UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 17-cv-05155-SRN-LIB

Mille Lacs Band of Ojibwe, et al.,

Plaintiffs,

v.

County of Mille Lacs, Minnesota, et al.,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AWARDING DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

The Court should deny Plaintiffs' motion for declaratory and injunctive relief for several reasons. First, Plaintiffs wrongly presume the issues of interference and injury were resolved on the merits when the Court ruled on standing. Those issues remain open. Then, they argue for an incorrect and overly expansive reading of the Court's decision in *United States v. Cooley*, 141 S.Ct. 1638 (2021), to conclude the Band's *inherent tribal* law enforcement authority gives them carte blanche powers over nonmembers who live within the 1855 reservation. Their request is also constitutionally untenable and conflicts directly with Supreme Court precedent. Finally, Plaintiffs cannot satisfy the essential requirements for declaratory and injunctive relief.

I. Establishing Article III standing on summary judgment does not excuse Plaintiffs from ultimately proving their injuries and causation

Plaintiffs ask this Court for declaratory and injunctive relief based on the Court's Memorandum Opinions and Orders dated December 21, 2020 and March 4, 2022. Neither Order, however, addressed the merits of whether Plaintiffs proved by a preponderance of the evidence that Defendants deterred or interfered with Plaintiffs' sovereign law enforcement authority. The Court's December 2020 Order addressed whether Plaintiffs had standing to bring the present action and found Plaintiffs sufficiently alleged an injury-in-fact "[*f*]*or purposes of Article III standing*." (ECF 217 at 32 (emphasis added).) That Plaintiffs were able to establish Article III standing and the existence of the Mille Lacs reservation does not mean—as they now claim—they have proved the merits of their

purported injuries.[1] *See Am. Farm Bureau Fedn. v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016). By asking now for a judgment awarding declaratory and injunctive relief, Plaintiffs seek to bypass a critical merits determination. Specifically, they have yet to ultimately prove Defendants interfered with and deterred Plaintiffs' exercise of their sovereign law enforcement authority as specifically alleged and that such interference and deterrence proximately caused their alleged injuries. Without having borne the burden to prove their case, Plaintiffs are not entitled to relief.

Plaintiffs' procedural gambit also flies in the face of the Court's Third Amended Scheduling Order, which strictly prohibited early dispositive motions not explicitly "outlined in their Joint Motion for Leave to File Early Dispositive Motions." (ECF 138 at 6; ECF 132.) Notably, a summary judgment motion on the merits of Plaintiffs' underlying facts regarding interference and deterrence was not outlined in the Joint Motion. (ECF 132 at 1-2.) As Plaintiffs surely recall, the Court at Plaintiffs' insistence refused to issue rulings for several arguments made in Walsh and Lorge's summary judgment motion that were not explicitly outlined in the Joint Motion. (ECF 217 at 46.)

A. Establishing injury-in-fact for Article III standing purposes does not prove on the merits that any injury actually occurred

To establish Article III standing, the "triad of injury in fact, causation, and redressability" must be established; it "constitutes the core of Article III's case-or-controversy requirement, and *the party invoking federal jurisdiction bears the burden of*

[1] Nor do Defendants concede the existence of the 1855 reservation when submitting this Memorandum.

establishing its existence." *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 103-04 (1998)(emphasis added). Relevant here, "there must be alleged (*and ultimately proved*) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent', not 'conjectural' or 'hypothetical.'" *Id.* at 103 (emphasis added).

On summary judgment, the threshold to establish an injury-in-fact for Article III standing purposes is low when compared to what is required to *ultimately prove* on the merits that Defendants injured Plaintiffs and proximately caused Plaintiffs' alleged injuries. *Id.*; *see Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 878 (8th Cir. 2003)("Our inquiry into standing … is not a review of the merits of [plaintiffs'] claims. Instead, at the summary judgment stage we accept as true all material facts alleged as 'long as they are not incapable of proof at trial.'" (citation omitted)); *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007). The standard for justiciability is highly deferential to plaintiffs and, if met, affords them the opportunity to prove the merits of their case at trial. But establishing standing on summary judgment does not obviate a plaintiff's burden to prove their case. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Plaintiffs' July 2020 summary judgment motion made averments to establish an injury-in-fact for *standing*—averments that were to be taken as true "as long as they [were] not incapable of proof at trial." *Oti Kaga, Inc.*, 342 F.3d at 878. Yet Plaintiffs now contend the December Order "set[s] forth substantial, *undisputed* evidence supporting each claim of [Plaintiffs'] injury." (ECF 319 at 3 (emphasis added).) This is untrue. Had Plaintiffs moved—on the merits—on the litany of specific allegations leveled by their affiants to support their alleged injuries, perhaps the record would reflect what facts are genuinely

disputed in this case. But Plaintiffs moved *for standing*; the "facts" for which they provided affidavits or other evidence were to be taken as true if provable at trial. *Oti Kaga*, 342 F.3d at 878. Thus, Plaintiffs never placed their averred facts in a position to be disputed on the merits, and Defendants were not on notice they needed to contest all of Plaintiffs' averments. *See Gibson v. Collier*, 920 F.3d 212, 218-19 (5th Cir. 2019)(plaintiff lacked notice and was entitled to an opportunity to prove the merits of his case when court *sua sponte* granted defendant summary judgment on the merits despite defendant never having moved on the merits.

While not required to do so, Defendants disputed some of those averments in their Response to Plaintiffs' standing motion. The following demonstrate just some of the genuine factual disputes Defendants will show when Plaintiffs actually attempt to prove their case on the merits.

1. Alleged reductions in public safety

Plaintiffs claim Defendants injured them by reducing effective law enforcement and public safety, which allegedly resulted in increased drug overdoses (fatal and non-fatal) and increased criminal activity. (ECF 217 at 16-21.) Defendants fervently disputed these serious accusations and challenged their provability in opposition to Plaintiffs' standing motion. (ECF 176 at 16-22.) "Plaintiffs … offered no evidence, statistical or otherwise, that criminal activity or overdoses actually increased post-revocation, let alone that it increased because of Defendants' actions." (ECF 176 at 16-22.) At minimum, the record created for standing purposes evinces genuine issues of material fact on the merits of Plaintiffs' claims about public safety. Furthermore, Plaintiffs would be unable to

demonstrate there are no genuine issues of material fact about the proximate cause of their alleged injuries to public safety, particularly when all reasonable inferences must be resolved in Defendants' favor. Take fatal opioid overdoses, for example.

The Regional Medical Examiner's records of fatal opioid overdoses in Indian country within Mille Lacs County show one Native American died in 2015, one in 2016 (predating revocation of the Cooperative Agreement), six in 2017, one in 2018, eight in 2019, three in 2020, and six in 2021. (Third Declaration of Brett D. Kelley, Ex. 1 (2015-2019 overdose deaths), Ex. 2 (2020 overdose deaths), Ex. 3 (2021 overdose deaths), Ex. 4, Rice 30(b)(6) Dep. Tr. 238:1-241:17 (discussing overdose deaths); *see id.*, Ex. 5 at 23 (Mille Lacs County opioid overdose deaths from 2000-2016).)

Former Tribal Police Chief Sara Rice explained the Band experienced year-over-year increases in overdose deaths dating back to 2013. (Kelley Dec. Ex. 4, Rice 30(b)(6) Dep. Tr. 242:21-243:24.) She explained Band members were using prescription opioid pills in 2013 and 2014, and "then all of a sudden, it just kind of snowballed from there, but now across the nation you hear about it." (*Id.*) Tribal Police Detective Michael Dieter testified that, beginning in 2016 and 2017, there was an influx of fentanyl mixed with heroin. (Kelley Dec. Ex 6, Dieter Dep. Tr. 54:14-56:8.) This corroborates the Minnesota Department of Health's opioid overdose data, which show a dramatic increase in statewide synthetic opioid deaths in 2017. (Kelley Dec. Ex. 5 *(Drug Overdose Deaths among Minnesota Residents, 2000-2018*), at 7, 9-10.) In 2018, opioid overdose deaths decreased dramatically across Minnesota consistent with data for Mille Lacs County. (*Compare* Kelley Dec. Ex. 5 at 7 *with* Ex. 1 at 1-3.) Although Rice did not know the precise cause of

increased opioid overdose deaths in 2019, she believed it was due to an increase in fentanyl in the area as well as combining methamphetamine and heroin with other drugs. (Kelley Dec. Ex. 4, Rice 30(b)(6) Dep. Tr. 241:18-242:8.) Adding to this tragedy, Minnesota had the highest drug-overdose-death rate in the nation among Native Americans from 2015 until at least 2018. (Kelley Dec. Ex. 5 at 20.)

