NO. 20-3424

IN THE UNITED STATES COURT OF APPEALS FOR EIGHTH CIRCUIT

RAYMOND CROSS, et al.,

Plaintiff/Appellants,

v.

MARK FOX, et. al,

Defendant/Appellees

On Appeal from the United States District Court for the District of North Dakota – Western Division

Case No. 1:20-cv-00177

APPELLEES' BRIEF

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JURISDICTIONAL STATEMENT

As recognized by Judge Traynor's decision the district court held no jurisdiction to provide a decision on the merits. Because the district court lacked subject matter jurisdiction, Judge Traynor undertook the only action allowed to him – dismissal.

The Appellees (referred to herein as the "Tribal Business Council") agree with the remainder of the jurisdictional statement. This appeal was timely filed, is an appeal of a final judgment, and that the 8th Circuit is empowered to hear this appeal.

STATEMENT OF THE ISSUES

1. Does the district court lack jurisdiction over a purely intra-tribal election dispute between tribal members and their elected officials? *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003); *Sac & Fox Tribe of the Miss. v. BIA, 43*9 F.3d 832 (8th Cir. 2006); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983).
2. Is tribal exhaustion required when the Appellant filed suit in tribal court and subsequently ran to federal court prior to exhaustion of

tribal remedies? *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985); *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Rsrv.*, 495 F.3d 1017, 1021 (8th Cir. 2007); *World Fuel Servs. v. Nambe Pueblo Dev. Corp.*, 362 F. Supp. 3d 1021, 1058 (D.N.M. 2019).

3. Are tribal officials entitled to sovereign immunity when they enforce lawfully enacted amendments to the tribal constitution? *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1993); *Smith v. Babbitt*, 875 F. Supp. 1353 (D. Minn. 1995).

STATEMENT OF THE CASE

This case is about a tribal member's attempt to interject federal courts into the elections of the Three Affiliated Tribes of the Fort Berthold Indian Reservation (the "Tribe"). The goal of the Appellant Raymond Cross ("Cross")[1] is to overturn decades of federal deference to tribal sovereignty and self-determination while simultaneously destroying

[1] The claims of the other plaintiff below, Marilyn Hudson, do not survive upon her death. As such, reference to the Appellant is singular.

tribal jurisdiction over tribal elections. As wholly internal tribal matters, this Court must follow the clear body of law which forbids the exercise of jurisdiction over tribal elections and tribal voting requirements. Black letter law requires deference to tribal self-determination. This matter can only be resolved by the Tribe and its courts. Cross has previously recognized tribal jurisdiction as he is currently engaged in litigation before the courts of the Tribe.

Cross provides a long and rambling history of the Tribe, the 1956 and 1986 constitutional amendments to the Tribe's Constitution, and the procedural history of this matter. The myopic recitation of the facts by Cross, especially the procedural history, is intended to cover-up the truly weak legal arguments supporting this appeal. For example, Cross paints the tribal court process as slow moving. However, a close review of the records shows that tribal courts acted responsibly, and that Cross is responsible for the speed of the litigation. Cross throws out dates and timelines without properly contextualizing them with the substantial briefing that was required and the *additional* briefing that Cross himself requested. Finally, Cross fails to point out that the Fort Berthold Court provided him a decision on the merits of his tribal complaint prior to the

2020 elections. To clear up this mischaracterization of the record, a proper recitation of the facts is provided.

I. THIS MATTER IS A WHOLLY INTRA-TRIBAL DISPUTE

Cross does not contest that this matter is wholly intra-tribal and concerns the rules for and the administration of a tribal election. Nor does Cross make any argument that the provisions he contests are lawful amendments of the Tribe's constitution Finally, there is no dispute that this matter has no bearing on state or federal elections.

Cross is an enrolled member of the Tribe. Appellant App. 13. Cross resides off the Fort Berthold Reservation in Arizona. *Id.* The Appellees are the tribal members who have been elected as the Tribal Business Council. Appellant App. 12.

The disputed legal provisions are lawfully enacted amendments to the Tribe's constitution regarding elections. Appellant App. 44. Cross agreed in the tribal court litigation that the proceedings for amendment "were conducted in a manner consistent with Article X of the [Tribe's] Constitution". *Id.* The first amendment, passed in 1956, requires that any candidate for a position on the Tribal Business Council must reside

within the segment. Appellees App. 48 (Constitution of the Three Affiliated Tribes (Tribal Const.), Art. IV § 6). The amendment further requires that the Tribal Chairperson be a bona fide resident of one segment. *Id.*

The second amendment, lawfully enacted in 1986, concerns off-reservation members. The amendment requires that members living off the Fort Berthold Indian Reservation must return to the Reservation to cast their vote . Appellees App. 43-44 (Tribal Const., Art. IV § 2(b)).

