carlson, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defense of Tribal Sovereign Immunity and Exhaustion of Tribal* Remedies, 101 Mich. L. Rev. 569 (2002), ftn. 44 at 576. (Given the tribal exhaustion requirement, as do the other federally established judicial abstention doctrines "limit[s] the ability of federal courts to decide issues [in Indian law cases brought] before them even though [all of the] jurisdictional and justiciability requirements have been met," that principle's judicial administration should likewise be subject to the wise prudential principles that guide the federal courts in their administration of similarly motivated abstention or deference doctrines).

Therefore, the *Thibodaux* abstention or deference principle requires the Court's application of the tribal exhaustion requirement to this case be justified by the assertion of "[a]n important [tribal] interest that is 'intimately involved' with the [tribal] government's acknowledged 'sovereign prerogative.'" See, *Thibodaux* at 28. However, Judge Traynor concedes that the assertedly "non-functioning" tribal court has steadfastly declined to decide whether a compelling or otherwise significant trial interest – after two years of assiduous litigation in the MHA Court

by Plaintiffs seeking a decision on this issue – justifies Defendants' denial of their "fundamental right" to participate in TAT governance. App. at 99.

In the absence of any significant or compelling tribal sovereign prerogative or interest justifying Judge Traynor's application of *NFU's* exhaustion requirement to this case, there is simply no rationale for its application aside from Traynor's unwarranted assertion the MHA Court is now "beginning to address this issue." App. at 102. Given the MHA Supreme Court has been evidently unimpressed by Defendants' general and conclusory claims of a virtually unbridled tribal sovereign or governmental power over their tribal members, Plaintiffs, unlike Judge Traynor, strenuously doubt whether – even given an additional two or more years of fruitless litigation in tribal court – either Defendants or the Court itself will somehow succeed in making a 'silk purse out of a sow's ear' so as to justify Defendants' denial of Plaintiffs' federally recognized fundamental right to participate in TAT governance. See, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (Voting is "a fundamental political right because it is preservative of all others.").

2. The district court erred in concluding that Plaintiffs had not exhausted their available tribal remedies.

Judge Traynor concluded Plaintiffs had not exhausted their tribal remedies. Judge Traynor's decision is both legally and factually in error.

First and foremost, given the present developments, Judge Traynor's factual determination is not supported by the record. In his decision, Judge Traynor notes

the "MHA District Tribal Court has not yet rendered its opinion on this issue on remand." App. at 102. However, as noted above, the MHA Supreme Court amended its order, four days after Judge Traynor's order dismissing the matter. The MHA Supreme Court's amended order reaffirmed its dismissal of plaintiffs' challenge to the return to the reservation to vote requirement. As such, there was nothing remanded regarding this primary challenge to the TAT's overall deprivation of Plaintiffs' voting rights. In addition, initially the MHA Supreme Court remanded the matter to analyze potential equal protection violations under ICRA in the context of absentee ballots being provided to resident members but not to non-resident members. However, in its amended Order, the supreme court held that the issue had not been raised in the underlying complaint. The MHA Supreme Court suggested Plaintiffs, on "remand," could file a new complaint. However, Plaintiffs have challenged the TAT's return to the reservation requirement fully in the tribal courts. That challenge has been dismissed in its entirety. There is nothing further to develop. The election ordinance does not allow absentee ballots to non-resident members. Cross applied for the absentee ballot and was refused. These issues have been fully developed and are ready for review. Accordingly, no additional exhaustion of tribal remedies is factually required.

Even if the factual basis for the claimed failure to exhaust tribal remedies were present, which it is not, the legal basis for exhaustion is not present.

In *National Farmers Union Ins. Cos.*, the Court noted that the examination of whether a tribal court had civil jurisdiction over non-Indians should first be decided in tribal court. Indeed, the Court noted that the exhaustion requirement favored a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge. *See National Farmers Union Ins. Cos.*, 471 U.S. at 856. In the present case, the tribal court has had a full opportunity to develop the record regarding Plaintiffs' challenge to TAT's return to the reservation to vote requirement. There is nothing else for the tribal court to develop as part of its record. In addition, the entire record regarding the issue of absentee ballots has been developed. The election ordinance does not allow absentee ballots for non-resident members and Plaintiff Cross was denied an absentee ballot for that very reason.

In an attempt to suggest that complete exhaustion had not occurred, Judge Traynor relied on the MHA Supreme Court's initial opinion remanding the very limited issue regarding the equal protection challenge under ICRA. However, even if this limited issue on remand (again it is worth noting that the Order was amended effectively eliminating the remand), there are still legal exceptions to the exhaustion requirement. Those include if the exercise or assertion of tribal jurisdiction is "motivated by a desire to harass or is conducted in bad faith," or where "the action is patently violative of express jurisdictional prohibitions," or "where exhaustion

would be futile because of the lack of an adequate opportunity to challenge the Court's jurisdiction." *See National Farmers Union Ins. Cos.*, 471 U.S. at 856, n 21.