This evidence demonstrates opioid overdose deaths for Native Americans in Mille Lacs County is consistent with the statewide data and Tribal Police testimony about the influx of fentanyl and the trend in deadly combinations of opioids with other drugs. Yet Plaintiffs here say Defendants caused or contributed to that increase. Defendants were not the proximate cause of opioid overdose deaths and that reasonable inference necessarily must be drawn in Defendants' favor.

Moreover, in 2019, the Band sued 21 pharmaceutical companies thereby joining the federal multidistrict litigation captioned, *In re: National Prescription Opiate Litigation*. There, the Band claims the pharmaceutical companies' "false and deceptive advertising practices resulted in increased opioid dosages being prescribed to [Band members], increasing the incidence of opioid addiction and overdose in [the Band] Community and the Reservation." (Kelley Dec. Ex. 7 *(*Complaint, *Mille Lacs Band of Ojibwe v. Teva Pharm, LTD, et al.*) at ¶479.) Melanie Benjamin testified how these pharmaceutical companies caused the national opioid crisis and harmed the Band community. (Kelley Dec. Ex 8, Benjamin Dep. Tr. 158:23-170:23.) This admission adds to the compelling inference that Defendants did not proximately cause the tragic opioid crisis.

Plaintiffs' claim that Defendants caused an increase in non-fatal opioid overdoses during revocation also fails. (*See* ECF 176 at 18-21.) As a threshold matter, Plaintiffs lack data on non-fatal opioid overdoses prior to revocation of the Cooperative Agreement. (Kelley Dec. Ex. 4, Rice 30(b)(6) Dep. Tr. 249:6-251:8.) Thus, they cannot prove there was any increase during the revocation period. Statewide data for non-fatal opioid overdoses within Mille Lacs County for all residents resulting in emergency room visits shows 51 in 2016, 63 in 2017, 38 in 2018, 67 in 2019, and 92 in 2020. (Kelley Dec. Ex. 9 at 2.) Similar to fatal opioid overdoses, the non-fatal overdoses in Mille Lacs County are consistent with statewide data, which depict a spike in 2017, a sizeable decrease in 2018, and a massive, inexplicable increase in 2019. (Kelley Dec. Ex. 10 (*Minnesota Opioids Overdose Dashboard Data*), at 3.) Plaintiffs cannot establish Defendants injured them by proximately causing any increase in non-fatal opioid overdoses.

Plaintiffs also lack data that criminal activity actually increased in Indian country within Mille Lacs County during the revocation period. (ECF 176 at 16-18; Kelley Dec. Ex. 11, West 30(b)(6) Dep. 220:9-221:22.) For crime data Plaintiffs do have, Plaintiffs are unsure whether crimes that occurred in Pine County were inadvertently reported in Mille Lacs County. (Kelley Dec. Ex. 11, West 30(b)(6) Dep. 224:22-226:9.) Plaintiffs rely on self-serving statements, conjecture, and hearsay to aver they were injured because crime increased as a result of Defendants' conduct. (ECF 148 at 18 n.44.) The credibility and admissibility of Plaintiffs' purported support for this claim must be tested at trial. "At the summary judgment stage, the court should not weigh the evidence, make credibility

determinations, or attempt to determine the truth of the matter." *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996).

2. Specific instances of interference/deterrence

Plaintiffs' specific allegations of interference with tribal police officers, (*see, e.g.*, ECF 148 at 9-13), likewise are disputed. For example, Plaintiffs submitted an affidavit by Tribal Police Officer Ashley Burton (formerly Stavish) alleging, among other things, that in 2016 Deputy Patrick Broberg took over one of her investigations and threatened her with arrest. (ECF 154 ¶¶17-23.) For support, Officer Burton's affidavit cited her police report, which states: "NOBODY KNEW OR SAW ANYTHING. CLEAR." (ECF 154-4, Ex. 4.) Perhaps the most salacious interference allegation in this case Officer Burton found so insignificant she made no mention of it in her police report. Defendants submitted the affidavit of Deputy Broberg, which directly contradicts Officer Burton's account of events. (ECF 176 at 35 n.6; ECF 179, ECF 179-1.) Resolving this fact dispute, and all other specifically alleged instances of interference, will require credibility determinations by the Court.

That Defendants did not file affidavits contradicting every single assertion made by Plaintiffs' affiants to establish standing does not mean the alleged facts to which those affiants testified are undisputed or preponderately true. *Giannullo v. City of New York*, 322 F.3d 139, 140-41 (2d Cir. 2003). That is the purpose of trial.

3. Decline in morale and officer resignations

Plaintiffs claim their morale was impacted by Defendants' actions. (ECF 148 at 16-17 n.43.) Defendants maintain this is not a legally-cognizable injury. (ECF 176 at 39-40).

While the Court accepted Plaintiffs' assertions as true for standing purposes, (ECF 217 at 14-16, 30), it did not directly address Defendants' argument. Insofar as Plaintiffs' morale claim is a legally-cognizable injury, their assertions must be tested at trial and involve credibility determinations that preclude summary judgment. *Quick*, 90 F.3d at 1276-71. Furthermore, deposition testimony shows there is a genuine dispute regarding the potential causes for any decrease in morale or officer turnover. Among the possible reasons: the appointment of Sara Rice to replace Jared Rosati as the tribal Chief of Police after revocation of the Cooperative Agreement. Mr. Rosati testified that when Sara Rice was named Chief, it "didn't sit well with the officers" given her lack of law enforcement experience and "[a]bsolutely … affected morale." (Kelley Dec. Ex. 12, Rosati Dep. Tr. 62:18-63:25.) And the mere fact some tribal officers left for other employment does not, *ipso facto*, prove a decline in morale—there could be many explanations.

This discussion highlights the genuine fact disputes and evidentiary issues with some of Plaintiffs' most serious allegations regarding their purported injuries. To be clear, there are many other allegations Defendants will dispute when Plaintiffs attempt to prove their case on the merits. But without having determined on the merits that there are no genuine issues of material fact as to Plaintiffs' injuries, the Court lacks a fully-developed record necessary to grant Plaintiffs' requested relief.

B. Plaintiffs are not entitled on the present, undeveloped record to the extraordinary and unprecedented relief they seek

Plaintiffs assert "it is now 'necessary to determine the precise extent of the Band's [law enforcement] authority on' all lands within the Reservation." (ECF 319 at 4.) The

problem is Plaintiffs bypass a critical inquiry, namely, whether the preponderance of evidence establishes they suffered injuries warranting the imposition of the unprecedented relief they seek. That inquiry is necessary for this Court to enter narrowly-tailored relief to address a concrete injury within a particularized set of factual circumstances.

