UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-3735

James Van Nguyen,

Appellant,

v.

Patricia Foley, in her individual and official capacity, et al.,

Appellees.

No. 21-3821

James Van Nguyen,

Appellee,

v.

Patricia Foley, in her individual and official capacity, et al.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
THE HONORABLE ERIC C. TOSTRUD, JUDGE

BRIEF OF COMMUNITY DEFENDANTS/APPELLEES

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SUMMARY OF THE CASE

James Nguyen's appeal is frivolous. His brief is filled with new allegations not contained in his Amended Complaint (R. Doc. 4, "complaint"), documents attached to the complaint, or other documents the district court considered when deciding to dismiss his claims. It is also filled with arguments raised for the first time on appeal. He has wholly failed to challenge any of the district court's legal reasons for dismissing his claims. Therefore, even if Nguyen's three arguments on appeal had legal merit (they do not), they could not change the outcome of this case.

Patti Foley, Nancy Martin, Charles Vig, Keith Anderson, Rebecca Crooks-Stratton, and Cole Miller (collectively, "Community Defendants") appeal the district court's decision that they are not immune from Nguyen's monetary claims by virtue of tribal sovereign immunity. Nguyen named the Community Defendants in their individual and official capacity. The district court dismissed the official capacity claims based on sovereign immunity but not the individual capacity claims. Because the Shakopee Mdewakanton Sioux Community ("Community" or "SMSC") is the real party in interest, sovereign immunity should preclude all claims against the Community Defendants.

If oral argument is granted, the Community Defendants request 15 minutes for argument.

CORPORATE DISCLOSURE STATEMENT

The Community Defendants/Appellees are persons, not corporations.

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JURISDICTIONAL STATEMENT

On October 27, 2021, the United States District Court for the District of Minnesota issued an order granting the Community Defendants' motion to dismiss Nguyen's claims, and on October 28, 2021 entered a judgment to that effect. (R. Docs. 42, 43). Nguyen filed a timely notice of appeal on November 24, 2021. The Community Defendants thereafter filed a timely notice of appeal on December 8, 2021. This Court has jurisdiction over the appeals filed by Nguyen and the Community Defendants because they are direct appeals from a final decision of the district court under 28 U.S.C. § 1291.

STATEMENT OF ISSUES FOR NGUYEN'S APPEAL[1]

I. Nguyen raises a new issue on appeal as to whether the Tribal Court lacked jurisdiction over the child welfare proceeding involving A.N. due to Public Law 280. The district court did not decide this issue because it was not raised below. And this Court recently decided that the Tribal Court does have jurisdiction over tribal member child welfare proceedings. Should this Court consider this issue and does it have merit?

- *Hartman v. Workman*, 476 F.3d 633 (8th Cir. 2007).
- *Watso v. Lourey*, 929 F.3d 1024 (8th Cir. 2019).
- *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005).

II. Nguyen's claim under 42 U.S.C. § 1983 was dismissed based on Nguyen's failure to plead that the Community Defendants were acting under color of state law. The district court did not decide whether the Community Defendants violated Nguyen's constitutional rights. However, on appeal, Nguyen argues that the district court erred by not deciding that the Community Defendants violated his constitutional rights. Should the district court's decision, based on unchallenged grounds, be affirmed?

- *Creason v. City of Washington*, 435 F.3d 820 (8th Cir. 2006).
- *Coleman v. Duluth Police Dept.*, 2009 WL 921145 (D. Minn. Mar. 31, 2009).

III. Nguyen raises a new issue on appeal as to whether the Minnesota Commissioner of Human Services had authority to enter into a 2007 Tribal/State Agreement. The Agreement itself cites the statute giving the Commissioner authority to enter into it. The district court did not decide this issue because it was not raised below. Should this Court consider this new issue and does it have merit?

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[1] Nguyen lists two issues in his Statement of Issues (the first and third listed here). However, his brief argues a third issue (the second issue listed here). *Compare* Br. of Appellant at 6, with *id.* at 18.

- *Hartman v. Workman*, 476 F.3d 633 (8th Cir. 2007).
- *Bear Robe v. Parker*, 270 F.3d 1192 (8th Cir. 2001).
- *Prowse v. Prowse*, 984 F.3d 700 (8th Cir. 2021).

STATEMENT OF ISSUE FOR THE COMMUNITY DEFENDANTS' APPEAL

I. The Supreme Court has long held that whether a government official sued in an individual capacity is immune from suit by virtue of sovereign immunity depends on whether the sovereign is the real party in interest, which in turn depends on whether the sovereign would be responsible for the judgment, the judgment would interfere with public administration, or the effect of the judgment would restrain or compel the government to act. In 2017, the Supreme Court reaffirmed that rule in the context of tribal sovereign immunity. Did the district court err by deciding the real party in interest based only on whether the sovereign would be responsible for the judgment, and not dismissing all claims against the Community Defendants at the outset based on sovereign immunity?

- *Lewis v. Clarke*, 137 S.Ct. 1285 (2017).
- *Dugan v. Rank*, 372 U.S. 609 (1963).
- *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).
- *Cunningham v. Lester*, 990 F.3d 361 (4th Cir. 2021).

STATEMENT OF THE CASE

A. Factual and Pre-Federal Procedural Background

This present federal case was preceded by many years of litigation in at least seven different actions involving Nguyen in tribal, state, and federal court. A brief review follows, based upon the complaint and record materials submitted to the district court in connection with the motions to dismiss.

1. The Department Initiates a Child Welfare Proceeding for A.N., Who Becomes a Ward of the Tribal Court

The Shakopee Mdewakanton Sioux Community is a federally recognized Indian tribe. (R. Doc. 4, at ¶3). Non-Indian Nguyen married Community tribal member Amanda Gustafson in 2014. (*Id.* ¶21). A.N., their child, was born in September 2014 and, as the child of Gustafson, was enrolled in the Community. (*Id.* ¶¶2, 25).

After receiving reports about physical and emotional abuse, mental health issues, as well as drug use by both parents, Community Family and Children's Services Department ("Department") child welfare officer Patricia Foley filed a petition in the Community's Tribal Court ("Tribal Court") on November 26, 2014, on behalf of the Department, alleging that A.N. was a child in need of protection. (*Id.* ¶48; R. Doc. 4-2, at 8). In a January 2015 hearing, after receiving a report from

Foley,[2] the Tribal Court found A.N. to be a child in need of assistance under Community law, ordered that A.N. be a ward of the Tribal Court, and determined that the family would receive social services help from the Department. (R. Doc. 4, at ¶85, R. Doc. 1-9, at 29-30). Nguyen and Gustafson actively participated in the child welfare proceedings by attending court hearings, counseling sessions, and receiving social services provided by the Department. (*See* R. Doc. 1-9, at 8-9, R. Doc. 1-12, at 4). The child welfare case was closed in July 2015, but, under the final order in the case, the Tribal Court determined that A.N. would remain a ward of the Tribal Court. (R. Doc. 4, at ¶89). Nguyen does not allege that he challenged Tribal Court jurisdiction over the child welfare proceeding, Case No. CC082-14, or that he appealed the July 2015 final order in that proceeding.

Although the Tribal Court child welfare case involving Nguyen, Gustafson and A.N. concluded in 2015, Nguyen's complaint and his appeal revolve around events that allegedly took place in connection with that child welfare action in the Tribal Court, more than five years prior to the filing of the complaint here.

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[2] Foley was only involved in the investigation into the child welfare proceeding. Exhibit O to the complaint (R. Doc. 4-2), Ms. Foley's report to the Tribal Court that is referenced in the complaint, see R. Doc. 4, at ¶85, reflects the docket number of the child welfare proceeding, CC082-14 ("CC" standing for Children's Court and "14" for 2014), as do the transcripts of the Tribal Court hearings at which Foley appeared by telephone. (*See* R. Docs. 1-8, 1-9). She was not involved

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2. The Community Issues Notices of No Trespass to Nguyen

On November 5, 2014, around the time that the Department opened the child welfare proceeding, the Community's Business Council issued a notice of no trespass to Nguyen. (R. Doc. 4, at ¶32). The no-trespass notice, which has been continually renewed, informed Nguyen that he was not permitted on the Community's reservation "EXCEPT for scheduled tribal court hearings and court ordered appointments or visits." (R. Doc. 1-3).