This matter began when Cross requested an absentee ballot for the tribal election of 2018. Appellant Appendix 3-4. The Tribal Election Board denied the absentee ballot application in October 2018 because of the tribal constitutional requirement that tribal members living off the

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[2] Concurrent with this brief the Tribal Business Council has filed an appendix as well. Pursuant to Local Rule 30A(b)(3) the materials contained in the Appellees' appendix are non-duplicative of materials in the Cross appendix. The materials in the appendix are as follows: (1) the tribal court complaint filed by Cross, (2) the August 5, 2019 decision of the Fort Berthold District Court, (3) the Fort Berthold Supreme Court November 23, 2020 Amended Order, (4) the Three Affiliated Tribe's Tribal Constitution, and (5) excerpts of the Tribe's Tribal Code. Each of these items are public documents and/or judicial decision which this Court can take judicial notice of and consider part of the record. *Stutzka v. McCarville*, 420 F.3d 757, 760 n.2 (8th Cir. 2005).

Fort Berthold Indian Reservation must return to the Reservation to vote. Appellant App. 40. The requested ballot only contained races for *tribal* elections. *Id.* Cross was free to obtain an absentee ballot for his local, state, and federal races from the appropriate authorities if those authorities allowed absentee voting.

II. TRIBAL GOVERNMENT STRUCTURE

The Tribal Business Council is the governing body of the Tribe. Appellees App 35-36 (Tribal Const. Art II). Six of the seven Tribal Business Council members are elected as representatives of the six segments of the Fort Berthold Indian Reservation. *Id.* at Art. II § 2. The seventh member, the Tribal Business Council Chairperson, is elected at large. *Id.*

As the governing body of the Tribe, the Tribal Business Council – or an Election Board designated by the Tribal Business Council - is empowered to oversee and conduct tribal elections. Appellees App 48 (Tribal Const. Art. IV, § 5). The power to oversee or conduct elections can be altered by a constitutional amendment. Appellees App. 57-58 (Tribal Const. Art. VI § 7). Contrary to the assertions of Cross, the Tribal Business Council has no authority to unilaterally amend the tribal

constitution or otherwise change any constitutional provisions regarding elections. Appellant App. 46-47. The Tribal Business Council "has no authority to independently amend provisions of the Tribal Constitution nor are they at liberty to pick and choose which provisions of the Tribal constitution they will adhere to or enforce". *Id.* The Tribal Business Council is further required to ensure that tribal laws, procedures, and actions comply with the Tribal constitution. Art. VI, § 3.

The Tribe has also created the Fort Berthold District Court and the Fort Berthold Supreme Court. The judges of the Fort Berthold District Court and Supreme Court are law trained judges. Appellees App. 70-71 (Three Affiliated Tribes Tribal Code, Tit. I, Ch. 1 §§ 4.1-4.5). The tribal constitution confers jurisdiction on the tribal court to hear violations of the Indian Civil Rights Act. Appellees App. 54-55 (Tribal Const. Art. VI § 3(b)).

III. PROCEDURAL HISTORY

Cross attempts to paint the Tribe's courts as unresponsive and unconcerned with voting rights. However, a close review of the record shows that the Cross has consistently ambushed courts – both tribal and federal – shortly before an election date with litigation. The tribal

litigation has consistently moved forward except where Cross has delayed the process through requests for additional briefing or through plain inaction. Even with the delays caused by COVID 19 and the litigation strategies of Cross, the Tribe's courts were able to provide a decision on the merits of the case prior to the 2020 election.

a. Cross Ambushes the Tribal Court and Slow Walks His Case

Cross attempted to ambush the Tribe's trial court on November 2, 2018. On that date the Cross filed his complaint requesting a preliminary injunction. Appellant App. 42. Therein Cross alleges that the enforcement of the "return to the reservation" amendment by the Tribal Business Council violates the Indian Civil Rights Act. Appellees App. 7-8, 25-27; Appellant App. 44-45.

The date of filing came an entire ***TWO*** business days before election day.[3] Regardless of the delay in filing by Cross, the tribal court worked swiftly and only three days later on November 5, 2018 issued an order denying the request for a preliminary injunction. Appellant Br. 20.

[3] Such timing is curious as the two constitutional amendments that Cross bases his suit upon have been in force for 62 and 32 years respectively.

Cross did not respond to the tribal court's order denying the preliminary injunction motion. After Cross failed to prosecute his case, the tribal defendants filed a motion to dismiss on March 8, 2019.[4] Appellant App. 13. In recognition of the rights of each party, the tribal district court allowed for a full briefing schedule and oral arguments on the motion to dismiss. *Id.* Oral arguments were heard on May 30, 2019. *Id.* The tribal court issued its decision dismissing the matter on August 5, 2019.Appellees App. 27.

