UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, et al., Plaintiffs, v. County of Mille Lacs, Minnesota, et al., Defendants.	Case No. 17-cv-05155 (SRN/LIB) **PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AWARDING DECLARATORY AND INJUNCTIVE RELIEF**

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Plaintiffs submit this reply in support of their motion for declaratory and injunctive relief. Because defendants' opposition arguments lack merit, the Court should grant plaintiffs' motion.

Proof of Injury

Defendants argue this Court has not determined they interfered with plaintiffs' law enforcement authority or injured plaintiffs. Defendants' Memorandum of Law at 1-11 (July 14, 2022) (Doc. 327). Because injury and causation are essential elements of standing, plaintiffs had the burden to prove them to obtain summary judgment on standing. *See* Memorandum Opinion and Order at 24, 29-34 (Dec. 21, 2020) (Doc. 217). Plaintiffs met this burden: "the evidence in the record reveal[ed] numerous actual, concrete, and particularized incidents in which the Band's police officers [were] restricted from carrying out their law enforcement duties pursuant to the Opinion and Protocol" and "[t]he County *concedes as much*[.]" *Id*. at 31 (emphasis added).

Defendants mistakenly contend standing does not require proof of injury "on the merits." Doc. 327 at 1. "Although standing in no way depends on the merits of the plaintiff's contention *that particular conduct is illegal*," *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasis added), it requires proof of injury and causation. *E.g.*, *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 103-04 (1998). Thus, while this Court left "for another day" the *lawfulness* of defendants' conduct, it determined plaintiffs had suffered "actual, concrete, and particularized [injuries,]" which were "fairly traceable to

Defendants' challenged conduct." *Id*. at 32-33.

Defendants argue that only averments—not proof—of injury were necessary for plaintiffs to obtain summary judgment on standing. Doc. 327 at 3. However, the "low[er]" standard to which they refer, *id.*, applies when a *defendant* moves for summary judgment on standing; in that situation, it is sufficient for plaintiff to identify a genuine issue of material fact to *avoid* summary judgment. *E.g., Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 877 (8th Cir. 2003). Here, *plaintiffs* moved for summary judgment on standing and, to prevail, had to *prove* injury and causation.

Defendants' contention that they "were not on notice they needed to contest all of Plaintiffs' averments," Doc. 327 at 4, is misplaced. Plaintiffs' motion was not based on the averments in their complaint but on eight declarations and 73 exhibits, Doc. 150-160, placing the burden on defendants to identify a genuine issue of material fact for trial. *E.g.*, *County of Mille Lacs v. Benjamin*, 361 F.3d 460, 463 (8th Cir. 2004). That defendants may not have understood this provides no basis for reconsideration of this Court's order granting plaintiffs' motion. *See* Order at 14 (Mar. 3, 2022) (Doc. 312) (reconsideration standards).[1]

[1] Even now, defendants identify no genuine issue of material fact that might have precluded summary judgment. Although they deny causing increases in overdoses or deaths, Doc. 327 at 4-8, plaintiffs never claimed defendants caused such increases. *See* Plaintiffs' Memorandum of Law at 15-16 (July 8, 2020) (Doc. 149); Plaintiffs' Reply Memorandum at 7 n.5 (Aug. 12, 2020) (Doc. 194). Plaintiffs submitted *undisputed* evidence of a decline in law enforcement and public safety, which defendants do not contest in their current memorandum. *See* Doc. 149 at 20-23 (discussing Lennox's observations of a decline in

Establishing standing on summary judgment is neither uncommon[2] nor, as defendants contend, a "procedural gambit." Doc. 327 at 2. Far from a "disfavored procedural shortcut," summary judgment is "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation omitted). Here, because plaintiffs established standing, including injury and causation, on summary judgment, no further proof of injury or causation is needed.

Law Enforcement Authority

Defendants argue plaintiffs' requested relief overstates plaintiffs' law enforcement authority in part. They assert the Band lacks inherent authority to investigate violations of federal or state law by non-Indians on non-Indian fee lands within the Reservation except

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law enforcement and public safety and noting the County Attorney's testimony that he had "no reason to question" those observations); *see also* Doc. 194 at 6-8 (summarizing evidence).