3. Nguyen and Gustafson File Competing Divorce Petitions

Almost two years after the child welfare proceeding closed, Nguyen filed for divorce in California in June 2017. (R. Doc. 4, at ¶106). Gustafson filed her own petition for divorce in the Tribal Court in July 2017. (*Id.* ¶108). Gustafson moved the California court to dismiss Nguyen's petition. *See Nguyen v. Gustafson* ("*Nguyen I*"), 2018 WL 4623072, at *1 (D. Minn. Sept. 26, 2018). After a two-day evidentiary hearing, the California court found that A.N. had not resided in that state for the time required for California to have jurisdiction and the forum was inconvenient. *Id.*

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in the parents' divorce proceeding, Tribal Court Case No. 867-17, which occurred three years later.

On August 7, 2017, the Tribal Court issued an order confirming the pendency of the action initiated by Gustafson and its intent to proceed with the case. *Id.* The Tribal Court recognized that it "maintains exclusive, ongoing child welfare jurisdiction over the minor child pursuant to the final order issued in [the earlier] child welfare proceeding commenced by this Community." (R. Doc. 25-1, at 9).[3] Recognizing the Tribal Court as the suitable venue, the California court thereupon dismissed Nguyen's petition. *Nguyen I*, 2018 WL 4623072, at *1.

Nguyen filed another dissolution petition in August 2017, this time in Hennepin County District Court. *Id.* District Judge Christopher Sande "stayed Nguyen's action as a matter of judicial expedience and comity," in favor of the Tribal Court action. *Id.*

Nguyen filed a motion to dismiss the Tribal Court divorce proceeding for lack of subject-matter jurisdiction and personal jurisdiction. *Id.* On November 10, 2017, the Tribal Court issued an order denying that motion. (R. Doc. 4, at ¶113). One factor that the Tribal Court considered in making its determination was that

[3] The Community Defendants cited the materials from R. Doc. 25-1, exhibits to a declaration made by their counsel, Richard Duncan, in support of their motion to dismiss. The district court determined that these materials were properly considered in the context of a motion to dismiss because they were necessarily embraced by the complaint. *Nguyen v. Foley* ("*Nguyen II*"), 2021 WL 4993412, at *3 n. 4 (D. Minn. Oct. 27, 2021). Nguyen does not appeal that decision.

A.N. was currently a ward of the Tribal Court and the parents had participated in the child welfare proceedings. (R. Doc. 25-1, at 6-7).

On December 4, 2017, Nguyen appealed the Tribal Court's jurisdictional order, arguing that the order was immediately reviewable as a collateral order or that it should be certified for interlocutory review. (R. Doc. 4, at ¶114); *Nguyen I*, 2018 WL 4623072, at*1. Both the Tribal Court and the Tribal Court of Appeals rejected Nguyen's arguments for an immediate appeal. *Nguyen I*, 2018 WL 4623072, at *1.

4. Nguyen Unsuccessfully Challenges Tribal Jurisdiction in Federal Court

On February 23, 2018, Nguyen filed an action in the District of Minnesota against Gustafson, a Tribal Court judge, and the Tribal Court itself, seeking (1) a declaration that the Tribal Court, which both California and Minnesota courts had deferred to, lacked jurisdiction over the divorce, and (2) an injunction prohibiting the Tribal Court from continuing to exercise jurisdiction. (Compl., R. Doc. 1, *Nguyen I*). Judge Susan Richard Nelson dismissed the case for failure to exhaust tribal remedies because Nguyen had failed to complete the divorce proceeding in Tribal Court. *Nguyen I*, 2018 WL 4623072, at *1, *3.[4]

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[4] Assuming *arguendo* that Nguyen properly pled a challenge to Tribal Court jurisdiction, he faces an exhaustion issue in this case too. He alleged in the complaint that he exhausted his Tribal Court remedies in the divorce proceeding,

(continued on next page)

5. The Tribal Court Awards Custody of A.N. in the Divorce Proceeding

Shortly after Gustafson initiated the divorce proceeding in Tribal Court, that court on August 7, 2017, temporarily ordered that the parents share joint custody of A.N. (R. Doc. 25-1, at 74). The temporary order in the divorce proceeding stayed in place until the Tribal Court issued a final judgment on May 3, 2019, which, *per the parties' stipulation*, ordered that they share joint custody of A.N. with equal parenting time. (*Id.* at 88).

On October 21, 2019, after Nguyen refused to abide by that agreement, Gustafson filed a motion to modify custody and placement of A.N. (*See id.* at 133). The Tribal Court found that Gustafson was correct, that the parenting order was not being followed and that the parents displayed an inability to cooperate, disagreeing about all aspects of the order and the raising of A.N. (*Id.* at 137).

Ultimately, based on Nguyen's uncooperative behavior and the impact of the parents' acrimonious relationship on the child, the Tribal Court awarded Gustafson sole custody of A.N. on January 6, 2020. (*Id.* at 142). Nguyen sought to undermine

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but his claims in this case are not related to the divorce proceeding. (*See* R. Doc. 4, at ¶130). His claims are based on the child welfare proceeding from 2014-2015. He does not allege that he exhausted his tribal court remedies in that case, because he did not.

that ruling and start a new round of litigation by filing the present action in federal district court.

B. The District Court Litigation

1. Nguyen's Complaint

Nguyen filed this case on April 14, 2021 against representatives of the Department involved in the child welfare proceeding, the guardian ad litem for the child welfare proceeding, and members of the Community's elected leadership. Specifically, Nguyen sued (1) two Department employees, Department child welfare officer Patricia Foley and Department director Nancy Martin ("Department Defendants"); (2) four current or former members of the Community's Business Council, Defendants Charles R. Vig, Keith Anderson, Rebecca Crooks-Stratton, and Cole W. Miller ("Business Council Defendants"); and (3) the Tribal Court-appointed guardian ad litem, Jody Alholinna. (R. Doc. 4, at ¶¶6-12). In his case caption, he named the defendants in their official and individual capacities. (*Id.*).

Nguyen brought claims under Section 1983 (42 U.S.C. § 1983), the Indian Civil Rights Act ("ICRA") (25 U.S.C. § 1302), the Stored Communications Act ("SCA") (18 U.S.C. ch. 121), and state tort law. At the heart of his complaint was a request that the district court restrain or reverse tribal government action. Nguyen requested a writ of habeas corpus for custody of A.N., declarations regarding the defendants' alleged violations of Nguyen's constitutional rights and rights under

ICRA, a "declaration vacating" the Tribal Court's 2015 decision to make A.N. a ward of the court, an injunction requiring the SMSC to stop exercising jurisdiction over A.N., and monetary damages tied to his claims under Section 1983, the SCA, and state tort law. (R. Doc. 4, at ¶¶34, 46).

2. Nguyen's Allegations Against the Business Council

Nguyen alleged that the Business Council is "a three-member panel of the Shakopee Mdewakanton Sioux Community Tribal Government, consisting of a Chairman, Vice-Chairman, and Secretary/Treasurer. The SMSC Business Council is responsible for the day-to-day operations of the tribe, and for implementing the decisions of the General Council." (*Id.* ¶4). Nguyen's allegations against the Business Council were directed against the Business Council as an entity and the collective actions of the Business Council Defendants in issuing no-trespass notices to Nguyen.

For example, Nguyen alleged that "through the actions and direction of Defendants Vig and Anderson, the SMSC Business Council issued a no-trespass order against Mr. Nguyen . . . . The SMSC Business Council never notified Mr. Nguyen that it was considering such an action, nor did the SMSC Business Council notify Mr. Nguyen of any hearing on the matter." (*Id.* ¶32; *see also* ¶¶34, 39, 40, 172). Nguyen did not allege a cause of action based on conduct attributable to any single member of the Business Council. And the no-trespass notices that are the

foundation of Nguyen's claims against the Business Council Defendants were joint actions taken by the Business Council members, not the action of a single person. (*Id.*, Ex. B (consisting of no-trespass notices from "SMSC Business Council")).