The August 5, 2019 decision was on the merits of the complaint. Broadly, the lower court determined that the "return to the reservation" amendment, Art. IV § 2, did not violate ICRA. Appellees App. 25-27. The lower court stated that it would enforce ICRA "if it determined…that the [Tribal Business Council] [specifically] violated the Act". Appellees App. 24-25. The lower court then determined that the Tribal Business Council did not violate ICRA by enforcing the return to the reservation amendment. *Id.* The Tribal Business Council could not violate ICRA

[4] This is one example of the misleading characterization of the tribal litigation. If Cross were concerned with litigating this manner efficiently, he would have moved forward after the denial of the preliminary injunction motion, for example, by seeking discovery, filing for summary judgment, or appealing the injunction.

through enforcement of the amendment for two reasons. First, the Tribal Business Council cannot unilaterally amend the constitution. *Id.* The power to amend the tribal constitution lies exclusively with the tribal membership. *Id.* Second, the Tribal Business Council lacks the authority to independently determine which tribal constitution provisions they will enforce. *Id.* In total no violation of ICRA occurred because the Tribal Business Council must adhere to the will of the people – the same people who voted to amend the tribal constitution and require non-members to return to the reservation in order to vote.

Cross appealed the August 5, 2019 decision on October 24, 2019. Appellant App. 41-42.[5] The Tribe filed its brief on November 13, 2019. Appellant App. 41. Further delaying the matter, Cross filed a motion requesting additional briefing on December 9, 2019. Appellant App. 42. The Fort Berthold Supreme Court would deny the motion but would allow for oral argument. *Id.* Oral arguments were heard on June 3, 2020. *Id.*

[5] The fact that the Supreme Court accepted the appeal cured any alleged oversight on the part of the tribal court clerk in not mailing the August 5 decision on Cross. Appellant Br. 21.

Cross attempts to besmirch the timeliness of the Fort Berthold Supreme Court by leaving out the crucial fact that appeal was conducted during a global pandemic. The briefing – including briefing on a motion for additional briefing – concluded in December 2019. Appellant App. 42. Shortly thereafter the COVID-19 pandemic shut down not only the tribal government and its courts but the federal government and its courts. Almost every court – federal, state, and tribal – saw significant disruption of their court calendars. The Fort Berthold Supreme Court was no different.

Even with delays caused by the COVID 19 pandemic the Fort Berthold Supreme Court provided Cross a decision on the merits before the 2020 election. On July 28, 2020, the Fort Berthold Supreme Court affirmed the dismissal on the merits by the lower court (the "July 28 Order"). Appellant App. 50. The July 28 Order agreed with the lower court that tribal courts could adjudicate violations of ICRA by the Tribal Business Council. Appellants App 46. The Fort Berthold Supreme Court affirmed that the Tribal Business Council did not violate ICRA through enforcement of the return to the reservation amendment. Appellant App. 47.

The July 28 Order also remanded to the lower court a question whether the tribal Election Ordinance violated ICRA. Under the Election Ordinance residents may vote absentee in specific situations but non-residents cannot vote absentee. Appellees App. 73-74 (Tribal Election Ordinance, Tit. 12, Ch. VI.). The Tribe then moved for reconsideration of the remand order on the ground that Cross never raised the issue of the Election Ordinance violating ICRA before the lower court. Appellees App. 31-32. Cross was afforded an opportunity to respond to the motion but chose to ignore the motion and filed no brief in response. *Id.*

The Fort Berthold Supreme Court granted the tribes motion and corrected their improper remand in a November 23, 2020 Order (the "November 23 Order"). The November 23 Order confirmed the July 28 Order decision on the merits but revised the remand to address a purely procedural question. First, the new order affirmed that the return to the reservation amendment and its enforcement by the Tribal Business Council was not a violation of ICRA. Appellees App.031-32. Second, it recognized that the remand regarding whether the Tribal Election Ordinance violated ICRA was based questions and arguments raised for the first time on appeal by Cross. *Id.* As the issue was not raised below

the Fort Berthold Supreme Court amended their remand to determine whether Cross should file an amended complaint or file a new complaint. *Id.*

To date Cross has not responded to the remand. Cross is within his rights to file a motion to amend his complaint. Instead, Cross continues to sit on his hands.

Contrary to Cross' assertions Fort Berthold courts have worked diligently. It is Cross who has delayed matters. Cross has continually elongated matters by requesting additional briefing, failing to file motions, and failing to respond to motions. The tribal litigation has smoothly moved but for the litigation decisions of Cross.

b. Cross Ignores Tribal Jurisdiction And Flees To Federal Court.

During the pendency of remand, Cross decided to flout tribal jurisdiction and file in federal court. Cross abandoned his tribal court case while his obligation to respond to the Tribe's Motion for Reconsideration was pending. Hoping to inject the federal court into tribal elections Cross filed his federal complaint on September 29, 2020.

Appellant App. 38. The Tribe then filed a Motion to Dismiss on October 26, 2020. Appellant App. 92.

The district court granted the Tribe's Motion to Dismiss on October 28, 2020. Appellant App. 94-107. Cross filed his Notice of Appeal on November 19, 2020. During the pendency of this appeal Cross continues to ignore litigation options available to him in tribal court.

SUMMARY OF THE ARGUMENT

The legal aspects of this appeal are very straightforward, and this Court can uphold the underlying decision on multiple grounds. Cross's arguments would require this Court to ignore decades worth of case law and to act in direct contravention of federal policies supporting tribal sovereignty.