Absent fact findings on the merits, the only thing the Court can do is issue a prohibited advisory opinion. *KCCP Tr. v. City of N. Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005)("Article III … prohibits us from issuing advisory opinions … advising what the law would be upon a hypothetical state of facts." (citation omitted). Furthermore, this Court cannot grant Plaintiffs' requested relief because it cannot be narrowly tailored without a developed, undisputed record. Particular facts matter, as *Cooley* explains. *Cooley* reaffirmed that sovereign tribal authority remains limited, and any decision extending a tribe's sovereign law enforcement authority is confined to the particular facts at issue under two exceptions set forth in *Montana* v. *United States*, 450 U.S. 544 (1981). The Court made clear the *Montana* exceptions are "limited" and "cannot be construed in a manner that would swallow the rule." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008)(internal quotation marks omitted). Thus, a court may only overcome the presumption against tribal jurisdiction over non-Indians based on particularized facts, which this record lacks.[2]

[2] The Court has "repeated *Montana*'s proposition and exceptions in several cases involving a tribe's jurisdiction over the activities of non-Indians within the reservation. In doing so we have reserved a tribe's inherent sovereign authority to engage in policing *of the kind before us*." *Id.*, 141 S.Ct. 1643-44 (2021)(emphasis added)(citing *Plains Commerce Bank*, 554 U.S. at 328-330; *Nevada v. Hicks*, 533 U.S. 353, 358-360, n.3 (2001); *South Dakota*

Tellingly, Plaintiffs' memorandum makes only cursory mention of the legal standards for declaratory and injunctive relief. (*See* ECF 319 at 1-2, 30.) Plaintiffs provide no analysis explaining why they are entitled to the relief they seek at this stage. Nor do Plaintiffs explain how their requested relief is narrowly tailored to the particular factual circumstances of this case. Indeed, Plaintiffs provide no explanation why the Band's inherent law enforcement authority includes the right to investigate all violations of federal and state criminal law by tribal and non-tribal members throughout the entire reservation—a concept the Supreme Court has come nowhere close to endorsing.

Plaintiffs' request for extraordinary and unprecedented relief is procedurally premature. Defendants are entitled to an opportunity to contest Plaintiffs' factual allegations and develop a full, undisputed record. But should the Court address Plaintiffs' requested relief, it must determine whether Plaintiffs possess—as a matter of law—the sweeping authority they claim to wield.

II. Plaintiffs' requested relief requires authority beyond what *Cooley* contemplates

Plaintiffs contend tribes have inherent authority to investigate violations of state and federal criminal law by *non-Indians* within their reservations. (ECF 319 at 9.) Plaintiffs seek authority for Band police[3] "to conduct searches and otherwise gather and retain

v. Bourland, 508 U.S. 679, 694-696 (1993); *Duro v. Reina*, 495 U.S. 676, 687-688 (1990); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 426-430 (1989)). In all these cases, the Court rendered opinions narrowly tailored to the specific facts of each case.

[3] To hire officers with state law enforcement authority, the Band must comply with Minn. Stat. §626.90 and enter into a cooperative agreement with the Mille Lacs County Sheriff.

evidence and to detain and investigate non-Indian suspects" across the reservation.[4] (ECF 317 at 1.) This authority would extend even in non-Indian homes on non-Indian owned fee lands.[5] The only limitations on the sweeping authority advocated by Plaintiffs are the provisions of the Indian Civil Rights Act, 25 U.S.C. §§1301-1304.

This far exceeds the authority affirmed by *Cooley*. The issue in *Cooley* was "whether an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation." 141 S.Ct. at 1641. In contrast, Plaintiffs assert: "*Cooley* and other applicable law strongly support the proposition that a tribe's inherent law enforcement authority over non-Indians extends throughout its reservation, and includes the power to investigate possible violations of state or federal criminal law, including the power to conduct searches subject to the Fourth Amendment standards (not just for the immediate safety of tribal officer or others)." (ECF 319 at 16.) But Plaintiffs' expansion of *Cooley* is unsupported by *Cooley* or any other Supreme Court precedent.

A. *Cooley* affirmed inherent tribal authority in a specific set of circumstances distinguishable here

The Court's holding in *Cooley* was narrowly tailored to fit the "health or welfare" exception set forth in *Montana*. In *Cooley*, a tribal officer noticed a vehicle stopped on the

[4] Plaintiffs define "investigate" as "including such police actions as making traffic and investigative stops; interviewing people and taking statements; conducting searches; and otherwise gathering and retaining evidence." (ECF 319, n.1.)

[5] Fee lands means the lands owned by nonmembers where the ownership originated in a patent from the United States. Only fourteen percent of the land within the 1855 reservation boundaries is trust land or Band-owned fee land. (Kelley Dec. Ex. 18, Report of Rod Squires, at 1.)

side of the highway, and, upon engaging with the driver, noticed the driver appeared to be under the influence of drugs or alcohol, and saw two semiautomatic rifles lying on the front seat. 141 S.Ct. at 1642. It was nighttime and the officer, concerned for his own safety given the defendant's behavior, ordered the defendant out of the vehicle and conducted a patdown search. *Id*. He called tribal and county officers for assistance, returned to the vehicle and found drugs and drug paraphernalia. *Id*. The officer took the defendant to the Crow Police Department where he was questioned by federal and local officers. *Id*.

The Court reasoned the second *Montana* exception fit the circumstances "like a glove." *Id*. at 1643. In other words, the tribal officer possessed the authority to conduct an initial investigation on a public road running through a reservation and to temporarily detain a non-Indian suspect to address "conduct that threatens or has some direct effect on the health or welfare of the tribe." *Id*. at 1642.

Cooley occurred on the Crow Reservation, an enormous reservation spanning over two million acres in Montana. Montana is not a PL-280 state. The tribal officer in *Cooley* was not cross-deputized with federal or state law enforcement authority. The road at issue was primarily patrolled by tribal police. These particularized facts were essential to the Court's holding.[6]

Plaintiffs take the premise of *Cooley* and expand it beyond recognition. From those facts, Plaintiffs extrapolate an unlimited inherent criminal investigatory authority over nonmembers and their lands, subject only to the Indian Civil Rights Act. The "close fit"

[6] Justice Alito, concurring in the judgment, expressed that his understanding of the Court's holding was limited to the specific issue presented in *Cooley*. *Id*.

between the second *Montana* exception and the facts in *Cooley* is simply inapplicable to broad investigatory power over nonmember activities on fee lands, particularly in a PL-280 state in which local officers can be called in to investigate suspicious activities by nonmembers on fee lands.

B. Plaintiffs' requested relief swallows the second *Montana* exception

Cooley explains that the "*Montana* exceptions are 'limited' and 'cannot be construed in a manner that would swallow the rule.'" 141 S.Ct. at 1645 (quoting *Plains Commerce Bank*, 554 U.S. at 330). The holding of *Cooley* is premised on an *exception* to the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id*. at 1643 (quoting *Montana*, 450 U.S. at 565). And exceptions to tribal jurisdiction over nonmembers from *Montana* must be narrowly read. *See id*. at 1645.

Plaintiffs, however, suggest that application of the second *Montana* exception in *Cooley* now permits blanket criminal investigatory authority over nonmembers, even on nonmember fee lands and in their homes, regardless of whether there exists any immediate danger to tribal health and welfare and regardless of the availability of local law enforcement. Plaintiffs argue that because "the [second *Montana*] exception is not limited to public rights-of-way, the Court's reliance on *Montana*'s second exception in *Cooley* demonstrates that the tribal authority the Court recognized in *Cooley* extends throughout a tribe's reservation." (ECF 319 at 17.) But Plaintiffs interpretation of *Cooley* ignores the plain language in the "issue presented" by *Cooley*, which is expressly framed as an issue regarding authority of a tribal officer on a public-right-of way running through a

reservation. 141 S.Ct. at 1641. This is precisely the overexpansion of the exception the Court warns against. *Id*. at 1645.

Plaintiffs argue criminal activity on non-Indian fee lands within a reservation threatens the health and welfare of the tribe just as criminal activity on a public right-of-way does. (ECF 319 at 17.) While this may be true in some instances, including where, for example, officer safety or tribal member safety is specifically threatened, it is simply not the case in all instances and therefore cannot be the basis for the extraordinary expansion of authority sought by Plaintiffs under an *exception* to the general rule that tribes lack authority over non-Indians and on fee lands.[7] Plaintiffs simply have not and cannot point to a reason why, in every case, if they suspect a nonmember residence of being a "drug house," Tribal Police cannot provide that information to the Sheriff or his Deputies for investigation. Plaintiffs oversell the reach of *Cooley* in their effort to exert maximum authority over lands within the reservation boundary, which, as explained *infra* Part IV, Plaintiffs cannot do.

C. The Supreme Court has consistently expressed the limits of tribal inherent law enforcement authority over non-Indians and on fee lands

As the Supreme Court has consistently stated, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Plains Commerce Bank,* 554 U.S. at 330 (*citing Atkinson Trading Co. v. Shirley*, 532 U.S. 645,

[7] Examples of criminal activity that does not rise to the level of the second *Montana* exception include: non-Indian drug possession without distribution; domestic disputes within non-Indian households; child neglect in nonmember families; and theft by and against non-Indians.