3. Nguyen's Allegations Against the Department and Its Staff

Nguyen alleged that the Department "is an agency within the Tribal Government that 'provides case management services for Community Member clients in tribal court.'" (R. Doc. 4, at ¶5). Similar to his allegations directed against the Business Council Defendants, Nguyen's allegations concerning the Department Defendants centered on their actions "on behalf of the Tribal Government," "on behalf of the SMSC Family and Children Services Department," or in their "official capacity as an SMSC Child Welfare Officer." (*Id.* ¶¶48, 168, 180).

Nguyen's claims against the Department Defendants concern actions they took as representatives of the Department, in their official roles, related to the investigation into the welfare of A.N. (*Id.* ¶¶49-79). The only factual allegation Nguyen made specifically against Defendant Nancy Martin was that she was the director of the Department when some of the alleged events occurred. (*Id.* ¶¶12, 126, 192-93). The remaining allegations concerning the Department Defendants were directed at the Department as an agency and Defendant Patricia Foley.

The allegations concerning Foley relate only to the work she did for the Department investigating the Indian child welfare matter involving A.N. Nguyen alleged that Foley improperly considered private e-mails that Gustafson sent her without copying Nguyen.[5] (*See, e.g.*, *id.* ¶¶50, 52). Nguyen also complained that Foley's conclusions and recommendations she made on behalf of the Department generally were not grounded in evidence and that Foley's investigation was biased against Nguyen. (*Id.* ¶¶51, 76-79, 85).

Taken together, Nguyen's claims, made nearly six years after many of the events in question occurred, amount to nothing more than an expression of his dissatisfaction with the results of the Department's 2014-2015 child welfare investigation and the Tribal Court's ultimate decision on custody of A.N. made in the divorce case that began in 2017 and concluded in 2020.

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[5] This is not the first time Nguyen has brought a claim based on the same e-mails to collaterally attack custody orders in his divorce proceeding. On July 20, 2018, Nguyen filed an ethics complaint against Gustafson's lawyer and the Department's lawyer in Tribal Court. Nguyen claimed in that proceeding that the attorneys knew that Gustafson read privileged and private e-mails to or from Nguyen in January 2015 and sent them to Foley. (R. Doc. 25-1, at 55-56). Nguyen requested in the ethics complaint that the Tribal Court vacate the orders in the divorce and child welfare proceedings, rescind A.N.'s ward status, and issue an order reopening any case involving Foley. (R. Doc. 25-1, at 53-54).

4. The District Court's Dismissal of Nguyen's Complaint

The Community Defendants and Jody Alholinna filed separate motions to dismiss Nguyen's complaint. Both motions were granted.[6]

The district court granted the Community Defendants' motion to dismiss on the grounds that (1) they are immune from Nguyen's claims for monetary relief and declarations that they violated law for claims against them in their official capacities; (2) Nguyen failed to state a Section 1983 claim because the Community Defendants were acting under tribal law, not state law; (3) Nguyen could not bring a habeas claim under the Indian Civil Rights Act to collaterally attack a tribal court decree as to parental rights or child custody; (4) the Department Defendants could not be held secondarily liable under the Stored Communications Act for the actions of Gustafson; and (5) the court should not exercise supplemental jurisdiction over the remaining state law claims. *Nguyen II*, 2021 WL 4993412.

However, and relevant to the Community Defendants' appeal, the district court denied the Community Defendants' request for dismissal of the claims against them purportedly in their individual capacity for monetary damages based on the Community's sovereign immunity, a threshold issue of subject matter jurisdiction for the court to address. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205

[6] Nguyen raises no apparent challenge to the dismissal of Alholinna in his appeal.

F.3d 1040, 1043 (8th Cir. 2000) (citation omitted); *Nguyen II*, 2021 WL 4993412 at *6.

The Community Defendants argued that all of Nguyen's claims should be dismissed based on sovereign immunity because, although the claims were nominally against them in their individual capacity, in truth, they are official-capacity claims as the Community and its agencies are the real parties in interest. (R. Doc. 24, at ¶¶14-17). The district court agreed that the question turned on who the real party in interest is, but decided that, based on *Lewis v. Clarke*, 137 S.Ct. 1285 (2017), the Community Defendants were the real parties in interest because Nguyen sought some monetary relief from them and named them in the complaint in their individual/personal capacity. *Nguyen II*, 2021 WL 4993412 at *6.

SUMMARY OF THE ARGUMENT

On appeal, Nguyen seemingly seeks to start his case over. His facts are largely new and not contained in the record below. He raises two of his three arguments for the first time on appeal. They should not be considered, but even if the Court does consider them, they are meritless. And his final argument, that the Community Defendants violated his constitutional rights, is irrelevant because it fails to challenge the district court's grounds for dismissing his claim under 42 U.S.C. § 1983, or his Indian Civil Rights Act claim, the claims in the complaint asserting constitutional violations.

The Community Defendants seek reversal of the district court's failure to dismiss Nguyen's claims brought against the Community Defendants in their individual capacity at the threshold of the case based on tribal sovereign immunity. Under well-settled Supreme Court precedent, as well as the majority of courts interpreting the Supreme Court's 2017 decision in *Lewis v. Clarke*, the Community and its instrumentalities were the real parties in interest in Nguyen's nominally individual or personal capacity claims—not the Community Defendants. As such, the district court erred by not dismissing all of Nguyen's claims based on sovereign immunity.

STANDARD OF REVIEW

The Court "reviews a grant of a motion to dismiss de novo, accepting as true all factual allegations in the complaint, and drawing all reasonable inferences in the nonmovant's favor." *Watso v. Lourey*, 929 F.3d 1024, 1026 (8th Cir. 2019).

RESPONSE ARGUMENT TO NGUYEN'S APPEAL

I. THE COURT SHOULD NOT CONSIDER NGUYEN'S EXTRA-RECORD FACTS AND CITATIONS

This case was decided at the motion to dismiss stage. The facts are therefore limited to what was pleaded in the complaint, documents attached to the complaint or necessarily embraced by it, and matters subject to judicial notice before the district court when the district court made its decision. *Podraza v. Whiting*, 790 F.3d 828, 833 (8th Cir. 2015); *see also Nguyen II*, 2021 WL 4993412, at *1 n.2, *3

n.4 (considering documents embraced by the complaint). Most of Nguyen's asserted facts in his Statement of the Case are irrelevant and outside the record before the district court when the district court made its decision to dismiss the case.

Only the following paragraphs from Nguyen's Statement of the Case have any basis in the record before the district court:

- The first paragraph on page seven concerning the summary of Nguyen's complaint (based on the entirety of the complaint and the counts in the complaint);
- The second paragraph on page seven concerning Nguyen, Gustafson, A.N., and Gustafson's individual struggles (based on paragraphs 1, 2, 20, 74, and 126 of the complaint);
- The first and second full paragraphs on page eight concerning no-trespass notices from the Business Council (based on paragraphs 33 and 40 of the complaint);
- The first paragraph on page eleven concerning Foley's investigation of A.N. and Gustafson's taking of Nguyen's e-mails (based on paragraphs 49-53 of the complaint);

- The second paragraph on page eleven concerning Foley's allegedly biased investigation (based on paragraphs 65 and 66 of the complaint); and
- The first full paragraph on page twelve concerning A.N. remaining a ward of the tribal court (based on paragraph 85 of the complaint).

The other "facts" from Nguyen's brief, comprising approximately six out of eight pages, are not drawn from the complaint or any other documents presented to the district court before it made its decision. The district court therefore did not consider them, and this Court cannot consider them. *Shanklin v. Fitzgerald*, 397 F.3d 596, 604 (8th Cir. 2005) (refusing to consider documents included in an appendix because they were not before the district court when the district court granted summary judgment); *Bath Junkie Branson, LLC v. Bath Junkie*, 528 F.3d 556, 559-60 (8th Cir. 2008) ("An appellate court can consider only the record and facts before the district court and thus only those papers and exhibits filed in the district court can constitute the record on appeal.").