Three separate grounds exist to uphold the underlying decision. The first two are simply that the district court correctly decided the issues of federal question jurisdiction and tribal court exhaustion. Additionally, this Circuit could determine that dismissal was proper on the grounds of sovereign immunity. Though sovereign immunity is not discussed in the underlying decision it is a pure jurisdictional question that can be raised

at any time including by this Court. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684-85 (8th Cir. 2011); *Crowe & Dunlevy, P.C. v. Stidham, 64*0 F.3d 1140, 1154 (10th Cir. 2011).

The first question a court must answer is whether it holds jurisdiction over the subject matter of a suit. Here, no federal question jurisdiction exists. Though Cross references multiple federal statutes and constitutional provisions none are applicable to tribal governments. The lack of applicability means that no federal question is present. Dismissal on this ground alone was appropriate.

Even if there was federal question jurisdiction, tribal court exhaustion is required as tribal litigation is still ongoing. Cross cannot sit on his hands and refuse to litigate his tribal case. There are no exceptions to the tribal court exhaustion requirement that apply here. Requiring exhaustion of tribal remedies in deference to tribal self-determination is especially vital because this matter is a wholly intra-tribal dispute between tribal members and their government.

Finally, even if exhaustion were not required and federal question jurisdiction were somehow imbued onto a federal court, dismissal is still required as sovereign immunity applies. Each of the Tribal Business

Council members are cloaked in the immunity of the Tribe and are immune from suit for actions taken in their official capacity. The enforcement of constitutional election requirements mandated by the tribal constitution is an official act for which sovereign immunity was specifically designed.

ARGUMENT

I. FEDERAL QUESTION JURISDICTION

Federal courts are courts of limited, not general, jurisdiction. *Alumax Mill Prods., Inc. v. Cong. Fin. Corp.*, 912 F.2d 996, 1002 (8th Cir. 1990). As such, before embarking on any exploration of a cases' merits a federal court must first address the "threshold issue" of its subject matter jurisdiction *U.S. Water Servs. v. Chemtreat, Inc.*, 794 F.3d 966, 971 (8th Cir. 2015). The district court did so and correctly found that it lacked jurisdiction.

a. Tribal Election Disputes Are Intra-Tribal Matters Which Are Nonjusticiable By Federal Courts

Tribal election disputes – including who may vote and how they may vote – are the sole domain of tribal governments. As a wholly intra-tribal

matter, no grounds exist for a federal court to insert its opinion on the creation, administration, and enforcement of tribal voting mechanisms. No federal source of law empowers a federal court with jurisdiction over these internal matters.

As sovereign nations tribes hold "inherent and exclusive power over matters of internal tribal governance". 1 Cohen's Handbook of Federal Indian Law §4.06 (2019) (hereafter "Cohen"). Federal courts consistently affirm the principle that "it is important to guard the authority of Indian governments over their reservations". *Id.* (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)). This deference to Indian tribes and tribal jurisdiction is "particularly true when…the case involves an intra-tribal dispute". *Id.* For this reason, the "jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws…lies with Indian Tribes and not in [federal courts]". *Sac & Fox Tribe of the Miss. v. BIA*, 439 F.3d 832, 835 (8th Cir. 2006) (citing *United States v. Wheeler*, 435 U.S. 313, 323-36 (1978)).

The internal nature of tribal election disputes makes them "nonjusticiable, intratribal matters". *Sac & Fox Tribe of the Miss,* 439 F.3d at 835 (citing *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir.

1983)). The only action available to a federal court in a lawsuit regarding tribal elections is to dismiss. *See Goodface*, 708 F.2d at 339 (stating that the district court overstepped the boundaries of its jurisdiction in addressing the merits of an election dispute). Cross fails to cite to a binding case where a federal court has intervened in a tribal election dispute and indeed there are none. The absence of any relevant cases where a federal appeals court allowed and/or directed a district court to intervene in a tribal election dispute is illuminating.

b. Judge Traynor Correctly Concluded No Federal Question Jurisdiction Exists

Cross attempts to overcome the nonjusticiable nature of tribal elections by relying upon federal laws which do not apply to the Tribe or its elections. The district court reviewed and disposed of each federal statute and federal constitutional provision relied upon by Cross. Appellant App. 96-99 (disposing of ICRA grounds for jurisdiction);103-106 (disposing of Voting Rights Act grounds); 100-101 (disposing of federal constitutional grounds). The decision of Judge Traynor is supported by the uncontradicted law of this Circuit and the plain language of the statutes.

Federal courts will only exercise federal question jurisdiction when "federal law is determinative of the issues involved". *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589 (8th Cir. 2005). Put more simply a federal question exists if the outcome is "controlled or conditioned by federal law". *Id.* In this matter, none of the federal law cited by Cross is applicable to tribal governments or tribal elections. How a tribal government administers and conducts a tribal election is controlled by tribal law and not federal law.