The 14th Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any [government] deprive any person of life, liberty, or property, without due process of law; nor deny any person within his jurisdiction equal protection of the laws." The amendment clearly prohibits the imposition of severe burdens on the fundamental right to vote unless they are narrowly drawn to advance a compelling government interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). As such, the Plaintiffs' challenge and claim in this case involves ascertaining whether their fundamental constitutional voting rights are being deprived. Despite the fundamental nature of this right, and the impact a deprivation of that right has on both the individuals being deprived as well as the electoral system in general, this case has drug on in the tribal court for years. While generally, delay in and of itself is not ordinarily sufficient to show that pursuing tribal remedies is futile, at some point a lack of a functioning tribal court system makes exhaustion per se futile. *See Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999). Indeed, Judge Traynor cited the *Gila River Indian Community* case noting that at some point the lack of action by the tribal court would make exhaustion futile. In recognizing the fundamental nature of the right to vote, he noted, "shockingly, the MHA Tribal Court has not made a decision and we are now less than one week before the

election." App. at 99. The judge noted candidly, "this Court presumes the lack of an answer becomes the answer, i.e. nonresident tribal members cannot vote absentee." *Id.* In fact, that is factually already established in the record after Plaintiff Cross requested the absentee ballot from the TAT in the spring of 2018 but was summarily denied. Judge Traynor recognized that Plaintiffs' have been attempting to pursue a remedy in the MHA tribal court since November of 2018. He candidly warned the "failure to make a decision when the fundamental right of voting is involved raises the question of whether the MHA Tribe has a functioning Court system." *Id.*

As the record reflects, Plaintiff Cross initially requested an absentee ballot in the spring of 2018. When his request was summarily denied, Defendants initiated an action in tribal court in November of 2018. Within three days, the tribal judge denied the plaintiff's request for a preliminary injunction without argument. It then took an additional four months for the court to move forward with motion practice including the Plaintiffs' motion to dismiss. The tribal court heard oral argument on that motion on May 30, 2019. It was then four months after oral argument that the undersigned counsel, having not received an order, inquired directly with the court administrator as well as the judge. The tribal court judge responded the next day noting that he had issued his decision some six weeks earlier on August 5, 2019.

The tribal court clerk had never served the tribal court judge's opinion on Plaintiffs' counsel.

Again, in an attempt to protect the fundamental voting rights of the Plaintiffs, an appeal was filed with the MHA Supreme Court on October 24, 2019. In light of the nature of the rights at stake, Plaintiffs requested an expedited oral argument. The matter sat unattended and unaddressed. Some six months later, Plaintiffs renewed their request for oral argument to the MHA Supreme Court. Ultimately, some seven and a half months after the appeal had been initiated, the MHA Supreme Court heard oral argument on June 3, 2020.

On July 28, 2020, the MHA Supreme Court rendered its opinion. Again, this opinion struck down Plaintiffs' primary challenge to the return to the reservation to vote requirement. It remanded a very narrow issue in relation to the equal protection challenge under ICRA regarding the issuance of absentee ballots to resident members but not nonresident members. Despite the fundamental nature of voting rights, another two months passed and neither the MHA Supreme Court nor the tribal court took any additional action to address Plaintiffs' claims. Indeed, another election cycle was approaching, as such, an action was filed in federal district court on September 29, 2020 in the hopes of seeking some remedy prior to the November 2020 election occurring and further depriving Plaintiffs of their voting rights. The Defendants filed their dispositive motion to dismiss on October 26, 2020 and, as

noted above, it was granted less than 41 hours later without Plaintiffs even being allowed to brief the issues.

Plaintiffs then filed this appeal to this Court on November 19, 2020. Importantly, four days later, on November 23, 2020, the MHA Supreme Court amended its prior order. Again, that order affirmed its previous decision rejecting Plaintiffs' challenge to the return to the reservation to vote requirement. It also further suggested that the equal protection claim under ICRA had not been fully developed or raised in the lower court and therefore remanded the issue, suggesting Plaintiffs could file a new complaint in tribal court. This would, for all intents and purposes, effectively restart the entire litigation. Plaintiffs would be required to go through the same ineffective, inefficient and delayed tribal court process. Another two years and countless hours and financial resources would be expended to once again finally reach the federal court. This kind of belabored and futile process is not what was envisioned or required under the tribal exhaustion doctrine. While generally, delay alone is not sufficient to show pursuing tribal remedies are futile, in this case it clearly is. Indeed, the federal judge in this case noted that the TAT "should be on notice, the failure to provide a functioning Court system may invite intervention by the United States Courts." In light of the TAT's specific denial of Cross' request for an absentee ballot, in conjunction with the MHA Supreme Court's amended order effectively denying Plaintiffs' claims in their entirety, and then

suggesting Plaintiffs could advance to "go" and start all over again … the purpose, reasoning and logic for exhausting tribal court remedies is nonexistent. Accordingly, the federal court erred in concluding that further tribal exhaustion was necessary.

CONCLUSION

Plaintiffs request that this Court reverse Judge Traynor's ruling and remand this matter for further proceedings in district court for these two reasons: a) the MHA Tribal Court, including its MHA Supreme Court, has steadfastly declined or refused to decide – despite over two years of litigation by Plaintiffs on this singular issue before that court system – whether Plaintiffs have a fundamental due process or equal protection right to participate in TAT governance on the Fort Berthold Reservation; and b) it is high time, now, to end what Professor Wright has rightfully called this "tragic experience with [inappropriate and unwarranted] abstention...[that] goes on endlessly[.]" See, Sidney A. Shapiro, *Abstention And Primary Jurisdiction: Two Chips Off The Same Block?* – A Comparative Analysis, 60 Cornell L. Rev. 75, ftn. 16 at 78 (1974).

Plaintiffs further request that this Court award them all other such relief as is proper, just and equitable.

Dated this 1st day of March, 2021.

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Dated this 1st day of March, 2021.

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I hereby certify that, with respect to the foregoing:

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Dated this 1st day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on March 1, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by this Court's CM/ECF system.

I also hereby certify that upon notification that Appellant's Brief has been filed, I will file with the Clerk of Court ten (10) paper copies of Appellant's Brief by sending them to the Court via Federal Express.

I also hereby certify that upon notification that Appellant's Brief has been filed, I will send one (1) paper copy of Appellant's Brief to counsel of record for Defendants by sending it via U.S. Mail to the address listed on the Court's CM/ECF System.

Dated this 1st day of March, 2021.

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