Instead of basing his facts on the complaint, Nguyen cites documents attached to his application to proceed in forma pauperis ("IFP"), which he filed in the district court after he filed his notice of appeal. (R. Docs. 64-66).[7] At the time

[7] The district court denied Nguyen's petition on March 7, 2022. (R. Doc. 68).

the documents were submitted to the district court, it was unclear how they were relevant to his IFP application. It is apparent now that the IFP application was a Trojan horse—Nguyen filed the documents with the district court so that he could improperly cite them in his appellate brief. He went a step further and filed them as "exhibits" to his appellate brief. There is no basis in the Federal Rules of Appellate Procedure for him to file exhibits to his appellate brief, much less exhibits that were not part of the record below.

Regardless, these new allegations, which pertain mostly to Nguyen's complaints about his ex-wife Gustafson, the Community, the Tribal Court, and Nguyen's admitted litigious history, are irrelevant to the claims that the district court dismissed.

II. NGUYEN FAILED TO PRESERVE HIS FIRST AND THIRD ARGUMENTS RAISED ON APPEAL

Nguyen's first argument is that the Tribal Court lacked exclusive jurisdiction over the child welfare proceeding based on the decision of the Ninth Circuit Court of Appeals in *Doe v. Mann*, 415 F.3d 1038, 1053-68 (9th Cir. 2005), Appellant's Br. at 17, and his third argument is that the Minnesota Commissioner of Human Services lacked authority to enter into a 2007 Tribal/State Agreement, *id.* at 19. Both arguments fail because Nguyen (1) did not raise either argument in the district court and (2) failed to make a claim in the complaint related to his third argument. This Court will not consider an argument for the first time on appeal

unless it "is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result." *Hartman v. Workman*, 476 F.3d 633, 635 (8th Cir. 2007) (quoting *P&O Nedlloyd, Ltd. v. Sanderson Farms, Inc.*, 462 F.3d 1015, 1019 (8th Cir. 2006)). Further, claims that are not stated in a party's complaint, even if that party is pro se (which Nguyen was not in the district court), cannot be raised on appeal. *Prowse v. Prowse*, 984 F.3d 700, 704 (8th Cir. 2021).

Nguyen did not present his first argument, that the Tribal Court lacked *exclusive* jurisdiction over the child welfare case involving A.N. under *Doe v. Mann*, to the district court. (Appellant's Br. at 17). And Nguyen mentioned the 2007 Tribal/State Agreement ("Agreement")[8] for the first time in this case when he filed his opening brief. (Appellant's Br. at 19). He made no argument related to the Agreement to the district court and the district court did not decide the issue he now raises, of the Commissioner's authority to enter it. Nguyen also made no claim related to the Agreement in his complaint.

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[8] The 2007 Agreement between the Commissioner of Human Services and Minnesota's Indian tribes was "intended to coordinate the abilities and to maximize the guidance, resources and participation of tribes in order to remove barriers from the process that impede the proper care of Indian children." https://www.mncourts.gov/documents/0/Public/Childrens_Justice_Initiative/TRIBAL_STATE_AGREEMENT_-_Combined.pdf at 2. The Agreement "states the policies and procedure agreed to by both the tribes and the State and specifies the roles and duties of each in the implementation of child welfare services to Indian families and children." *Id.*

There being no justification for addressing these issues now, the Court does not need to address either argument because Nguyen failed to preserve them. Regardless, as we turn to next, both arguments are facially meritless even if they had been properly made and preserved for appeal.

III. THE APPELLEES HAVE NO POWER TO ALTER THE JURISDICTION OF THE TRIBAL COURT, WHICH PROPERLY EXERCISED JURISDICTION OVER A.N.

Nguyen challenges the Tribal Court's exercise of jurisdiction over A.N., but the Community Defendants have no power to alter or stop the exercise of jurisdiction over A.N.—even if Nguyen's claims had merit. Without that power, and because Nguyen named no one with that power in his complaint, his argument fails. Moreover, assuming *arguendo* that the Community Defendants did have that power, the Tribal Court properly exercised jurisdiction over A.N.

A. The Appellees Have No Power to Alter the Jurisdiction of the Tribal Court

Like state officials, tribal officials can be named in an *Ex Parte Young* suit for prospective, injunctive relief. *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993). Accordingly, "tribal immunity does not bar . . . a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014) (emphasis in original).

In his first argument, Nguyen claims (as best we can tell) that the Tribal Court unlawfully exercised jurisdiction over A.N. in the child welfare case. (Appellant's Br. 17). But Nguyen failed to name an official that was responsible for the alleged unlawful conduct. The Appellees did not exercise tribal court jurisdiction over A.N., and they do not have the power to alter the jurisdictional holdings of the Tribal Court in a tribal child welfare matter. That power belongs to the Tribal Court judge assigned to A.N.'s case. Therefore, Nguyen's argument asserting lack of Tribal Court jurisdiction over A.N. cannot be remedied based on his complaint.

B. The Tribal Court Had Jurisdiction Over A.N.

As this Court held in *Watso v. Lourey*, 929 F.3d at 1027, another challenge to the Tribal Court's jurisdiction over Indian child welfare proceedings, the Tribal Court has at least concurrent jurisdiction over child welfare proceedings involving member children. And the Community's exercise of that jurisdiction "is consistent with Public Law 280." *Id.*

Watso argued that *Doe v. Mann*—the case that Nguyen relies on for his argument—divested the Tribal Court of jurisdiction over the child welfare case involving her child, who is a member of the Community; but the Court recognized that *Doe v. Mann* stands for the proposition that "Public Law 280 states have only concurrent jurisdiction with the tribes over child custody proceedings involving

Indian children." *Id.* (quoting *Mann*, 415 F.3d at 1063 n. 32). *Doe v. Mann* does not somehow divest the Community of such jurisdiction. *Id.*; *see also Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 559-62 (9th Cir. 1991) (rejecting the argument that states have exclusive jurisdiction over Indian child welfare cases).[9]

Concurrent jurisdiction is all that was necessary for the Tribal Court to have exercised jurisdiction over A.N.—as there was no competing state court case or attempt by the state to exercise jurisdiction. Because the Tribal Court had at least concurrent jurisdiction over A.N.'s child welfare case, Nguyen's jurisdiction argument fails.

IV. NGUYEN'S SECOND ARGUMENT RELATED TO THE VIOLATION OF HIS CONSTITUTIONAL RIGHTS FAILS BECAUSE HE HAS NOT CHALLENGED THE BASIS FOR THE DISTRICT COURT'S DECISION TO DISMISS HIS CLAIMS

The district court dismissed Nguyen's constitution-based claims under 42 U.S.C § 1983 because it concluded that Nguyen failed to plead that the Community Defendants were acting under color of state law. Deprivation of constitutional rights by a defendant acting under color of state law is the *sine qua non* of a

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[9] Nguyen mentions, without citation or argument, the case of *Sandman v. Dakota* in his heading on page 17 of his brief. *Sandman v. Dakota*, 816 F. Supp. 448 (W.D. Mich. 1992), does not support his appeal. Like the district court here, the *Sandman* court held that a tribal court child welfare placement decision cannot be challenged under ICRA's habeas provision. *Id.* at 451.

Section 1983 claim. *E.g., Creason v. City of Washington*, 435 F.3d 820, 823 (8th Cir. 2006). Instead, Nguyen alleged *in his complaint* that the Community Defendants were acting under color of tribal law. (R. Doc. 4, at ¶¶4-5); *Nguyen II*, 2021 WL 4993412, at *7 ("The only plausible inference is that the Community Defendants acted under the color of tribal law."); *see also id.* at *6 ("It is settled law that a defendant acting under tribal authority is not acting under color of state law and that no action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law" (quoting *Coleman v. Duluth Police Dept.*, 2009 WL 921145, at *23-24 (D. Minn. Mar. 31, 2009))). The district court did not reach the issue of whether the Appellees violated Nguyen's constitutional rights or deprived him of those rights, because the essential predicate for such a claim—action under color of state law—was absent from Nguyen's complaint.

Yet, Nguyen fails to challenge the dispositive color-of-state-law issue. Nguyen instead argues in his second appeal issue that the district court erred by not holding that his constitutional rights were violated by the "overreach of the tribal court," simply repeating his error below of asserting a claim based on action under tribal, not state law. (Appellant's Br. at 18). Because Nguyen has failed to point out any error in the basis for the district court's dismissal of his Section 1983 claim, the district court's decision to dismiss the claim should be affirmed.