Defendants dispute a single interference claim, Doc. 327 at 8, but disregard the across-the-board restrictions imposed in the County Attorney's Opinion and Protocol, multiple other interference instances that flowed from those restrictions, and the County Attorney's own assertion that the Sheriff took over all state law enforcement services *pursuant to* his Opinion and Protocol. *See* Doc. 217 at 4-14, 31-34.

As for the decline in officer morale, Doc. 327 at 9, the officers' undisputed testimony was that morale declined and several resigned *because of* defendants' restrictions on Band officers. *See* Doc. 149 at 16 n.43; Doc. 217 at 14-16. The testimony defendants cite, *see* Doc. 327 at 9, does not address the effect of *defendants' restrictions* on officer morale or purport to dispute the officers' testimony and thus does not create a *genuine* fact issue.

[2] *See*, *e.g.*, *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 329-30 (1999); *Am. Farm Bureau Fed'n v. United States EPA*, 836 F.3d 963, 968-69 (8th Cir. 2016).

in narrow circumstances such as those in *United States v. Cooley*, 141 S. Ct. 1638 (2021). *See* Doc. 327 at 11-16.[3] Defendants do *not* dispute the Band's inherent law enforcement authority over Indians, its inherent authority over non-Indians on trust or other Band-owned lands (where the Band has the right to exclude), or plaintiffs' federally delegated law enforcement authority as set forth in plaintiffs' proposed order.[4]

Defendants' argument regarding inherent authority over non-Indians on non-Indian fee lands misreads *Cooley* and fails to mention numerous cases, including Eighth Circuit and Minnesota Supreme Court cases, that contradict their argument. *See* Plaintiffs' Memorandum of Law at 10-28 (June 16, 2022) (Doc. 319). Notably, defendants *cite no case* holding inherent tribal law enforcement authority is limited in the manner they assert.

Defendants argue *Cooley*'s reliance on *Montana*'s second exception[5] means a tribe's inherent law enforcement authority requires a case-by-case determination that specific non-Indian criminal activity threatens a tribe's health or welfare. *See*, *e.g.*, Doc. 327 at 15. This misreads *Cooley* and would hobble tribal law enforcement by requiring officers to make complex legal determinations in the field. *Cooley* explained that "[t]o deny a tribal police

[3] Defendants suggest the relief plaintiffs seek would allow Band officers "to secure a tribal court warrant to search a nonmember's home[.]" Doc. 327 at 23. Plaintiffs have not sought such relief because the scope of tribal court authority was not raised by defendants' conduct. Any determination regarding such authority must await another day.

[4] Defendants' argument that there is no "evidentiary source" for inherent tribal law enforcement authority, Doc. 327 at 31, is foreclosed by *Cooley*, 141 S. Ct. 1642-45, which held such authority is a component of a tribe's retained sovereignty.

[5] *Montana v. United States*, 450 U.S. 544, 566 (1981).

officer authority to search and detain for a reasonable time *any person he or she believes may commit or has committed a crime* would make it difficult for tribes to protect themselves against ongoing threats." 141 S. Ct. at 1643 (emphasis added). The Court described a variety of such threats, including those posed by "non-Indian drunk drivers, *transporters of contraband*, or *other criminal offenders* operating on roads within the boundaries of a tribal reservation." *Id.* (emphasis added). *Cooley* nowhere suggested this authority was limited to specific crimes and cited federal and state court cases holding "tribal officers possess the authority at issue here." *Id*. at 1644.