Cross first turns to the Voting Rights Act of 1965 ("VRA") which by its express terms is not applicable to tribal governments. The VRA applies only to states or political subdivisions and their elections. 52 U.S.C. § 10101(1); *see also Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Rsrv.*, 507 F.2d 1079, 1081 (8th Cir. 1975). The VRA does not apply to tribes because they are neither a state nor a political subdivision. *Wounded Head*, 507 F.2d at 1081; *Gardner v. Ute Tribal Court Chief Judge* (10th Cir. 2002); *Cruz v. Ysleta Del Sur Tribal Council*, 842 F. Supp. 934, (W.D. Tex. 1993); *see also* 1977 S.D. Op. Att'y Gen. 175 (1977). Judge Traynor further pointed out that the VRA has not been extended to tribal elections because tribes are separate sovereigns which

pre-exist the federal constitution and federal courts do not lightly assume that Congress intends to undermine tribal self-government. Appellant App. 106 (citing *Spurr v. Pope*, 936 F.3d 483 (6th Cir. 2019).

Cross cannot overcome the inapplicability of the VRA by arguing that Indians are included under concepts of due process and equal protection. The *Wounded Head* court previously addressed this issue and concluded that any attempt to include tribal elections through such an argument is "ingenious [but] not persuasive". *Wounded Head*, 507 F.2d at 1081.

Use of ICRA to create federal question jurisdiction is similarly unavailing. The Supreme Court held decades ago that, with the sole exception of *habeas corpus*, the ICRA does not create a federal cause of action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).[6] Since there is no *habeas* claim here, ICRA does not "provide a basis for federal

[6] Cross may attempt to cite to decisions pre-dating *Santa Clara Pueblo*, as some district courts would at the time entertain cases regarding tribal elections. *E.g.*, *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194 (D.S.D. 1975). Those decision hold no precedential value after the Supreme Court's ruling in *Santa Clara Pueblo* and must be rejected.

question jurisdiction". *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273, 1275-1276 (8th Cir. 1987).

The Court in *Santa Clara Pueblo* reasoned that using the ICRA to create federal court jurisdiction could "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity". 436 U.S. at 70; see *Runs After v. United States*, 766 F.2d 347, 353 (8th Cir. 1985) (Any action seeking relief under the ICRA must be resolved through tribal forums). Since *Santa Clara Pueblo* federal courts have in lock step dismissed challenges related to tribal elections based on the ICRA. *See, e.g.,* S*hortbull v. Looking Elk,* 677 F.2d 645, 650 (8th Cir. 1982); *Wheeler v. Swimmer*, 835 F.2d 259, 261 (10th Cir. 1987); *Goodface v. Lower Brule Sioux Tribe 2020 Election Bd.,* U.S. Dist. LEXIS 154133, at * 3 (D.S.D. Aug. 25, 2020).[7]

[7] This court's decision in *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998) provides no exception. *Wadena* dealt with a federal criminal prosecution for tribal election fraud, not a private civil action to challenge the enforcement of duly enacted tribal law, and the court specifically distinguished *Santa Clara Pueblo* on this and other grounds, all of which are applicable here. 152 F.3d at 844-847.

Nor can Cross create federal jurisdiction by relying upon amendments to the Federal Constitution. Cross makes the oft defeated argument that ICRA applies the restrictions of the 5th, 14th, and 15th amendments to tribal governments. However, the district court correctly pointed out that ICRA does not provide for a wholesale extension of federal constitutional requirements to tribal governments. Appellant App. 100 (citing *Santa Clara Pueblo*, 436 U.S. at 62). *Santa Clara Pueblo* recognized that because tribes are "separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitation on federal or state authority". *Id.* at 56; (citing *Talton v. Mayes*, 163 U.S. 376 (1896)); *see also Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697 (8th Cir. 2019); *Johnson v. Frederick*, 467 F. Supp. 956, 957 (D.N.D. 1979).

In short, because no federal statute, regulation or law provides for federal question jurisdiction over Cross' action, the district court correctly held that it lacked jurisdiction.

II. TRIBAL COURT EXHAUSTION

Cross attempts to frame the district court decision on tribal exhaustion as an exercise in "hypothetical jurisdiction". Such framing is

incorrect and fundamentally misunderstands the need for analyzing the tribal exhaustion issue. The decision on its face does not reach the merits but instead spends significant time exploring why tribal exhaustion is required. Furthermore, even if the district court did engage in the use of hypothetical jurisdiction, such error is harmless.

a. Judge Traynor Correctly Decided That Tribal Exhaustion Is Required

Federal courts have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government and self-determination. *See, e.g.,* I*owa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982). A tribal court is vital for self-government and self-determination. *Iowa Mut. Ins. Co.*, 480 U.S. at 14-15. The deference of federal courts to tribal courts concerning activities occurring on the reservation is deeply rooted in Supreme court precedent. *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1299 (8th Cir. 1994).

Although in some cases a civil complaint challenging the existence of tribal jurisdiction can present a federal question, *Nat'l Farmers Union*, 471 U.S.at 852-853, tribal exhaustion is required in such cases in order

to (1) support tribal self-government and self-determination, (2) promote the orderly administration of justice in federal court by allowing a full record to be developed in Tribal Court, and (3) providing other courts with the benefits of the tribal courts' expertise on their own jurisdiction. *Id* at 856-57; *Hengle v. Asner*, 433 F. Supp. 3d 825, 860 (E.D. Va. 2020).[8] The exhaustion requirement is "a prudential exhaustion rule, in deference to the capacity of tribal courts to explain to the parties the precise basis for accepting [or rejecting] jurisdiction". *Sprint Communs. Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, 898 (D.S.D. 2015) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 450 (1997)). The district court correctly asserted that tribal exhaustion is at its most important when "the issues being litigated involve tribal affairs and tribal members". Appellant App. 98.