To the extent Nguyen's argument is directed at his ICRA[10] claim (it is unclear), that claim was also dismissed on unchallenged grounds. The district court dismissed Nguyen's ICRA habeas claim (the only relief available in federal court) because he did not "plausibly allege that A.J.N. is being detained by the Community. . . . Instead, Nguyen seeks to challenge the validity of the Tribal Court's custody determination." *Nguyen II*, 2021 WL 4993412, at *8. The district court continued, "Nguyen's allegations plainly show that he seeks to relitigate his own parental rights rather than any liberty interest of A.J.N. Habeas relief under § 1303 [of ICRA] is not available under these circumstances." *Id.* Nguyen's failure to appeal or challenge the district court's detention determination dooms any appeal of the dismissal of his ICRA claim.

V. NGUYEN'S THIRD ARGUMENT RELATED TO THE 2007 TRIBAL/STATE AGREEMENT IS IRRELEVANT AND WRONG

In his third argument on appeal (related to the Agreement), Nguyen remains focused on his objection to the Tribal Court having exclusive jurisdiction over tribal member child welfare proceedings. (Appellant's Br. 19). Again, the Tribal Court did not need to have exclusive jurisdiction to exercise jurisdiction over A.N. All the Tribal Court needed was concurrent jurisdiction—which Nguyen does not challenge. The Tribal Court's concurrent jurisdiction makes Nguyen's new

[10] ICRA contains its own version of the due process clause. 25 U.S.C. § 1302(a).

argument that the Agreement illegally granted the Community exclusive jurisdiction irrelevant. *Cf. Bear Robe v. Parker*, 270 F.3d 1192, 1195-96 (8th Cir. 2001) ("The additional arguments [Appellant raised] have no bearing on the question on which the district court granted summary judgment, and thus we need not address them.").

Nevertheless, Nguyen argues that former Minnesota Commissioner of Human Services Cal Ludeman did not have authority to enter into the Agreement on behalf of Minnesota, which Agreement, Nguyen claims, gives the Community exclusive jurisdiction. (Appellant's Br. at 13). Nguyen argues that in supposedly granting tribes exclusive jurisdiction over child welfare matters involving Indian children, the Commissioner circumvented other federal laws and failed to allow for "fair debate to consider how this would affect the children of Minnesota." (*Id.*). His challenge is meritless.

Nguyen provides no citation in support of his untimely argument. Worse for his appeal still, the Agreement itself states the basis for the Commissioner's authority: "The Commissioner of Human Services is authorized to enter into this Agreement on behalf of the State of Minnesota. Minn. Stat. § 260.771, subd. 5

(2006)."[11] Minn. Stat. § 260.771, subd. 5 states that the "commissioner is hereby authorized to enter into agreements with Indian tribes pursuant to United States Code, title 25, section 1919, respecting care and custody of Indian children and jurisdiction over child custody proceedings[.]" The Agreement is an agreement between the Commissioner and Indian tribes pursuant to 25 U.S.C. § 1919.[12] Thus, this new argument fails on the merits as well, even if the Court could consider it.

COMMUNITY DEFENDANTS' APPEAL ARGUMENT

I. THE BUSINESS COUNCIL DEFENDANTS AND THE DEPARTMENT DEFENDANTS SHARE THE COMMUNITY'S SOVEREIGN IMMUNITY

The Community's sovereign immunity protects the individual Community Defendants from Nguyen's claims for money damages. In recognition of well-settled law concerning the real party in interest, which was reaffirmed by the Supreme Court in 2017, the Court should apply a test created by the Fourth and Seventh Circuit Courts of Appeals to determine whether the "effect of the relief sought" by Nguyen would "interfere with public administration." The Court should reject the district court's analysis that contemplated only one part of a disjunctive, three-part test adopted by the Supreme Court. Application of the proper test should

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[11] https://www.mncourts.gov/documents/0/Public/Childrens_Justice_Initiative/TRIBAL_STATE_AGREEMENT_-_Combined.pdf at 2.

[12] *Id.*

lead the Court to conclude that the Community is the real party in interest in this suit, and, therefore, the individual claims against the Community Defendants should have been dismissed at the threshold based on sovereign immunity.

A. The Court Should Adopt the Fourth and Seventh Circuits' Test for Determining the Real Party in Interest

Whether the Community Defendants share the Community's sovereign immunity[13] depends on if the Community or the individual Defendants are the real party in interest. To make that determination, the Court should follow well-settled Supreme Court precedent. It should also adopt an interpretation of the Supreme Court's recent decision in *Lewis v. Clarke*, 137 S.Ct. 1285 (2017), that does not conflict with the settled Supreme Court precedent—which *Lewis* cited favorably.

1. Tribal Officials Sued in Their Individual Capacity Share Tribal Sovereign Immunity When They Are the Real Parties in Interest

Sovereign immunity is a threshold jurisdictional question that must be addressed before the merits. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 171 (2009); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011). "As a matter of federal law, an Indian tribe is subject to suit only where

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[13] The only immunity at issue before the district court, and thus before this Court, is sovereign immunity. The Community Defendants did not assert, but have not waived, other potential immunity defenses such as judicial or quasi-judicial immunity, qualified immunity, or legislative immunity.

Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). The Community is a federally recognized Indian tribe and possesses sovereign immunity from suit. *Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996).

Tribal employees or officials sued in their official capacity share the Community's immunity, because "[a] suit against a governmental actor in his official capacity is treated as a suit against the government entity itself." *Brokinton v. City of Sherwood, Ark.*, 503 F.3d 667, 674 (8th Cir. 2007). "[A] plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 714, 727 (9th Cir. 2008). As Nguyen alleges, all of the Community Defendants are current or former tribal elected officials or employees. (R. Doc. 4, at ¶¶6-12).

When a tribal employee or official is sued in an individual capacity, whether the employee or official shares a tribe's sovereign immunity hinges on the question of whether the individual or the tribe is the real party in interest. *Lewis*, 137 S.Ct. at 1290. The Supreme Court in *Lewis* was clear that courts should not decide who the real party in interest is based on whether a plaintiff nominally names an official in his or her individual capacity in the complaint: "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint,

but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* (citing *Ex parte New York*, 256 U.S. 490, 500-02 (1921)).

In *Lewis*, which was originally a state court case in Connecticut, the Supreme Court decided that the defendant (Clarke) was the real party in interest, not the tribe. *Id.* at 1291. Clarke, a tribal employee, was sued by a couple (the Lewises) after he rear ended them while driving casino patrons home in a company limousine. *Id.* at 1289. Clarke was not involved in the exercise of the tribe's sovereignty. *Id.* The Supreme Court reasoned that what followed was "a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut." *Id.* It was "not a suit against Clarke in his official capacity." *Id.*

The Supreme Court in *Lewis* applied, in the Indian-law context, a series of cases that have analyzed the question of determining who the real party in interest is in a suit against a public employee or official. Leading cases in this line are *Dugan v. Rank*, 372 U.S. 609 (1963), cited in *Lewis*, 137 S.Ct. at 1291, and *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984). Under the *Dugan-Pennhurst* line of cases, "the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." *Pennhurst*, 465

U.S. at 107.[14] Thus, "[a] suit is against the sovereign if [1] the judgment sought would expend itself on the public treasury or domain, or [2] interfere with the public administration, or [3] if the effect of the judgment would be to restrain the Government from acting or to compel it to act." *Pennhurst*, 465 U.S. at 102, n.11 (quoting *Dugan*, 372 U.S. at 609);[15] *see also Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011) (quoting the rule from the *Dugan-Pennhurst* cases); *Dugan*, 372 U.S. at 620 (stating the same tripartite rule); *Land v. Dollar*, 330 U.S. 731, 738 (1947) (same); *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1102 (8th Cir. 2012) (stating the three-factor rule and determining that a tribal administrator did not have to comply with a civil subpoena because he

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[14] In *Dugan*, the Supreme Court held that the United States was the real party in interest in a suit against federal officials seeking to enjoin the federal government from storing or diverting water to the San Joaquin River at Friant Dam or a decree regarding water rights of the parties. *Dugan*, 372 U.S. at 620-21. The court reasoned that a judgment against the officials would require the federal government to alter a significant water project approved by the Secretary of Interior and/or expend funds to construct additional dams. *Id.* Under those circumstances, the court decided, the judgment would interfere with public administration and expend itself from the public treasury. *Id.* at 621.