Defendants' examples of criminal activity that allegedly do not trigger *Montana*'s second exception illustrate the problem. *See* Doc. 327 at 15 n.7. Their first example, non-Indian drug possession without distribution, would prevent tribal officers from investigating how drugs arrived on the Reservation; from investigating persons suspected of distribution if the evidence only supported a possession charge; or from addressing visible drug use as occurred in this case. *See* Doc. 217 at 19-20. Defendants' remaining examples—domestic disputes, child neglect and theft—are equally problematic. Given their potential to lead to violence and disturbance of public order, these criminal activities can and do threaten the Band. *See*, *e.g.*, *United States v. Terry*, 400 F.3d 575, 578 (8th Cir. 2005) (ammunition and rifle discovered in domestic violence incident). Former U.S. Attorneys provided this example in *Cooley*:

> [I]f a tribal officer patrolling the streets of a reservation community comes across a residence with fresh blood in its driveway, broken house windows,

> and screaming coming from within the house, but the officer knows that the house is on non-Indian fee land and that the resident is a non-Indian, [defendants' position] leads to the conclusion that the officer lacks authority to enter the house and should instead sit idly by while waiting for state or county police to arrive to stop the mayhem. *Cf. Michigan v. Fisher*, 558 U.S. 45 (2009) (per curiam).

Brief amici curiae of Former U.S. Attorneys at 32, *United States v. Cooley* (U.S. June 1, 2021) (No. 19-1414) (https://www.supremecourt.gov/DocketPDF/19/19-1414/166500/20210115134044388_19-1414%20tsac%20Former%20U.S.%20Attorneys.pdf).

Defendants argue plaintiffs' reading of *Cooley* "expand[s] it beyond recognition … particularly in a PL-280 state in which local officers can be called in to investigate suspicious activities by nonmembers on fee lands." Doc. 327 at 13-14. However, plaintiffs' reading simply *preserves* authority long recognized in cases *Cooley* cited with approval—cases defendants persistently ignore. *See* Doc. 319 at 20-25. And *Cooley* itself rejected availability of alternative law enforcement mechanisms as grounds for limiting tribal law enforcement authority. 141 S. Ct. at 1645-46. In addition to the timing issues raised by former U.S. Attorneys, *supra*, local officers' lack of community knowledge and other factors can reduce their effectiveness, rendering their availability an inadequate substitute for inherent tribal authority. *See* Doc. 217 at 16-19.

Relying on *non*-law enforcement cases, defendants argue plaintiffs' position swallows the second *Montana* exception; contravenes limits the Supreme Court placed on tribal authority over non-Indians on non-Indian fee lands; and impairs County residents' voting rights. Doc. 327 at 13-16, 22-23. *Cooley* rejects these arguments in the law

enforcement context. For example, the Court's prior cases denying tribal jurisdiction over non-Indian activities on a reservation "rested in part upon the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them." 141 S. Ct. at 1644. However, tribal law enforcement authority "protects the public *without raising similar concerns*" because it does not subject non-Indians to tribal law but only to *state and federal* laws. *Id*. at 1644-45 (emphasis added, internal quotation omitted). Tribal law enforcement authority over non-Indians is further limited because, with narrow exceptions, it cannot lead to prosecution in tribal court, but only in *state or federal* court.[6] And, despite the Court's previous warnings against reading *Montana*'s exceptions expansively, *Cooley* noted the Court had repeatedly acknowledged the exceptions' existence and the possibility that certain non-Indian conduct—here, violation of state or federal criminal law—might sufficiently affect the tribe to justify tribal oversight. *Id*. at 1645.

Defendants assert that "[i]f 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

[6] Because non-Indians can only be prosecuted in state or federal court (except in limited circumstances under the Violence Against Women Act, 25 U.S.C. § 1304), those courts will determine whether any evidence was obtained in violation of the suspect's rights. *See*, *e.g.*, *State v. Thompson*, 937 N.W.2d 418, 422 n.3 (2020).

required by Minn. Stat. §626.90." Doc. 327 at 23.[7] *Cooley* rejected this argument, noting such "agreements are difficult to reach" and "often require negotiation … over such matters as training, reciprocal authority to arrest, the geographical reach of the agreements, the jurisdiction of the parties, liability of officers performing under the agreements, and sovereign immunity." 141 S. Ct. at 1646 (internal quotation omitted).

Moreover, state law cannot condition or restrict a tribe's inherent authority; only Congress can do so. *See*, *e.g.*, *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 70 (2016) ("unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form"). Here, Section 626.90, subd. 6, *disclaims* any intent to restrict the Band's inherent authority, and as defendants concede, § 626.90 does not in any event provide for the same authority that is at issue here. *See* Doc. 327 at 25.