[8] Cross admitted the tribal court had jurisdiction when he filed his tribal court complaint in this matter. Appellees App. 2. Cross' jurisdictional statement in his federal complaint does not specifically allege that the tribal court lacked jurisdiction over his claims. Appellant App. 8-9. This only underscores the notion that there is no federal question jurisdiction which would even necessitate an exhaustion analysis. Nevertheless, the exhaustion doctrine is addressed here on the assumption that Cross' complaint, construed liberally, challenges the tribal court's jurisdiction over his claims.

Where a court determines that tribal exhaustion is required it must abstain. *Nat'l Farmers Union*, 471 U.S. at 856-57. Only after a tribal court decides its jurisdiction may a litigant request that a federal court weigh in on the question of tribal jurisdiction. *Iowa Mutual*, 480 U.S. at 19. However, such a review is restricted to whether the tribal court properly determined jurisdiction and if so, the merits of the case cannot be reviewed and relitigated before the federal court. *Id.* In other words, if the tribal courts have jurisdiction, federal courts will not review the merits of the underlying tribal decision.

The district court properly decided that tribal exhaustion is required in this matter. The decision first points out that exhaustion has been required in cases where there are non-Indian litigants. Appellant App. 97. (citing *World Fuel Servs.*, 362 F. Supp. 3d at 1058), and that courts will require exhaustion even where there is no pending action in tribal court. *Id.* (citing *Hengle*, 433 F. Supp. At 860). Exhaustion is required even when there are contested claims to be defined substantively by state or federal law. *Id.* Finally, even where a federal question exists a federal court requires exhaustion. *Id.* (citing *Auto-Owners Ins. Co.*, 495 F.3d at 1021).

Here the facts are much more straight forward and demanding of tribal court exhaustion. This is a dispute over the rules governing a tribal election. The dispute is between enrolled tribal members and their governing body. There are no federal or state questions. This is a tribal member dispute over the application of tribal law. The dispute itself is still before a tribal court and is only before this court because Cross failed to exhaust his tribal remedies.

Finally, even if the district court's analysis of tribal exhaustion represents "hypothetical jurisdiction" such an error is harmless. Cross must show that Judge Traynor made an error of law or fact that resulted in an incorrect decision or affected the substantial rights of the parties. *United States v. Lane*, 474 U.S. 438, 445 (1986). Cross does not argue that any "hypothetical jurisdiction" harmed his rights or resulted in an incorrect decision.

b. No Tribal Exhaustion Exception Is Applicable

The only hope for Cross to avoid tribal exhaustion is the application of one of the exceedingly narrow exceptions to the tribal exhaustion requirement. In *Nat'l Farmers Union*, the Supreme Court recognized three exceptions: (1) where "tribal jurisdiction is motivated by a desire to

harass or is conducted in bad faith;" (2) where the case "is patently violative of express jurisdictional prohibitions;" and (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Sprint Communs.*, 121 F. Supp. 3d at 898-899 (quoting *Nat'l Farmers Union*, 471 U.S. at 856 n.21). None of those exceptions apply in this case.

Cross makes the truly bizarre argument that remand to a tribal court for exhaustion of remedies would "serve no tribal sovereign prerogative". Appellant Br. 43. The ability to determine who may vote, where they may vote, and how they may vote is perhaps one of the most important aspects of tribal sovereignty. But since Cross has not received a decision to his liking, he is willing to tread upon tribal sovereignty in hopes of avoiding exhaustion.

Before turning directly to the "sovereign prerogative" issue it is important to review exactly where the Cross found such language. Cross– ignoring decades worth of tribal court exhaustion cases – bases his argument upon a 1959 Supreme Court decision regarding eminent domain and the interpretation of Louisiana law. That case, *La. Power & Light Co. v. City of Thibodaux,* 360 U.S. 25 (1959) is not applicable here.

First, the case deals with the interpretation of *state* law. *Id.* at 28. The case has no tribal law component and predates the creation of the tribal exhaustion rule in *Nat'l Farmers Union.* If Cross wants to argue that tribal court exhaustion is not required, he must rely upon the exceptions provided by *Nat'l Farmers Union* and not a state law interpretation case. Second, the outcome of *La. Power & Light* actually supports remand to tribal court. At its most basic *La. Power & Light* stands for the proposition that federal courts should abstain from construing the law of another sovereign when there is an opportunity for that sovereign to do so. *Id.* at 25.