In *Pennhurst*, the court held that the state-employee defendants, who operated a Pennsylvania institution for the care of the mentally disabled, were immune from suit when they acted "within the sphere of their official responsibilities," "had nothing to gain personally from their conduct," and "were not found to have acted wilfully or even negligently." 465 U.S. at 107. "As a result, all the relief ordered by the courts below was institutional and official in character." *Id.* at 108.

[15] The Supreme Court in *Lewis* cited *Dugan*, the case quoted in footnote 11 of the *Pennhurst* opinion.

shared the tribe's sovereign immunity) (citing *Dugan*, 372 U.S. at 620); *U.S. ex rel. Guadineer & Comito, LLP v. Iowa*, 269 F.3d 932, 937 (8th Cir. 2001) (deciding that an official shared sovereign immunity because the plaintiff failed to allege that the official acted outside of his official duties).

Although the *Dugan-Pennhurst* line of cases is older than *Lewis*, as the district court pointed out, *Nguyen II*, 2021 WL 4993412, at *6, the Supreme Court in *Lewis* did not overrule them, or the numerous other cases relying on the same tripartite formulation of the real party in interest analysis applicable to nominally individual-capacity claims against public officials. The opposite is true; the Supreme Court in *Lewis* cited the line of sovereign immunity cases both before and after *Pennhurst* applying the real party in interest test, and confirmed that those cases should control the analysis in the context of tribal sovereign immunity. *Lewis*, 137 S.Ct. at 1291 ("There is no reason to depart from these general rules in the context of tribal sovereign immunity.")

2. The Majority of Courts Apply a Different Test to Determine the Real Party in Interest than the District Court Applied Here

Because the real party in interest test from the *Dugan-Pennhurst* line of cases has vitality post-*Lewis*, the district court erred by deciding that sovereign immunity did not bar Nguyen's claims against the Community Defendants in their individual capacity on the sole bases that Nguyen named them in their individual

capacity and sought monetary damages. *Nguyen II*, 2021 WL 4993412, at *6. Further analysis was necessary, and that further analysis should have led the district court to the legal conclusion that, based on the allegations in Nguyen's complaint, the Community or its departments or agencies are the real parties in interest, not the named individual Defendants.

Several courts that have interpreted or relied on *Lewis v. Clarke* since it was decided in 2017 have rejected the district court's reasoning that courts should only "look to the remedy sought to determine the real party in interest." *Nguyen II*, 2021 WL 4993412, at *6. They have determined that such a test would permit too many plaintiffs to sue tribal, state, and local officials for monetary damages under the guise of an individual/personal claim, where the locus of the claim was really against governmental or official action, not individual action.

For example, the Fourth Circuit Court of Appeals, in *Cunningham v. Lester*, addressed a class action suit against federal employees in their (nominally) individual capacity for monetary damages based on alleged violations of the Telephone Consumer Protection Act. 990 F.3d 361, 363 (4th Cir. 2021) (J. Wilkinson). The plaintiff alleged that the defendants violated the act by calling him to deliver a pre-recorded message related to the deadline for him to enroll in a federal healthcare program. *Id.* at 364. The defendants were instructed by a federal

agency to deliver the message to satisfy a statutory mandate of the Affordable Care Act. *Id.* at 363.

The Fourth Circuit, in holding the claim barred by sovereign immunity, rejected the appellant's argument there that *Lewis* overruled the Supreme Court's real party in interest precedent in favor of a bright line rule that if a plaintiff named a defendant in an individual or personal capacity and sought monetary damages, then sovereign immunity did not bar the claim. 990 F.3d at 367. The court reasoned that such a rule would collapse "the distinction between genuine and nominal personal-capacity suits." *Id.* The court held that "ultimately, *Lewis* does not purport to break from the [Supreme] Court's substantive approach to its real-party-in-interest jurisprudence." *Id.*

Instead, quoting *Pennhurst*, the Fourth Circuit reasoned that if the individual defendant was only nominally named in an individual capacity, "[s]overeign immunity bars suit [against an individual] *regardless of whether the plaintiff seeks damages or injunctive relief*." *Id.* at 366 (emphasis in original). The court examined a range of criteria to determine whether the effect of the relief sought made the sovereign the real party in interest, whether by operating against the sovereign or interfering with the public administration. The factors analyzed by the court included whether the complained of actions were inextricably tied to official duties, whether the sovereign would be burdened by a judgment against the

individual defendant, whether the judgment would operate against the sovereign, whether the official's actions were taken to further personal interests, and whether the officials' actions were *ultra vires*. *Id.*

The Fourth Circuit ultimately determined that the real party in interest in *Cunningham* was the sovereign because (1) the defendants were sued for actions they took in their official capacity, unlike the defendant in *Lewis* who was sued based on personal negligence; (2) it was not plausible that the defendants in *Cunningham* were acting in their own private interest; (3) there was no allegation that the defendants were acting outside of their official capacities; and (4) the change in future behavior of officials acting in the same capacity if the officials named in the case were burdened with a monetary judgment. *Id.* at 367-68.

Similarly, in *Genskow v. Prevost*, the Seventh Circuit Court of Appeals held that four tribal police officers were immune from a suit for monetary damages in their individual capacity. 825 Fed. Appx. 388, 391 (7th Cir. 2020). In that case, the tribal chairman allegedly ordered the four officers to remove the plaintiff tribal member from a tribal meeting. *Id.* at 390. The plaintiff alleged that the officers illegally removed her using excessive force. *Id.* at 389-90.

The Seventh Circuit held that to the extent the plaintiff's action was based on the chairman's order that she be removed, the claim could not survive because the tribe was the real party in interest "because the officers' actions in essence

were the tribe's own." *Id.* at 391 (quotation omitted). "In carrying out the Chairman's directive, the officers were acting merely as an arm or instrumentality of the tribe." *Id.*

And to the extent the plaintiff's claim was based on excessive force used by the officers without being ordered to use it by the chairman, the court held that the tribe's sovereign immunity still barred the suit because the suit was intended to impact tribal self-government and "'undermine the authority of tribal forums,' which 'have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personnel and property interests of both Indians and non-Indians.'" *Id.* at 391 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 649, 664-65 (1978)).

The Seventh Circuit reasoned that *Lewis* differed from the *Genskow* case "in material ways." *Id. Lewis* was an "action for damages brought by a non-Indian for personal injuries sustained in a car accident on a state highway," which "would not require involvement by the sovereign or disturb the sovereign's property." *Id.* (quoting *Lewis*, 137 S.Ct. at 1292). By contrast, in *Genskow*, "a tribal member [sought] to hold individual officers liable for using excessive force while removing her from a meeting of the Nations' governing body on tribal land at the Tribal Chairman's direction." *Id.* The Seventh Circuit concluded that the suit could not proceed in such conflict with principles of tribal self-government. *Id.*

The Connecticut Supreme Court has also rejected the mode of analysis adopted by the district court in favor of a test similar to the one adopted by the Fourth Circuit. *See Great Plains Lending, LLC v. Department of Banking*, 259 A.3d 1128, 1151 (Conn. 2021). Great Plains Lending was a tribal lending entity created by tribal council resolution. *Id.* at 1134. The Connecticut department of banking investigated the company and affiliated entities for violations of banking and usury laws. *Id.* at 1135. It discovered that the tribal lending entities violated the state's banking laws by making small, high-interest consumer loans to Connecticut residents via the internet (often referred to as "pay day loans") without a license to do so. *Id.* The department issued cease and desist orders and ordered that the defendant lending entities and the defendant individual, a chairman of the tribe and secretary and treasurer of the entities, pay restitution. *Id.* The entities and the individual challenged the department's prosecution of the claims on sovereign immunity grounds. *Id.*

In its decision, the Connecticut Supreme Court looked to the same pre-*Lewis* line of cases, adopted to Indian law in *Lewis*, to determine the real party in interest. *Id.* at 1151 (citing *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985)).To determine the real party in interest, the Connecticut Supreme Court held that courts can consider whether (1) the actions of the officials were taken to further personal interests distinct from the sovereign's interest, (2) the allegedly unlawful actions of

the officials were tied inextricably to their official duties, (3) the burden of relief would be borne by the sovereign if the official had authorized the relief at the outset, (4) a judgment would be institutional and official in character so as to operate against the sovereign, (5) the official's actions were *ultra vires*, and (6) allegations were directed at specific conduct of the officials. *Id.*

Ultimately the court determined that the administrative action being brought against the tribal official was blocked by sovereign immunity. *Id.* The court pointed out that there were no allegations about personal wrongdoing by the tribal official that gave rise to the alleged violation of Connecticut banking and usury laws that were the subject of the action. *Id.* Instead, the tribal official was nominally named as an individual because of his official-capacity role as a high-ranking officer of the tribe and of tribal entities, "rather than as a result of personal actions taken within the scope of his official capacity." *Id.* at 1152. The court distinguished negligence and fraud cases based on actions performed by individual tribal officials, from which tribal officials generally are not immune from suit. *Id.* n.16.