Constitutional Constraints

Defendants argue plaintiffs' inherent law enforcement authority must be defined by Congress and that the Constitution does not allow the Court or Congress to recognize inherent tribal authority to investigate state law crimes committed by nonmembers. *See* Doc. 327 at 16-23. These arguments cannot be reconciled with *Cooley*, where the Court applied its own "precedent to determine whether a tribe [had] retained [the] inherent

[7] Plaintiffs disagree with defendants' reading of § 626.90, but it is not necessary to resolve that disagreement here. *See* Plaintiffs' Memorandum of Law at 6 (July 29, 2020) (Doc. 173).

sovereign [law enforcement] authority" at issue, including the authority to investigate non-Indian violations of "state and federal laws[.]" 141 S. Ct. at 1643-45. "Federal courts have often treated the scope of a tribe's inherent sovereign authority as a matter of federal common law[,]" including "the scope of a tribe's inherent sovereign law enforcement authority[.]" Doc. 217 at 26-27. Defendants offer no persuasive reason to hold otherwise.

Public Law 280

Defendants argue Public Law 280[8] "overrides the Band's interests in self-government" and gives Minnesota "jurisdictional primacy over … crimes [committed by or against Indians]." Doc. 327 at 24 (citing *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022)). Defendants cite no textual support for this argument in Public Law 280, which, as amended, expressly recognizes concurrent federal, state *and* tribal jurisdiction. *See* 18 U.S.C. § 1162(d)(2). *Castro-Huerta* addressed only state concurrent authority, independent of Public Law 280, to prosecute crimes committed by non-Indians in Indian country where the victim is an Indian, *not* tribal law enforcement authority or the effect of Public Law 280 on such authority. *See*, *e.g.*, 142 S. Ct. at 2491. The Court's observation that Public Law 280 *expressly* allowed certain states to exercise jurisdiction over Indian-country crimes committed by Indians, even though such jurisdiction might implicate tribal self-government, *id.* at 2499-500, does not mean Public Law 280 *silently* overrode tribal law enforcement jurisdiction or granted states "jurisdictional primacy" over tribes.

[8] Act of Aug. 15, 1953, ch. 505, 67 Stat 588, codified in part at 18 U.S.C. § 1162.

To the contrary, courts have held consistently that Public Law 280 did not divest any tribal authority, including tribal law enforcement authority. In *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1200 (C.D. Cal. 1998), the court held Public Law 280 did not divest a tribe of "its inherent authority to establish a police force with jurisdiction to enforce tribal criminal laws against Indians and to detain and turn over to state or local authorities non-Indians who commit suspected offenses on the reservation." The court explained that "'Public Law 280 was designed not to supplant tribal institutions, but to supplement them[,]'" and "'is not a divestiture statute.'" *Id*. at 1199 (quoting *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.3d 548, 560 (9th Cir. 1991)).

In *State v. Schmuck*, 850 P.2d 1332, 1344 (Wash. 1993), the court held Public Law 280 did not divest "a tribe's authority to stop and detain non-Indian motorists allegedly violating state and tribal law while traveling on reservation roads." It explained that "[b]oth the United States Supreme Court and the Ninth Circuit have concluded that Public Law 280 is not a divestiture statute[,]" and that "[i]n the area of criminal jurisdiction, the Eighth Circuit concluded that Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their members for violations of tribal law[.]" *Id*. at 1343 (citing *Venetie*, 944 F.2d at 560; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-12 (1987); *Bryan v. Itasca Cnty*., 426 U.S. 373, 383-90 (1976); *Walker v. Rushing*, 898 F.2d

672, 675 (8th Cir. 1990)).[9] "[N]othing in the language or history of Public Law 280 indicates an intent by Congress to diminish tribal authority[,]" and, "[g]iven that one of the primary goals of Public Law 280 is to improve law enforcement on reservation, holding that Public Law 280 divested a tribe of its inherent authority to detain and deliver offenders would squarely conflict with that goal." *Id*. at 1344.