654 (2001)). "Tellingly, with only 'one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*.' *Id.* at 333 (citing *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)).

The Court's analysis of the second *Montana* exception raises insurmountable barriers to Plaintiffs' claims of authority to investigate any suspected criminal activity involving nonmembers occurring on nonmember fee lands. Plaintiffs' requested relief not only stretches the bounds of inherent tribal authority expressed in *Cooley* over non-Indians but assumes authority over nonmember Indians that the Band does not possess. Plaintiffs' relief is a *de facto* overruling of *Oliphant v. Suquamish Indian Tribe*, which held that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. 191-210 (1978). But the Supreme Court recently cited *Oliphant* with approval in *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 19 (June 29, 2022). In *Castro-Huerta*, the Court affirmed that the analysis of tribal criminal jurisdiction must be consistent "with the Constitution's structure, [and] the States' inherent sovereignty, and the Court's precedents." *Id.* at 22. Congress has not approved the sweeping powers the Plaintiffs seek.

D. Plaintiffs' requested relief must come explicitly from Congress, assuming that even Congress has that power

The scope of tribal criminal authority over nonmember Indians remains unsettled. Although Congress, through the Indian Civil Rights Act amendment known as the "*Duro* Fix," eased the restrictions on tribal inherent criminal jurisdiction over nonmember Indians,

whether and how the "structure of the Constitution" impacts that congressional authorization remains unanswered.

In *United States v. Lara*, 541 U.S. 193 (2004), a tribe brought a criminal misdemeanor prosecution against a nonmember Indian. The Court in *Lara* ultimately denied the double jeopardy challenge to Lara's federal criminal prosecution, after he pled guilty to a criminal charge in tribal court arising out of the same factual circumstance, on the basis that Congress was not delegating federal power, but relaxing restrictions on the bounds of inherent tribal authority. *Id*. at 207.

What was left undecided by *Lara*, as highlighted in Justice Kennedy's concurrence, was whether the Constitution prohibits tribes from prosecuting a nonmember citizen of the United States. *Id.* at 205. The Court never reached the issue of whether constitutional protections would bar tribal prosecution because Lara failed to raise it in his tribal court case, and the resolution of that issue was unnecessary to his efforts to have the federal case dismissed on double jeopardy grounds.

Justice Kennedy, in his concurrence, stated that it was "most doubtful" whether the Constitution empowered Congress to authorize tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. *Id.* at 211-14.

In *Plains Commerce Bank*, the Court cited Justice Kennedy's concurrence:

> Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution.'" *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring). The Bill of Rights does not apply to Indian tribes … and nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on

> nonmembers only if the nonmember has consented, either expressly or by his actions.

554 U.S. at 337.

Plaintiffs' relief also raises a broader question about the source of any federal authority to grant such relief. Justice Thomas has described the Court's Indian law jurisprudence as "schizophrenic." *Lara*, 541 U.S. at 219 (Thomas, J., concurring). The Court has described Congress's authority as plenary, *see United States v. Kagama*, 118 U.S. 375 (1886), yet characterizes Congress's authority as based on enumerated powers, *United States v. Lopez*, 514 U.S. 549, 552 (1995)("We start with first principles. The Constitution creates a Federal Government of enumerated powers."). Nor can the Court easily reconcile its application of constitutional guarantees such as due process or equal protection with cases rejecting strict scrutiny where such a provision was involved. *See Morton v. Mancari*, 417 U.S. 535 (1974). As this case does not involve any treaty provision, the treaty-making authority in Article II is not implicated.

That leaves by default Congress's authority under the Indian Commerce Clause in Article I, section 8. While this power has been described as plenary, textually the phrase is expressly tied to "commerce," a term used in the same section for regulating "commerce between the states," a power the Court has held is not unlimited. In the context of drafting the Constitution to replace the Articles of Confederation, the convention drafting the Constitution settled on commerce, rather than affairs, the term used in the Articles of Confederation. This change was deliberate and strongly suggests that Congress's power

should be tied to commerce. *See* Robert Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER U. L. REV. 201 (2007).

A related foundational issue, assuming it is within Congress's Article I authority, is whether Congress provides tribes with what the Band seeks here as a recognition of inherent tribal authority, as was done with the so-called "*Duro* Fix," recognized in *Lara*, or whether Congress affirmatively delegates that authority, through treaty or otherwise. *See Duro v. Reina*, 495 U.S. 676, 686 (1990)(suggesting tribal power to prosecute outsiders "could only have come to the Tribe by delegation from Congress, subject to the constraints of the Constitution"). This distinction is important. Tribal inherent authority is outside the Constitution and individual liberties granted therein are thus unavailable. However, if the power the Band seeks is obtained by way of delegation, Congress must act within the limits of the Constitution, and individual constitutional rights would survive. *See* Jane Smith and Richard Thompson, *Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act*, CONG. RESEARCH SERV. Report 42488, at 7 (May 15, 2012).

III. The Constitution does not permit this Court, or even Congress, to grant Band police authority to investigate state law crimes committed by nonmembers

A. Plaintiffs' injunction would violate the Constitution and principles of federalism

Plaintiffs' proposed declaratory and injunctive relief would violate the structure of the Constitution, which provides that the authority of government in the United States comes from the consent of the governed. Justice Kennedy's concurrence in *Lara*, 554. U.S. at 337, cited with approval in *Plains Commerce Bank*, explains "[t]he Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on

the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State." 541 U.S. at 212. Tribal government is of limited sovereignty over its members and over fee lands. The general rule under *Montana* is that a tribe lacks jurisdiction over nonmembers and their fee lands, even within a reservation.

B. The Guarantee Clause requires that the Mille Lacs County electorate vote for leadership that can oversee the exercise of law enforcement everywhere in the County

Plaintiffs want this Court to empower their police department with broad criminal investigatory powers over nonmembers within the 1855 boundary. While the Band's police department may be answerable to the Band's executive department, only enrolled members of the Band can vote for Band executive officers. This relief violates the Guarantee Clause, which provides "the United States shall guarantee to every state in this union a Republican Form of Government." U.S. Const. art. IV, § 4. The great value of this form of government is accountability—those in the legislative and executive branches are held to account by the electorate.

The Supreme Court previously considered alleged Guarantee-Clause violations nonjusticiable political questions. *See Luther v. Borden*, 48 U.S. 1 (1849). In *New York v. United States*, 505 U.S. 144 (1992), however, the Supreme Court questioned this bright line: "More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. at 185 (citation omitted)*; id.* ("contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances.").

In *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126 (Cal. 2006), the Fair Political Practices Commission, a state agency, sued the Agua Caliente Band to enforce the campaign contributions reporting requirement of the state's Political Reform Act ("PRA"). The court held the Tenth Amendment and Guarantee Clause provided the agency the authority to enforce the PRA, notwithstanding claims of tribal sovereign immunity:

> Allowing the Tribe immunity from suit in this context would allow tribal members to participate in elections and make campaign contributions (using the tribal organization) unfettered by regulations designed to ensure the system's integrity. Allowing tribal members to participate in our state electoral process while leaving the state powerless to effectively guard against political corruption puts the state in an untenable and indefensible position without recourse. Given the unique facts here, we agree with the Court of Appeal and conclude that the guarantee clause, together with the rights reserved under the Tenth Amendment, provide the FPPC authority under the Federal Constitution to bring suit against the Tribe in its enforcement of the PRA….
>
> The inability to enforce the PRA against the Tribe, a major donor to political campaigns, has the effect of substantially weakening the PRA. The State of California has determined that the PRA is vitally important to its republican form of government.

Id. 1138-39.

Accountability is critical here, and the County has the right to ensure all its citizens can participate in the political process that oversees law enforcement. *New York*, 505 U.S. at 169 (emphasizing importance of holding local officials accountable to "the views of the local electorate"). County voters elect the Sheriff, the County Attorney, and the Board of Commissioners. Band members are also eligible to participate in this oversight of County officials. While the Guarantee Clause refers specifically to the "United States" that is the federal government, this Court is part of that government, and hence, duty bound to limit

the Band's police-force activities to investigations of *only* Band members if using self-claimed inherent powers.