In contrast to those decisions, the Ninth Circuit Court of Appeals has adopted a test focused only on whether the remedy sought was against the tribe, with a few exceptions. *See Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 910 (9th Cir. 2021). In *Acres Bonusing*, the plaintiff sued a tribal court judge, law clerks,

clerk of the tribal court, tribal officials, and outside law firms that represented the tribe after a tribal corporation allegedly wrongfully pursued a tribal court case against the plaintiff in conspiracy with the chief judge of the tribal court. *Id.* at 906.

The court acknowledged that whether the defendants shared tribal sovereign immunity depended on who the real party in interest was. *Id.* at 908. But the Ninth Circuit decided that the critical question in determining the real party in interest is whether the remedy sought is truly against the sovereign. *Id.* And to answer that question, the court examined whether (1) the defendants were named in their individual capacity and (2) the plaintiff sought monetary damages. *Id.* at 910. Based on this more-truncated analysis, similar to what the district court performed here, the majority held that sovereign immunity did not bar the suit at least as to some defendants because the plaintiffs sought "money damages against the defendants in their individual capacities" and any "relief ordered by the district court will not require [the tribe] to do or pay anything." *Id.* at 910. The court rejected the argument that the *Dugan-Pennhurst* line of cases required a deeper analysis. *Id.* at 911.

Notably, in a concurrence, Judge Gary Feinerman took the majority to task for not fully applying and distinguishing all three parts of the *Dugan-Pennhurst* analysis for determining when sovereign immunity bars a claim against an individual defendant. *Id.* at 917 ("This disjunctive, three-part test is one that we

and the Supreme Court have consistently articulated and applied when a party invokes sovereign immunity, be it federal, state, or tribal." (citing the long line of Supreme Court cases that we have cited above)). Judge Feinerman reasoned that the majority's rational only paid

> heed to the first ("the judgment sought would expend itself on the public treasury or domain") and the third ("the effect of the judgment would be to restrain the tribe from acting, or to compel it to act") components of the sovereign immunity test, but it leaves no room for the independent operation of the second ("where the judgment sought would . . . interfere with the public administration"). Diminishing or excising the second component in that way cannot be reconciled with the Supreme Court's (and our) articulation of the test in a disjunctive manner, with three separate and independent grounds for sovereign immunity.

Id. at 918.

However, Judge Feinerman concurred in the result because he agreed that under the circumstances "a retrospective monetary judgment against the named defendants, based wholly on liability for their past conduct, would not interfere with the Tribe's administration of its own affairs." *Id.* Judge Feinerman's reasoning comports with Supreme Court and Eighth Circuit precedent (*Alltel* and *Guadineer*); the *Acres Bonusing* majority's does not.

3. The Court Should Adopt and Apply the Test from the Fourth and Seventh Circuits

The Court should adopt a test based on the decisions from the Fourth and Seventh Circuits post-*Lewis* to determine the identity of the real party in interest in

a nominally individual-capacity action against a tribal official or employee because (1) these courts most faithfully apply the three-part analysis employed in the *Dugan-Pennhurst* line of cases and endorsed in Indian law in *Lewis* to assess the real party in interest; (2) as the Fourth Circuit recognized, the test adopted by the Ninth Circuit in Ac*res Bonusing* would collapse the distinction between genuine and nominal personal-capacity suits—effectively overruling seventy-five years of Supreme Court precedent distinguishing the two;[16] (3) the test adopted by the Ninth Circuit would permit plaintiffs to avoid tribal sovereign immunity through artful pleading, a view the Supreme Court rejected in *Lewis*;[17] (4) giving plaintiffs the ability to bring claims against tribal leaders for actions they took on behalf of the tribal government negatively impacts tribal sovereignty and self-determination; and (5) the Fourth Circuit's and Seventh Circuit's analyses are consistent with this Court's precedent from *Alltel* and *Guadineer* while the Ninth Circuit's in *Acres Bonusing* is not.[18]

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[16] *See Land*, 330 U.S. at 738 (dismissal case based on sreal party in interest test).

[17] 137 S.Ct. at 1290.

[18] The holding in *Guadineer* was that the official was immune from suit because he was acting in the scope of his official duties and a judgment against him would interfere in the administration of an Iowa government program. 269 F.3d at 936-937. In *Alltel*, the Court relied on the rule enunciated in the *Dugan-Pennhurst* line of cases and determined that the tribal official was immune from suit (service of a discovery subpoena). 675 F.3d at 1102 (citing *Dugan v. Rank*). Under *Acres Bonusing*, it does not matter if the official acted within his or her official duties;

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Thus, to determine whether a sovereign is the real party in interest, the Court should focus on the "effect of the relief sought." *Pennhurst*, 465 U.S. at 107. "A suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting or to compel it to act." *Id.* at 102, n.11 (quotation omitted) (emphasis added).

To determine the effect of the relief sought, the Court should examine (1) whether the complained of actions were inextricably tied to the defendant official's duties; (2) whether the sovereign would be burdened by a judgment against the individual; (3) whether the judgment would operate against the sovereign, either monetarily or through compelling or restraining the government from acting; (4) whether the actions allegedly taken were in furtherance of the personal interests of

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what matters is whether the official was simply named in an individual capacity and whether the plaintiff is seeking money damages. *Acres Bonusing*, 17 F.4th at 910.

Lewis didn't hold that whether the tribal employee defendant was acting within the scope of her duties was irrelevant to the question of sovereign immunity, only that it was not 'on its own, sufficient to bar a suit.'137 S.Ct. at 1288. That a tribal official was acting within the scope of her duties still is an important indicator that the action taken was that of the tribe, and the tribe is the real party in interest. The district court here overstated the holding of *Lewis* in concluding that, "[t]he fact that the Community Defendants were acting within the scope of their employment at the time of their allegedly unlawful conduct does not implicate tribal sovereignty." *Nguyen II*, 2021 WL 4993412, at *6.

the official; (5) whether the official's alleged actions were *ultra vires*; and (6) whether the official's actions were, in essence, the tribe's own actions. *Cunningham*, 990 F.3d at 366; *Genskow*, 825 Fed. Appx. at 391.

However the Court chooses to formulate the factors to consider in applying the real party in interest test, there is no basis for ignoring the second prong of the three-part test (whether the judgment would interfere with public administration) cited in *Lewis* and prior cases. *See, e.g., Dugan*, 372 U.S. at 609; *Alltel*, 675 F.3d at 1102. That part of the disjunctive three-part test remains good law and must be applied. The district court indisputably did not apply it. It should be dispositive here, as explained below.

B. The Business Council Defendants Are Immune from Suit

Nguyen's claims directed at the Business Council Defendants' actions, taken on behalf of the Community, should be barred by sovereign immunity. In terms of the non-exclusive factors we suggest the Court apply to determine the real party in interest, each points to a conclusion that the Community is the real party in interest here.

First, the complained of actions are inextricably tied to these Defendants' official duties. (*Supra* at 12-13). Second and third, the Community would be burdened by a judgment against the Business Council Defendants because it will impact Business Council members' decisions to exclude individuals from the

Community's Reservation in the future, a core aspect of tribal sovereignty. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) ("[A] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands."). The Community's decision makers should not be threatened with monetary damages by an excluded individual who believes the decision, made on behalf of the entire tribe, was wrong. That is precisely the type of governmental decision that sovereign immunity is intended to insulate from claims for monetary or injunctive relief.