Similarly, in *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 685 (5th Cir. 1999), the court held Public Law 280's conferral of civil jurisdiction on states did not deprive tribal courts of concurrent jurisdiction over such matters:

> "[N]othing in the wording of either the civil or criminal provisions of Public Law 280 or its legislative history precludes concurrent tribal court authority. The basic intent of the criminal law section was to substitute state for federal jurisdiction under the Indian County Crimes Act and the Indian Major Crimes Act. Because these two statutes do not preclude concurrent tribal jurisdiction, neither should Public Law 280."

(Quoting Felix Cohen, *Handbook of Federal Indian Law* ch. 6, § B4, at 344 (1982)) (internal modification normalized). The Ninth Circuit agreed, finding "'nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority[.]'" *Confederated Tribes of the Colville Reservation v. Superior Court of*

[9] In *Walker*, 898 F.2d at 675, the Eighth Circuit explained that "[a]s both the Supreme Court and this court have made clear, limitations on an Indian tribe's power to punish its own members must be clearly set forth by Congress[,]" and it found "no such clear expression of congressional intent in Public Law 280." In *United States v. Person*, 427 F. Supp. 2d 894, 905 (D. Minn. 2006), this Court held that, even before Congress extended tribes' inherent criminal jurisdiction to all Indians, "P.L. 280, did not divest Tribal authorities of criminal jurisdiction over its own members[.]"

Okanogan Cnty., 945 F.2d 1138, 1140 n.4 (9th Cir. 1991) (quoting *Walker*, 898 F.2d at 675).

These cases, which defendants fail to address, are fatal to their argument that Public Law 280 overrode plaintiffs' inherent law enforcement authority and conferred jurisdictional primacy on states.

Propriety of Relief

Defendants challenge the propriety of plaintiffs' requested relief on several grounds, including some already rejected in rulings defendants do not mention. For example, defendants argue an injunction directing the Sheriff and County Attorney not to interfere with plaintiffs' law enforcement authority would conflict with federalism principles articulated in *O'Shea v. Littleton*, 414 U.S. 488 (1974). Doc. 327 at 26-27, 29. But this Court already rejected that argument. Doc. 217 at 39-41. Similarly, the Court already rejected defendants' argument that it lacks subject-matter jurisdiction to grant plaintiffs' requested relief. *Id.* at 24-29; Doc. 327 at 31, 34.

Defendants' remaining arguments lack merit. First, defendants argue the record lacks "particular facts" to support plaintiffs' requested relief. Doc. 327 at 9-11. However, this Court found defendants interfered with plaintiffs' inherent and federally delegated law enforcement activities by: (1) limiting such authority to trust lands; (2) prohibiting Band officers from investigating violations of state law; and (3) with respect to non-Indians, prohibiting Band officers from conducting any investigations. *See* Doc. 319 at 2-3

(summarizing Court's findings).[10] These limitations were unlawful, *see id.* at 6-30, and provide the necessary factual predicate for plaintiffs' requested relief. Indeed, by "recogniz[ing] and restor[ing] the Band's sovereign law enforcement authority[,]" such relief "is specifically designed" to redress plaintiffs' injuries. Doc. 217 at 34.

Second, defendants argue plaintiffs' requested relief would interfere with the Sheriff and County Attorney's state-law authority. Doc. 327 at 26-30. However, nothing in plaintiffs' requested relief limits defendants' exercise of state-law authority; it requires only that defendants refrain from interfering with plaintiffs' inherent and federally delegated authority. Because state law cannot condition or limit plaintiffs' authority, *see*

[10] Defendants argue plaintiffs made no showing of interference with their federally delegated authority but concede there was a "dispute" over the geographic scope of that authority. Doc. 327 at 34 n.15. Defendants restricted the exercise of that authority to trust lands by insisting plaintiffs continue to follow the County Attorney's Opinion and Protocol after issuance of Special Law Enforcement Commissions to Band officers. *See* Doc. 149 at 14-15 and nn. 35-36; Doc. 194 at 2 n.2; Doc. 217 at 21.