Admittedly, recent judicial precedent interpreting the Guarantee Clause is mixed. Some courts have still applied the *Luther* rule. *E.g.*¸ *State ex rel. Huddleston v. Sawyer*, 932 P.2d 1145, 1158 (Ore. 1997). But other courts assume the justiciability of Guarantee Clause claims. *E.g.*, *Kerpen v. Met. Washington Airports Auth.*, 907 F.3d 152, 163-64 (4th Cir. 2018). One noted constitutional scholar wrote: "The Guarantee Clause should be regarded as a protector of basic individual rights and should not be treated as being solely about the structure of government." Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994). No controlling Eighth Circuit authority precludes this Court from adopting Professor Chemerinsky's interpretation of the Guarantee Clause. The Supreme Court has already held, consistently, that the principle behind the Guarantee clause – the "structure of the Consitituon" – *must* be considered when determining tribal enforcement authority over nonmembers. Accordingly, the Court should hold that County citizens residing in the 1855 treaty boundary are constitutionally entitled to vote for representatives who oversee all law enforcement in that area.

C. Plaintiffs' relief will also impair the majority of Mille Lacs County citizens' right to vote

A second constitutional problem with Plaintiffs' requested relief is that it will deny the majority of Mille Lacs County voters any electoral say in the performance of the Band's police department. The right to vote is a fundamental right, *see Harper v. Virginia St. Bd.*

of Elections, 383 U.S. 663, 670 (1996), and any governmental restriction on that right must pass strict scrutiny, *i.e.*, show a compelling governmental interest, *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969). Mille Lacs County voters residing within the 1855 reservation should have the right to vote for those who can monitor and supervise the actions of any peace officer investigating state law crimes within that area. The federal government's trust obligations toward tribes and a tribe's right for public safety under the second *Montana* exception do not vault the Band's inherent law enforcement powers to secure a tribal court warrant to search a nonmember's home where the only recourse for a Fourth Amendment violation is in tribal court. *See Plains Commerce Bank*, 554 U.S. at 341 ("the conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.")(quoting *Montana*, 450 U.S. at 566); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64-65 (1978)(holding that, save for habeas relief, tribal court is the sole forum for ICRA violations).[8] The Court warned against "subjecting nonmembers to tribal regulatory authority without commensurate consent" in *Plains Commerce Bank*, 554 U.S. at 337, and explained the authority to regulate is limited in scope. *See infra*, Part II.D.

If the Band wants its officers to have the power to investigate all state law violations, not just of its members, the Band should do what Minnesota law requires by ensuring its officers have that authority through the agreement required by Minn. Stat. §626.90. Given the Court's concerns about the authority of Congress in enacting the "*Duro* Fix," this Court should tread carefully when asked to grant Plaintiffs' requested relief as to non-Indians.

[8] No cause of action lies under §1983 for violations of tribal law. *See Pistor v. Garcia*, 791 F.3d 1104, 1115 (9th Cir. 2015).

IV. Plaintiffs' injunction would interfere with state law and the statutory authority of the Sheriff and County Attorney

A. Minnesota is a Public Law 280 state and has jurisdictional primacy over crimes committed throughout Indian country

The State of Minnesota is a mandatory Public Law 280 (PL-280) state. Congress expressly granted to Minnesota primacy over criminal law enforcement jurisdiction throughout Indian country in Minnesota.[9] Recently, the Supreme Court held that all states retain sovereign criminal law enforcement authority over non-Indian defendants in Indian country. *Castro-Huerta*., slip op. at 8. Moreover, the Court also held that PL-280 (i) does not preempt a state's preexisting sovereign authority to prosecute crimes committed by non-Indians *against Indians* in Indian country and, importantly here, (ii) ensures a PL-280 States' exercise of criminal jurisdiction over crimes committed even *by Indians* in Indian country cannot be preempted for infringing tribal self-government. *Id.*, slip op at 16-18. "Absent Public Law 280, state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government." *Id.*, slip op at 17.

Thus, even if Plaintiffs could prove the merits of their claims that Defendants repeatedly interfered with and infringed upon their inherent tribal authority by taking control of investigations commenced by Band police for crimes committed *by or against Indians* in Indian country (whether or not on trust or nontrust lands), under *Castro-Huerta*, PL-280 overrides the Band's interests in self-government and ensures that Minnesota has jurisdictional primacy over those crimes. Plaintiffs' requested relief seeks to preempt via

[9] Exceptions are the Red Lake Reservation under the terms of PL-280 and Nett Lake/Bois Forte as a result of retrocession.

federal judicial decree Minnesota's exercise of PL-280 jurisdiction over Indian country for allegedly infringing on the Band's interest in self-government. That, however, is precisely what the Court in *Castro-Huerta* forecloses.

Law enforcement in Mille Lacs County is markedly different in presence, availability, and scope of authority than presented by *Cooley*. Minnesota law reflects these differences. For example, under Minn. Stat. §626.90 and a Cooperative Agreement, the Mille Lacs Band has concurrent jurisdiction over (a) all persons on trust lands; (b) all Minnesota Chippewa Tribe members (not all Indians) within the original 1855 boundaries; and (c) over any person who commits or attempts to commit a crime in the presence of a tribal officer. *See*, Minn. Stat. §626.90, subd. 2(c)(1)-(3).

B. Mille Lacs County and the Band jointly lobbied for the cooperative law enforcement authority that was established under Minn. Stat. §626.90

The Band and the County jointly lobbied for the authority established under §626.90 in the early 1990s and were the first tribe and county in the State to execute a cooperative law enforcement agreement. The State of Minnesota requires the Band to follow Minn. Stat. §626.90 in order to exercise state law enforcement authority.[10] Because Minnesota is a PL-280 state, which affirms Minnesota's jurisdictional primacy over crimes committed in Indian country, *Castro-Huerta*, slip op. at 17, and the scope of the Band's state law enforcement authority is specifically delineated under Minnesota statute, the Band must

[10] Although Plaintiffs argue the cooperative agreement will terminate upon conclusion of this litigation, the parties have operated under a cooperative agreement for most of the last thirty years, and there is no reason to believe they will not execute another agreement upon termination of the present agreement.

follow Minnesota law to exercise state law enforcement authority notwithstanding the Band's interests in self-government and inherent authority. *Id*.

C. Plaintiffs' injunction would interfere with the Sheriff's statutory state law enforcement authority

In *State v. Manypenny*, 682 N.W.2d 143 (Minn. 2004), the Minnesota Supreme Court determined that the granting of state law enforcement authority to tribal police did not violate PL-280, because under the applicable statute (similar to §626.90), the Sheriff was sharing his state law enforcement authority with White Earth tribal police. *Id.* at 150. Moreover, the court cited with approval the provision in the cooperative agreement that the Sheriff had "the authority to control any designated crime scene" as indicating jurisdiction had not been surrendered to the tribe. *Id.*

Further, under Minn. Stat. §387.03, the Sheriff is required to investigate all felonies in Mille Lacs County. Plaintiffs request an injunction from this Court that could impede the Sheriff from fulfilling his statutory obligations to investigate all felonies in the County and control crime scenes over which he has jurisdictional primacy.[11] The Court should not grant an injunction against the Mille Lacs County Sheriff that would contradict Minnesota's directive under Minn. Stat. §387.03. Plaintiffs' requested relief would expressly violate the primacy Minnesota has over crimes committed in Indian country as ensured by PL-280, *Castro-Huerta*, slip op. at 16-18, and impermissibly require the Court

[11] Following revocation, the Sheriff increased the number of deputies on patrol to replace coverage by tribal officers, who nevertheless remained on duty, resulting in greater law enforcement coverage. (ECF 180, Lindgren Dec. ¶10; Kelley Dec. Ex. 21, Mott Dep. Tr. 16:2-18:3, 55:16-25.)

to indefinitely audit, supervise, and interfere with the Sheriff's exercise of such authority, *O'Shea v. Littleton*, 414 U.S. 488, 500-02 (1974); *see also Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

D. Plaintiffs' injunction would interfere with the County Attorney's statutory authority and prosecutorial discretion

Furthermore, Plaintiffs' proposed injunction interferes with the prosecuting authority of the County Attorney. Under Minn. Stat. §626.90, the County Attorney has the right to make all prosecuting decisions for state law violations within the 1855 boundaries. *See* §626.90, subd. 5. Tribal police, on the other hand, have asserted they have the right to engage in "street immunity" by offering criminal suspects protection against prosecution if they cooperate in a further drug investigation. (Kelley Dec. Ex. 6, Dieter Dep. Tr. 57:11-24, 118:22-121:14.) This "street immunity" power violates the elected duties of the County Attorney and the statutory duties set forth under Minn. Stat. §626.90.