There is no "sovereign prerogative" exception to the tribal exhaustion rule. But even if this Court wanted to apply *La. Power & Light*, the Tribe still holds a sovereign prerogative. Where a tribe conducts elections and provides administrative or judicial processes for contesting the election, it engages in a core governmental functional related to internal tribal affairs. Cohen, § 4.06. Tribal elections are "key facets of internal tribal governance" *Id.* In *Shortbull v. Looking Elk*, this Circuit stated that tribes "have an important interest in setting the standards for who may vote and run-in tribal elections". 677 F.2d 645, 649 (8th Cir. 1982).

Though perhaps one district court summed it up best when it said that the conduct of an election is an "essential governmental function". *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1203 (D. Minn. 1996). In *Vizenor* the Plaintiffs sought federal oversight of a tribal election to which the Court responded that a "more invasive action could hardly be imagined". *Id.* The 10th Circuit reached the same conclusion stating that "the right to conduct [a tribal] election without federal interference is essential to the exercise of the right to self-government". *Wheeler*, 835 F.2d at 262. *Id.* . Here, Cross requests much of the same in asking the 8th Circuit to determine who may vote and how they may vote in a tribal election in direct contradiction to the rules established by tribal government. There is no exhaustion exception that supports such an intrusion on the tribal prerogative.

Turning to the actual *Nat'l Farmers Union* exceptions to tribal exhaustion, Cross fairs no better. The exceptions to tribal court exhaustion are narrowly drawn. *Armstrong v. Mille Lacs Cty. Sheriffs Dep't*, 112 F. Supp. 2d 840, 844 (D. Minn. 2000); *Kerr-McGee Corp. v. Farley,* 115 F.3d 1498, 1501 (10th Cir. 1997). The only exception which

Cross appears to advocate is the futility exception, but that exception clearly does not apply for a number of reasons.

Cross first posits that the MHA Nation Court is non-functioning because litigation has been ongoing in tribal court since 2018 and exhaustion is therefore *per se* futile. Appellant Br. 50-52. Such a suggestion is both legally and factually incorrect. As explained above Cross is responsible for the majority of delays and the tribal courts provided a decision on the merits prior to the 2020 election. Cross has waited until the last minute to file litigation and then expects courts to provide immediate rulings during a pandemic. Cross has continually sat on his hands and then complains about a lack of action.

The futility exception occurs only when a litigant lacks "an adequate opportunity to challenge the [tribal court's] jurisdiction. *Nat'l Farmers Union*, 471 U.S. at 856, fn. 21. This can occur because a tribal court simply does not allow such a challenge or if the tribal court is non-functioning and the ability to challenge jurisdiction is *per se* futile. *See Krempel v. Prairie Island Indian Cmty,* 125 F.3d 621 (8th Cir. 1997); *Johnson v. Gila River Indian Cmty,* 174 F.3d 1032 (9th Cir. 1999). Cross argues that his ability to challenge jurisdiction is *per se* futile under

Johnson and *Krempel*. However, the facts in those cases are starkly different from this matter and neither case is applicable.

In *Gila River,* the tribal appellate court failed to provide a briefing schedule, to schedule oral argument, or to generally provide a meaningful response to the notice of appeal for over two years. *Id.* Here, however, the tribal court ruled on Cross' complaint within days of its filing and the tribal appellate court ruled on the merits of Cross' appeal after briefing and oral argument in less than a year after the appeal was taken from the tribal district court. Cross cannot conflate a two-year litigation period involving both tribal district and appellate court proceedings, numerous briefing schedules hearings, orders, and decisions, add to that a pandemic, with the complete and utter lack of action on a notice of appeal that was present in *Gila River*.[9]

[9] While the district court ultimately ruled that exhaustion was required, in a footnote it pontificated on the issue whether the Fort Berthold Courts are functional due to a perceived lack of decision before the 2020 election. Appellant App. 99, n.3. However, as explained at 8-13 above the Fort Berthold Courts provided Cross a decision on the merits prior to the 2020 election.

Krempel – the only 8th Circuit case – is even less applicable. In that case the tribe in question lacked an operational court. 125 F.3d at 623. The Tribe in question did not create a judicial code or employ judges until *after* the federal court case was filed. *Id.*

The narrow futility exception to the exhaustion requirement should not be used to undermine the effort of a tribal court and court of appeals to address a plaintiff's complaint simply because the complaining party thinks it is taking too long. No court, federal, state, or tribal, is perfect. *See Illinois v. Allen*, 397 U.S. 337, 346 (1970) ("Being manned by humans, the courts are not perfect and are bound to make some errors"). There are delays in many cases, due to many factors, but that in itself does not give rise to a futility exception. *Gila River*, 174 F.3d at 1036. ("Delay alone is not ordinarily sufficient to show that pursuing tribal remedies is futile").

Moreover, application of the futility exception is particularly inappropriate here because the delays Cross complains about were in many cases caused by Cross himself. Ruling that tribal court exhaustion is not required would reward the Cross and his counsel for sitting on their hands. The tribal courts have consistently moved the litigation forward only to be delayed by the litigation tactics of the complaining parties.

Cross should not be allowed to delay, refuse to file motions and responses, and then claim that exhaustion is futile.