Fourth, there is no allegation that the Business Council Defendants acted in their own personal interests when voting to exclude Nguyen. In fact, Nguyen did not allege that any individual Business Council Defendant did something actionable. *See Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1297 (10th Cir. 2008) (determining that a claim nominally against individuals was in fact against the sovereign because there were no allegations "fairly attributable to the officer himself" and instead were made against individuals as "the principal of the" tribal entity); *Great Plains Lending*, 259 A.3d at 1152 (determining that the tribe was the real party in interest because the plaintiff did not allege that the defendant "personally engaged in any conduct giving rise to these proceedings"). Fifth, Nguyen himself alleges that the Business Council Defendants were acting within the scope of their official duties, so they

were not *ultra vires*. (R. Doc. 4, at ¶32). Sixth and finally, the actions of the Business Council Defendants in issuing no trespass notices in general (and as to Nguyen in particular) were, and are, actions taken on behalf of the entire Community. (*Id.* ¶¶32, 34; R. Doc. 1-2 (Ex. B to the Amended Complaint)).

Other decisions that predate *Lewis*, but are not inconsistent with its holding, also support dismissing the claims against the Business Council Defendants on sovereign immunity grounds. Even under the Ninth Circuit's more restrictive precedent, Nguyen's claims against the Business Council Defendants should have been dismissed. In *Hardin v. White Mountain Apache Tribe*, the Ninth Circuit affirmed the dismissal of claims brought by the plaintiff based on the tribe's exclusion of the plaintiff from the reservation. 779 F.2d 476, 478-80 (9th Cir. 1985).[19] The plaintiff's suit was based on a resolution from the tribal council to petition the tribal court to exclude the plaintiff from the reservation, which petition the tribal court granted. *Id.* at 478. The court reasoned that "tribal immunity extends to individual tribal officials acting in their representative capacity and

[19] The Ninth Circuit reaffirmed that *Hardin* is still good law in *Acres Bonusing*. 17 F.4th at 911. The district court assumed, without close analysis, that *Hardin* was no longer good law in light of *Lewis*. *Nguyen II*, 2021 WL 4993412, at *6 ("Relying on pre-*Lewis* case law from other circuits, the Community Defendants argue that the Community is the real party in interest with respect to all of Nguyen's claims against them because success on his claims would result in interference with tribal

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within the scope of their authority." *Id.* at 479. And because "all the individual defendants here were acting within the scope of their delegated authority, Hardin's suit against them is also barred by the Tribe's sovereign immunity." *Id.* at 479-80.

This Court has applied the same test to affirm a district court decision denying a plaintiff permission to amend a complaint to add a meritless individual-capacity claim against a federal program administrator. *Guadineer*, 269 F.3d at 937. The Court refused to rely wholly on "the elementary mechanics of captions and pleading[; and, instead, looked] at whether the alleged conduct of the defendant was outside his official duties." *Id.* (cleaned up with quotations removed). Because the plaintiff's amended complaint failed to allege how the state official's actions were outside of his official duties, the district court's decision not to permit the amendment was affirmed. *Id.*

Similarly, in *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, the California Court of Appeals held that individual tribal council members were immune from suit because the acts complained about were "official actions taken by the tribal council on behalf of the tribe[.]" 74 Cal.App.4th 1407, 1422 (Cal. App. 1999). The plaintiff had alleged that the council members

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governance. . . . But *Lewis* makes clear that courts should look to the remedy sought to determine the real party in interest.").

concocted a fraudulent scheme to escape the tribe's responsibilities under a casino management contract between the plaintiff and the tribe. *Id.* at 1412-13. According to that court, "sovereign immunity does extend to tribal officials when they act in their official capacity and within the scope of their authority." *Id.* at 1421. The plaintiff failed to allege "any tribal official acted independently of the tribe or its council. Thus the allegations of [plaintiff's] first amended complaint demonstrate the action is in substance against the tribe itself." *Id.*

As in *Hardin* and *Morongo*, Nguyen's claims against the Business Council Defendants are founded in the Business Council's actions on behalf of the entire tribe (issuing no-trespass notices to Nguyen). And Nguyen did not allege that any of the Business Council Defendants acted outside of their official duties or capacity.

Because the Community is the real party in interest, the district court erred in not dismissing all claims against the Business Council Defendants based on sovereign immunity.

C. The Department Defendants Are Immune from Suit

Based on the factors considered by the Fourth Circuit in *Cunningham* and the Seventh Circuit in *Genskow* to determine the real party in interest, all claims against the Department Defendants should also have been dismissed on the basis of

sovereign immunity. That conclusion is also consistent with this Court's decisions in *Alltel* and *Guadineer*.

The actions that form the foundation of Nguyen's claims against Foley and Martin are inextricably tied to their official duties, including Foley's instigation of an investigation into the welfare of A.N. and the welfare investigation itself. (R. Doc. 4, at ¶¶49-79). The Community would be burdened by any judgment against the Department Defendants because it would impact how Department officials exercise a key piece of the Community's tribal sovereignty in the future—decisions related to the welfare of member children. *E.g.*, 25 U.S.C. § 1901(3) ("there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989) ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA. Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts."). Similar to future Business Council members, future Department child welfare officers and directors would be concerned as they carry out their official duties that they may be sued for money damages for actions they take in their role as Department employees by parents who disagree with their analysis and recommendations to the Tribal Court—and generally at least one parent is going to be unhappy with the result of the Department's work.

There are no allegations that the Department Defendants took any of the complained-about actions for personal gain. In fact, there are no substantive allegations concerning Nancy Martin whatsoever. From the face of the complaint, it appears she was named only because of her role as Director of the Department, which is by definition not a properly stated claim for individual liability. *Supra* at 13. And although there are specific allegations concerning Foley receiving e-mails from Gustafson while Foley acted in her role as a child welfare officer, none of Foley's actions were allegedly taken for personal gain. They were allegedly taken for the benefit of Nguyen's ex-wife, Gustafson. (R. Doc. 4, at ¶¶75, 78 ("Ms. Foley was actively working with and on behalf of Ms. Gustafson . . . . Ms. Foley acted as Ms. Gustafson's advocate, thereby violating her responsibility as a neutral party."), 155).

There is no allegation that the Department Defendants acted outside of their official duties—just the opposite. (R. Doc. 4, at ¶¶ 50-52 ("During the course of the investigation into this matter"), 75 ("through the investigation in the matter of A.J.N., Ms. Foley relied on false information provided by Ms. Gustafson")). And, finally, according to the complaint, the Department Defendants' actions were taken

on behalf of the sovereign. (*Id.* ¶¶168-169 ("Ms. Foley, acting on behalf of the Tribal Government . . . .").[20]

Under both the Community Defendants' proposed analysis of the real party in interest, and the three-part test in the *Dugan-Pennhurst* line of cases cited by the Court in *Alltel*, the Community's Department is the real party in interest in Nguyen's claims against the Department Defendants. Because the Department shares the Community's sovereign immunity,[21] the claims against the Department Defendants should have been dismissed on sovereign immunity grounds.

CONCLUSION

For the foregoing reasons, the Community Defendants respectfully request that the judgment dismissing Nguyen's claims be affirmed. The Community Defendants request that the Court reverse the district court's decision that sovereign immunity did not bar Nguyen's claims brought against the Community

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[20] Nguyen's request for declarations, injunctions, and habeas relief from official Department actions as well as actions taken by the Tribal Court in his complaint is further evidence that the Community and its instrumentalities are the real parties in interest—not the individual Defendants. His request for damages is almost an afterthought, and is pled in only the most conclusory terms, with no itemization of category or amount of damages sought. (R. Doc. 4, at ¶¶143, 174, 197, 210 (all stating simply that "Plaintiff seeks damages from the Defendants in an amount exceeding $75,000.")).

[21] *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 670-71 (8th Cir. 2015) ("A tribe's sovereign immunity may extend to tribal agencies, including the Tribal Court." (quotation omitted)).

Defendants in an alleged individual capacity, as the applicable threshold basis for dismissal.

Dated: April 20, 2022

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