Plaintiffs' proposed injunction makes no provision that the Band will not engage in police or street immunity, but the accepted position of law enforcement and county attorneys is that any decision granting immunity must be made by the County Attorney, not the police officer. (*See, e.g.*, Kelley Dec. Ex. 13 (09-18-2018 Mutual Aid/Cooperative Agreement) at ¶12(a)-(b)(requiring Band officers responding to any crime or traffic offense pursuant to state law enforcement authority to prepare and forward a report to the County Attorney, who may then request additional investigative activities from Band officers); Kelley Dec. Ex. 14, Walsh Dep. Tr. 46:22-48:11 (discussing improper informant practices by Band officers and consequences thereof), 124:19-125:13 (discussing County Attorney

Walsh's policy for confidential informant use), 136:22-137:18 (same); Kelley Dec. Ex. 15, Walsh Dep. Ex. 32, (Walsh policy regarding Band use of confidential informants); Kelley Dec. Ex. 6, Dieter Dep. Tr. 62:20-65:11, 73:10-74:18 (Dieter admitting Walsh policy regarding Band use of confidential informants not followed by Band police); Kelley Dec. Ex. 16, Walsh Dep. Ex. 26, (Letter from Assistant County Attorney notifying Band of prosecution declination due to Band Police Incident Report indicating incriminating evidence was destroyed).) Further, Plaintiffs seek "to conduct searches and otherwise gather and *retain evidence*,"[12] and to detain and investigate non-Indian suspects. (ECF 317 at 1, 1.A. (emphasis added); *see also* ECF 319 at 2, n.1.) Such authority rests solely with state law enforcement.

Plaintiffs' Memorandum is devoid of any authority for their fundamental proposition that the County Attorney is required to prosecute any criminal matters initiated by tribal police. Minnesota law makes the County Attorney the prosecuting authority for persons arrested by peace officers appointed under §626.90. The proposed injunctive relief would invade the discretion of the County Attorney in determining whether to prosecute criminal matters. Plaintiffs' proposed injunction states the County Attorney can decide whether to charge an individual with a criminal offense or prosecution "so long as the

[12] Retaining evidence is part of street immunity for drug investigations, because unless evidence is turned over to the County Attorney, no state law violation can be prosecuted. The 2018 cooperative agreement, by reference, addressed and prohibited "street immunity." (Kelley Dec. Ex. 14, Walsh Dep. Tr. 46:22-48:11 (discussing improper informant practices by Band officers and consequences thereof), Ex. 13 (2018 Mutual Aid/Cooperative Agreement) at ¶9.)

exercise of such discretion is not based on a denial of the authority of the Band or Band Police Officers as declared herein." (ECF 317 at 2.)

If the County Attorney cannot be required to prosecute any matter initiated by tribal police under their asserted inherent tribal law enforcement authority, how can a decision not to prosecute some matters initiated by Band police be limited by Court order? What Plaintiffs ask is that state law enforcement authority of an elected county attorney be subject to inherent tribal authority, as enforced by a federal court injunction. That request, however, requires imposition of the exact type of ongoing federal audit of the state's exercise of criminal jurisdiction the Court in *O'Shea v. Littleton* held requires abstention. 414 U.S. at 500.[13] If the injunction were issued and Plaintiffs were displeased with the County Attorney's future exercise of prosecutorial discretion, Plaintiffs could ask the Court to ensure the County Attorney's discretion was used for a "proper purpose." That request flouts Court precedent: "In our system, as long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charges to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 343 U.S. 357, 365 (1978); *O'Shea*, 414 U.S. at 500-02 (rejecting injunction that would require "continuous supervision by the federal court" over future state criminal proceedings); *Rizzo*, 423 U.S. at 380.

Plaintiffs' proposed injunction would require the Court to weigh and determine whether the decision to prosecute by the County Attorney was based on a "denial of

[13] *See also Rizzo*, 423 U.S. at 380.

authority of the Band or Band Police Officers as declared by the Court." (ECF 317 at 4.) How could the County Attorney counter such a challenge without being forced to disclose and discuss the reasons for his actions? Would the County Attorney, as a matter of discretion, be able to choose not to prosecute nonmembers that were subject to criminal investigations on their fee lands or their homes by Band Police officers because it was contrary to the will of Mille Lacs County voters? Could the County Attorney decline to prosecute because Band officers refused to turn over evidence in a timely manner, destroyed evidence, or engaged in street immunity activities? These are real-world examples of what the County Attorney dealt with prior to revocation of the Cooperative Agreement in 2016. (Kelley Dec. Ex. 6, Dieter Dep. Tr. 73:4-19; 74:11-18; 118:22-121:14.) In short, Plaintiffs' request would require this Court to indefinitely audit and supervise the County Attorney's reasons for declining to prosecute particular matters, which this Court cannot permissibly do.

E. Law enforcement officers do not need to "search the tract books"

Plaintiffs cite *Seymour v. Superintendent of Wash. St. Penitentiary*, 368 U.S. 351, 358 (1962) for the proposition that 18 U.S.C. §1151, which defines Indian country in the context of "federal law enforcement," rejected a patchwork approach to Indian country that would require a search of tract books to determine whether criminal jurisdiction over each particular offense lies with the state or federal government. That rationale does not apply in a PL-280 state, and it particularly does not apply in Mille Lacs County where the Cooperative Agreement sets forth the trust vs. non-trust lands based on maps. Finally, there is no authority for the position that the scope of federal law enforcement authority over fee

lands and non-fee lands within Indian country is the same as inherent tribal law enforcement authority over nonmember fee lands. *Montana* teaches the opposite.

V. The requested relief exceed this Court's Article III authority and will not provide the same protections for individual liberties as the Bill of Rights

Plaintiffs fail to recognize that there are serious constitutional limits to their request for sweeping investigatory authority. The threshold issue is the relief requested. Plaintiffs want this Court to enforce their inherent tribal law enforcement powers. Plaintiffs are vague about what those powers are and, especially, what is the evidentiary source of those powers. There simply is no evidentiary foundation to prove the source of powers, and "time immemorial" doesn't do it. And if those powers are inherent, their source, as Defendants have noted previously, is not a question of federal law within Article III. (ECF 164 at 17-19.)

The only limit Plaintiffs acknowledge is the Indian Civil Rights Act (ICRA), which is enforceable only in tribal court and does not need to adhere to the Bill of Rights "jot for jot." *Hicks*, 533 U.S. at 383-85 (Souter, J., concurring). Plaintiffs concede that the Bill of Rights does not apply to tribal officers and conveniently uses the euphemism "Fourth Amendment standards" (ECF 319 at 16), which is not the same as full constitutional protection. As a threshold matter, tribes are not bound by the Fourth Amendment to the Constitution, and almost no remedy for ICRA violations exists outside rests of tribal court. Plaintiffs are asking the Court to grant ongoing and extensive investigative powers over nonmembers, including nonmember activities on fee lands and in their own homes, without full constitutional protections. This is the power that the Band and then former Chief of

Police Sara Rice testified they possess under their inherent authority. (Kelley Dec. Ex. 17 , (Murphy Dep. Tr. 139:6-12, 140:3-18, 141:9-20, 142:6-144:18; Ex. 4 (Rice Dep. Tr. 82:12-83:1.)