III. TRIBAL IMMUNITY

a. This Matter Must Be Dismissed As The Tribal Officials Are Immune From Suit

There is no question that Tribal Business Council members are cloaked in the immunity of the Tribe. No exception to tribal official immunity applies in this situation.

Tribes enjoy the same immunity from suit enjoyed by sovereign powers and are "subject to suit only where Congress has authorized the suit, or the tribe has waived its immunity". *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). A waiver of immunity cannot be implied and must be unequivocally expressed. *United States v. Testan*, 424 U.S. 392, 399 (1976).

A tribal official is entitled to the same immunity. This occurs because a lawsuit against officials acting within their official capacity is nothing more than a claim against the sovereign. *Brandon v. Holt*, 469 U.S. 464,

471-72 (1985). Immunity for tribal officials persists so long as they are acting within their official capacity. *N. States Power Co.*, 991 F.2d at 460-61 (8th Cir. 1993). In *N. States* the Court ruled against official immunity because the tribal officials enacted and enforced an ordinance that attempted to preempt a federal statute on hazardous waste disposal and handling. *Id.* In "resolving to enforce the ordinance, the members of the Tribal Council were acting to enforce an ordinance that the tribe had no authority to enact…the members acted beyond the scope of their authority and placed themselves outside of the tribe's sovereign immunity". *Id.* at 462. Here, however, the Tribal Business Council is enforcing duly enacted tribal law where there is no federal preemption.

Enforcement of tribal laws is a fundamental official duty of any tribal official. The courts of this Circuit have continually held that the enforcement of tribal laws and tribal constitutional provisions are official acts entitled to the protections of sovereign immunity. In *Smith v. Babbit*, a litigant sued tribal government officials regarding their votes conferring membership in the tribe to certain individuals along with the right to vote on tribal matters. 875 F. Supp. 1353, 1356 (D. Minn. 1995). However, the *Babbit* Court determined that action to enforce

constitutional provisions are "not ultra vires actions of tribal officials". *Id.* at fn. 7. In the simplest terms actions to enforce or comply with constitutional requirements are not outside of a tribal officials scope and such actions are entitled to immunity.

To avoid this hurdle Cross tries to apply *federal* statutes to tribal elections. This Court must reject such an argument as federal law does not apply to tribal elections. *See* 16-22, *supra*. This Court, in deference to tribal sovereignty and self-determination, must decline to interpret and apply the tribes own constitution and laws law and instead allow the tribal courts to undertake such an analysis.

Following down the same road Cross attempts to apply federal constitutional amendments to tribal government action. Much like their attempt to apply federal statutes this line of argument must fall as well. The 5th, 14th, and 15th amendment do not apply to tribal governments and do not act to constrain or limit the actions a tribal government may take. As shown above at 22, the federal constitution generally does not apply to actions undertaken by tribal governments. *See Santa Clara Pueblo*, 436 U.S. at 62*; Johnson*, 467 F. Supp. at 9658 ("The powers of the Turtle Mountain tribal government are constrained only by the provisions of the

Indian Civil Rights Act, and not by the parallel provisions of the [federal constitution]"); *Groundhog v. Keeler*, 442 F.2d 674, 681 (10th Cir. 1971) ("The provisions of the [federal constitution] have no application to Indian nations or their governments, except as they are expressly made so by [the Commerce Clause of the federal constitution] or are made applicable by an Act of Congress").

b. *Randall* Does Not Apply

Cross next attempts to abrogate immunity by boot strapping a 9th Circuit decision which as no applicability to tribal immunity. *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988). *Randall* has no bearing on this matter as the 9th Circuit decision deals with a *habeas corpus* claim filed in federal court under the ICRA and not the sovereign power to create, administer, and enforce election rules. Furthermore, the decision does not discuss or analyze tribal sovereign immunity.

The fact that *Randall* involved a *habeas* claim and not internal tribal election matters is vitally important because a *habeas corpus* action is the *only* action over which a federal court has jurisdiction under the ICRA. See 20-21, *supra.* Cross does not raise a *habeas corpus* claim here, and any asserted limits on the "internal tribal matters doctrine"

advocated by Cross is limited to unlawful detention claims arising from *habeas corpus* actions and not any claim of sovereign immunity.

Furthermore, the *Randall* case does not even address the issue of tribal immunity. Instead, the decision focuses on whether a federal court may apply federal notions of due process when the federal court has *habeas* jurisdiction and the language of a tribe's laws mirror or closely resemble federal language. *Randall*, 841 F.2d at 899-900. The *Randall* court determined application of federal principles was allowable because the tribal court procedures paralleled those found in state or federal courts. *Id.* Here, however, we are not discussing a *habeas* matter or tribal court procedures. Instead, we are solely focused on the sovereign right of tribes to conduct elections pursuant to their own laws and requirements.

In short, the Tribal Business Council is immune from suit. Cross has not shown that any exception to this immunity applies in this case.

CONCLUSION

For the foregoing reasons, the Appellees respectfully request that the district court's decision dismissing the action be affirmed.

Dated this 10th day of May, 2021

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CERTIFICATE OF SERVICE

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

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

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