As a fundamental matter, the citizens of the United States are protected by not only the Constitution but its structure (as Justice Kennedy opined), and it is difficult to see how the citizens of the United States lose their constitutional protection within the boundaries of the United States to a government in which they cannot participate, i.e., an Indian tribe. Further, this will be a practical nightmare for Mille County courts and the County Attorney, who would have to address what would be essentially quasi-Fourth Amendment litigation, an administrative burden on both the state district court and the County Attorney.

VI. Plaintiffs' requested relief is silent on the rights of citizens over whom it would exercise authority

Plaintiffs seek criminal investigatory authority over Mille Lacs County citizens, even on their fee lands and in their homes, when those citizens cannot participate in tribal government. Because of the awesome police powers invested in a County Attorney and Sheriff, they are subject to selection and control by the citizens of Mille Lacs County at the ballot box. The Tribal Council and the tribal police, under Plaintiffs' motion, would have no accountability to Mille Lacs County citizens. Under Minn. Stat. §626.90 the Sheriff "shares his law enforcement authority" with the Band Police, which makes the exercise of that shared authority subject to control by the voters of Mille Lacs County. Plaintiffs' request for sweeping court-sanctioned state law enforcement authority undermines citizen

control in a republican government, *see supra* Part III, and the State's jurisdictional primacy under PL-280.

Further, if tribes lack criminal jurisdiction over nonmembers, there is a point at which criminal *investigation* spills over into criminal *jurisdiction*. That point is surely reached if nonmembers are required to attempt to protect their rights, not under the Bill of Rights, but under the Indian Civil Rights Act. Claims under that law must first be exhausted in tribal court before an individual can seek limited relief in federal district court. *Santa Clara Pueblo*, 436 U.S. at 69-70.

VII. Plaintiffs' requested relief is silent on the Band's sovereign immunity

Not only are Band police not subject to the control of nonmember citizens via elections, but tribal police and tribal government are immune from suit for violation of a citizen's rights absent a waiver of immunity. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo*, 436 U.S. at 58; *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). Notably, Plaintiffs proposed relief does not mention a waiver of immunity in seeking judicial authority for the exercise of inherent law enforcement authority over nonmembers and their fee lands.[14] If Plaintiffs' requested relief is granted, individuals who are not allowed to participate in tribal government could have their civil rights violated by a tribal officer, and yet have no recourse to bring a claim for a violation of those rights, outside of a very limited ability to seek review by the tribal court itself.

[14] Such a waiver of immunity is required for the Band's police to exercise state law enforcement authority under Minn. Stat. §626.90 and a cooperative agreement.

VIII. Plaintiffs have not shown they are entitled to declaratory relief or injunctive relief

As noted above, *supra* Part I, Plaintiffs have not proved Defendants deterred or interfered with Plaintiffs' sovereign law enforcement authority.[15] This failure of proof precludes both declaratory and injunctive relief.

Plaintiffs cannot show their entitlement to the relief sought because relief must come from Congress, if at all, because Congress, rather than the judiciary, has plenary power over Indian commerce. *See Lonewolf v. Hitchcock*, 187 U.S. 553, 564-65 (1903)(congressional plenary authority over Indians is political and not subject to judicial control). The Constitution requires protection of the rights of non-Indians and the ICRA provision is inadequate because tribal court is the only forum for relief from ICRA violations, other than habeas relief. *See Santa Clara Pueblo*, 436 U.S. at 64-65. Additionally, the court lacks subject matter jurisdiction to grant Plaintiffs' requested relief. *See Inyo County v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony*, 538 U.S. 701, 712 (2003)("[T]he Tribe asserted as law under which its claims arise the 'federal common law of Indian affairs.' But the Tribe has not explained, and neither the District Court nor the Court of Appeals appears to have carefully considered, what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state criminal processes." (citation omitted)).

[15] Plaintiffs have made no evidentiary showing of interference with their federally-delegated SLECs, which postdated the Opinion and Protocol. The only area of dispute was the existence of the reservation.

Both declaratory and injunctive relief against state law enforcement officers have negative consequences. Though there are some differences between each, "the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction." *Samuels v. Mackell*, 401 U.S. 66, 73 (1971)(discussing same in context of pending state prosecutions). Though Plaintiffs here do not seek to stop *pending* state criminal prosecutions, their requested relief nonetheless broadly interferes with state law-enforcement duties.

"[T]he Declaratory Judgment Act [is] 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.'" *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995)(citation omitted). "[T]he propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." *Id.* (quotation omitted).

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). If less drastic remedy is sufficient to redress an injury, then an injunction is unwarranted. *Id.* "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction…." *Steffel v. Thompson*, 415 U.S. 452, 466 (1974)(citing 28 U.S.C. §§2201-2202).

An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

A permanent injunction requires the moving party to show actual success on the merits. *Oglala Sioux Tribe v. C&W Enters.*, 542 F.3d 224, 229 (8th Cir. 2008). If a court finds actual success on the merits, it then considers the following factors in deciding whether to grant a permanent injunction: "(1) the threat of irreparable harm to the moving party; (2) the balance of harms with any injury an injunction might inflict on other parties; and (3) the public interest." *Id.* (citing *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)(en banc)).

A. Plaintiffs identify no irreparable injury they will suffer absent an injunction

Plaintiffs neither show nor argue they will suffer irreparable harm absent a permanent injunction. Nor do Plaintiffs argue or show that declaratory relief is insufficient without an injunction. Plaintiffs' proposed order contains sweeping, advisory declarations of rights unconnected to any specific, concrete fact in this case. For example, Plaintiffs seek a declaration that Band police officers may "carry and use firearms and other weapons for their personal protection and the protection of others" though there are no allegations of any such interference. (ECF 320 at 1.) The proposed order purportedly precludes the Mille Lacs County Attorney from exercising prosecutorial discretion if that discretion is "based on denial of the authority of the Band or its officers." (*Id*. at 4.)

Instead of showing why a permanent injunction is needed to prevent future irreparable harm, Plaintiffs look backwards to what they argue are their prior injuries. Plaintiffs claim interference with the Band's inherent law enforcement authority, decline in morale among and resignations of Band police officers, and impacts to public safety as

irreparable and noncompensable by legal remedies. (ECF 319 at 32). Plaintiffs have prevailed on the merits of none of those, and they are disputed. *Supra* Part I.A. Moreover, even if past harm had been proved, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96. Attempting to anticipate whether and when Defendants may violate Plaintiff's tribal authority would take the court into "into the area of speculation and conjecture." *Id.* at 496.

Plaintiffs' complaint alleges threats of arrest and threats of prosecution—both disputed by Defendants (*supra* Part I.A; ECF 176 at 22-25, 34-40)—but Plaintiffs do not identify any *ongoing* or *prospective* interference. (ECF 319 at 32-33.) Plaintiffs do not argue that there are any present threats of arrest and threats of prosecution, and in fact, the County and the Band have been working together under a cooperative agreement since 2018. Nor do Plaintiffs argue that the County, the County Attorney, or the Sheriff will violate the declaratory judgment that Plaintiffs seek. In essence, what they seek is an advisory opinion to the Sheriff and County Attorney, something outside this Court's Article III powers.

Plaintiffs' lead case, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015), which suggests that a pattern of violating a court judgment is a prerequisite to a permanent injunction, is readily distinguishable. 40 years earlier, the Ute Tribe prevailed in a suit that rejected Utah's claim that Congress had diminished three constituent parts of Ute tribal lands. *Id.* at 1003 (citing *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1093 (10th Cir. 1985)(*en banc*)). But Utah disregarded the prior Tenth Circuit

decision and attempted to relitigate the boundary dispute by prosecuting tribal members in state court for conduct occurring within what the Tenth Circuit held was Indian country. *Id*. at 1003.[16]

Here, the ruling on the existence of the reservation in Mille Lacs was made in connection with this action over Defendants' alleged offending conduct, rather than years earlier, as in *Ute*. Moreover, Defendants here have never arrested, threatened to arrest,[17] nor prosecuted any member of Band law enforcement before or after this lawsuit began. There has been no decades-long pattern here of Defendants denying a court judgment recognizing the Mille Lacs Reservation. In fact, County Attorney Walsh's July 29, 2020 declaration stated:

> I never said that any tribal police officer would be prosecuted for exercising law enforcement authority outside of trust lands, nor did I ever threaten to prosecute any such tribal police officer for any reason. No tribal police officer was ever arrested, prosecuted or charged with any crime relating to my Opinion and Protocol. On less than a handful of occasions, a case was declined for reasons that included concerns related to inadmissibility of evidence related to not following the Protocol. In no case did I refuse to prosecute a case simply because a tribal police officer was involved.

(ECF 117 pp. 11-12.)

The facts of *Ute* are also in stark contrast to those here. After losing before the Tenth Circuit decades earlier, Utah nonetheless argued that the very same congressional actions the 1985 *Ute* decision said did *not* diminish tribal territory *did* diminish at least part of the

[16] Eventually, the Supreme Court sided with Utah. *Hagen v. Utah*, 510 U.S. 395, 421-22 (1994).

[17] The only affidavit alleging a direct threat of arrest is vigorously disputed. *Supra* Part I.A.2; ECF 179&179-1.

Uintah Valley Reservation. *Id*. And the Utah Supreme Court eventually agreed. *See State v. Perank*, 858 P.2d 927 (Utah 1992); *State v. Hagen*, 858 P.2d 925 (Utah 1992).

In response, the Tenth Circuit recalled and modified the mandate of the 1985 decision. *See Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1527-28 (10th Cir. 1997). That modification was not as broad as Utah wanted, and Utah again prosecuted tribal members in state court for offenses occurring on tribal lands, including the lands that the 1997 decision held were still Indian country. *Ute*, 773 F.2d at 1005. Eventually, the Tenth Circuit reversed the denial of a permanent injunction, characterizing the local governmental litigants in that case as "intransigent litigants [who] challenge[d] settled decisions year after year, decade after decade, until they wear everyone else out." *Ute*, 790 F.3d 1000, 1312 (2015). The factors supporting an injunction in that case are plainly absent in this one. The operative facts in the string cite in Plaintiffs' footnote, (ECF 319 p. 32 n.7), are plainly absent here.[18]

[18] *Poarch Band of Creek Indians v. Hildreth*, 656 Fed. Appx. 934, 944 (11th Cir. 2016) involved an preliminary injunction against ongoing state tax assessment of Indian trust property. *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) involved an ongoing attempt to enforcing a federal administrative subpoena against a tribe. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) involved a preliminary injunction against the ongoing retention of seized monies and gaming machines. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001) involved a preliminary injunction against ongoing efforts to enforce state motor vehicle registration. *Mashpee Wampanoag Tribe v. Bernhardt*, Civil Action No. 18-2242 (PLF), 2020 WL 3034854 at *1, 3 (D.D.C. June 5, 2020) involved a preliminary injunction to stop the ongoing removal of tribal land from trust status. *Chemehuevi Indian Tribe v. McMahon*, ED CV 15-1538 DMG (FFMx), 2016 WL 4424970 at *1 (C.D. Cal. Aug. 16, 2016) involved a preliminary injunction against ongoing efforts to issue motor vehicle citations on reservation land.

B. The balance of hardships tips away from Plaintiffs

Plaintiffs argue that the balance of hardships favors an injunction because it will prevent interference with their law-enforcement authority. (ECF 319 at 33.) But Plaintiffs have shown no risk of future interference and, as explained above, *supra* Part I.A., have not proved prior interference. Plaintiffs have no evidence that the County Attorney or the Sheriff will take future action that is unlawful. Their request for prospective relief is based on speculation, not facts. And to the contrary, the 2016 Walsh Opinion and Protocol, (Kelley Dec. Exs. 19-20), specifically recognized the existence of inherent tribal criminal authority. The Opinion and Protocol are no longer good law, because they were in part based upon Walsh's understanding of the state of the law in 2016.[19] That law was changed by the *Cooley* decision, and Walsh has said he would not reissue the Opinion and Protocol again should the current Cooperative Agreement not be renewed. (ECF 306-1.) Consequently, the Opinion and Protocol will not recur, and no judicial relief of any kind is needed to prevent that from happening.

Granting Plainitffs' relief would create a practical nightmare where County would be on the leading edge of a fresh, new legal field of quasi-fourth-amendment litigation. State courts would be put in the position of resolving many issues of first impression, relitigating every issue in the field of Fourth Amendment jurisprudence, an area that is

[19] The Supreme Court departed from the general understanding of the law when it applied the second *Montana* exception to authorize tribal criminal investigations. At the time the County Attorney issued the Opinion and Protocol, the law was unsettled. The *en banc* opinion by the Ninth Circuit in *Cooley*, later reversed by the Court, demonstrates this. It is therefore unreasonable to enjoin the County Attorney when he was doing what he reasonably understood the law to be at the time he issued the Opinion and Protocol.

already rife with detail-oriented and permutating standards. The County Attorney's staff resources would be strained and an unnecessary burden on the local judicial system.

The balance of hardships cannot favor Plaintiffs because they identify no harm they will suffer without an injunction. The Court has recognized:

> [T]he need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is both great and immediate.

O'Shea, 414 U.S. at 499 (quotation omitted). Plaintiffs have proved neither the greatness of an irreparable injury nor the immediateness of one.

But the harm to Defendants from an injunction is clear. Plaintiffs' proposed order prohibits interference with the authority of the Band and Band police officers, but does not define, list, or explain what does or does not constitute interference. The injunction Plaintiffs seek would be the Sword of Damocles they could hold over the County Attorney. Plaintiffs' proposed order effectively ignores the State's sovereign authority over non-Indian defendants in Indian country, the State's authority over Indian defendants or victims under PL-280, and the delicate balance struck by the Minnesota Legislature in enacting §626.90, which requires the Band to enter into a cooperative agreement with the Sheriff. *See* Minn. Stat. §626.90, subd. 2(b).

Enjoining the County Attorney and the Sheriff will have an *in terrorem* effect that federal courts have widely acknowledged. *See Flowers v. City of Minneapolis*, 558 F.3d 794, 798 (8th Cir. 2009)("Courts should go very slowly before staking out rules that will deter government agents from the proper performance of their investigative duties."

(quotation omitted)). "Law enforcement's decision about whom to investigate and how, like a prosecutor's decision whether to prosecute, is ill-suited to judicial review." *Id.* And judicial review of investigative decisions, like oversight of prosecutions, tends "to chill law enforcement by subjecting the [investigator's] motives and decision-making to outside inquiry." *Id.*; *cf. Rizzo*, 423 U.S. at 363 ("principles of federalism … likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here.").

C. A permanent injunction would harm the public interest

Plaintiffs argue an injunction would serve the public interest "by providing clear authority to Band police officers and thereby strengthening law enforcement on the Reservation, for Indians and non-Indians alike." (ECF 319 at 34.) But Congress and the Minnesota Legislature have struck a different policy balance than the one Plaintiffs ask the Court to impose.

Congress designated Minnesota a PL-280 State, affirming Minnesota's criminal jurisdiction over crimes committed by or against Indians in Indian country. And as the Court recently held, PL-280 precludes preemption for infringing tribal self-government. *Castro-Huerta*, slip op. at 16-18. Enjoining the County Attorney and Sheriff here will not just violate Congress's grant of the State's jurisdictional primacy over Indian country, it will make law enforcement in Indian county more difficult, not less.

Minnesota requires the Band to enter into a cooperative agreement, Minn. Stat. §626.90, like the one currently in place. Cooperation, not injunction, better balances the

interests at stake. The public interest is best served by having the County Attorney and Sheriff unencumbered by an injunction prohibiting them from doing things they never did, and by allowing Minnesota by statute to share its law-enforcement authority with the Band. Minn. Stat. §626.90; *cf. McGirt*, 140 S.Ct. 2452, 2481 (2020)("With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek."). And as the Court noted recently, a "[state] has a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims." *Castro-Huerta*, slip op. at 20. Minnesota has full criminal authority over all persons in Mille Lacs County, and the Band has limited criminal authority; enjoining the work of the former to potentially improve morale of the latter makes everyone less safe.

CONCLUSION

For the reasons set forth above, Defendants ask the Court to deny Plaintiffs' motion for declaratory and injunctive relief.

Respectfully submitted,

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