Defendants also argue there was no evidence of interference with Band officers' authority to "carry and use firearms and other weapons for their personal protection and the protection of others." Doc. 327 at 36 (internal quotation omitted). However, the County Attorney's Opinion asserted a Band officer exercising authority outside trust lands could only do so as an out-of-jurisdiction state peace officer or a private citizen and warned that "[*w*]*hen acting as a private citizen making a citizen's arrest* … a … Band Police Officer's use of firearms to cause fear in another of immediate bodily harm or death would be a felony offense[.]" Doc. 150-9 at 11 (emphasis in original). The Protocol reinforced this warning by stating Band officers could not lawfully "'impersonate a state peace officer, obstruct justice, or engage in the unauthorized practice of a peace officer[.]'" Doc. 217 at 5 (internal modification normalized). The Band's Police Chief "was especially concerned about the restrictions that the Protocol imposed on Band officers' ability to use force[,]" *id.* at 12, and plaintiffs' proposed relief appropriately addresses that issue.

Sánchez Valle, 579 U.S. at 70, and because Minn. Stat. § 626.90, on which defendants rely, does not purport to do so,[11] the requested relief is proper.

Third, defendants complain that prohibiting the County Attorney from making prosecutorial decisions based on a denial of plaintiffs' law enforcement authority will unduly interfere with his discretion. Doc. 327 at 28-30. However, to enforce this prohibition, plaintiffs will first need to make a showing that the County Attorney improperly exercised his discretion and the County Attorney will then have an opportunity to explain the basis for his decision—whether lack of evidence, witness or informant credibility concerns, possible Fourth Amendment violations, lack of prosecutorial

[11] Citing Minn. Stat. § 626.90, subd. 5, defendants assert "the County Attorney has the right to make all prosecuting decisions for state law violations within the 1855 boundaries." Doc. 327 at 27. They assert this means Band officers may *never* exercise discretion not to charge a suspect and instead must disclose *every* potential criminal violation they encounter to the County Attorney. *Id.* at 27-28. However, § 626.90, subd. 5, addresses investigations conducted under *state-law* authority, while § 626.90, subd. 6, disclaims any restriction on the Band's *federal-law* authority. Thus, even if defendants' reading of subd. 5 were correct, it is inapplicable here.

Defendants' reading of Subd. 5 strains credulity. Then-Band Sergeant Michael Dieter, who has significant experience in drug investigations and numerous commendations from the United States Attorney's Office, the Mille Lacs County Attorney's Office, and the Mille Lacs and Pine County Sheriff's Offices, *see* Doc. 157 at 2, testified that an officer's discretion not to file charges is essential in developing drug informants and in other circumstances. *See* Dieter Dep. 59:2-13 (Baldwin Decl. Ex. A (filed herewith)). The County Attorney's demand to approve every informant is "not how it works in the real world. That's not how drug investigations work. That's not how discretion works." *Id.* at 65:1-3. Such demands by local authorities to micromanage tribal police led the Supreme Court to reject cooperative agreements as a substitute for a tribe's inherent authority. *Cooley*, 141 S. Ct. at 1465-66.

resources, or any other relevant factor. *Cf. Flowers v. Mississippi*, 139 S. Ct. 2228, 2243-44 (2019) (process for determining whether prosecutor improperly exercised peremptory challenges based on race or gender). This is not an undue burden and does not entail an "ongoing federal audit of the state's exercise of criminal jurisdiction[.]" Doc. 327 at 29. Instead, it provides a minimally intrusive remedy for defendants' violations of the Band's sovereign authority under federal law. *See* Doc. 173 at 33-35 (discussing broad discretion to enjoin conduct violating federal law). Defendants make no suggestion for tailoring relief to address their concern, asking only that the Court deny *all* relief, enabling defendants to continue denying plaintiffs' authority and to re-inflict the injuries giving rise to this case.

Fourth, defendants argue that, because exercise of the Band's inherent law enforcement authority is subject only to the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1304, plaintiffs' requested relief will not provide the same protections for individual liberties as the Fourth Amendment. Doc. 327 at 31-32. They assert this "would create a practical nightmare where [the] County would be on the leading edge of a fresh, new legal field of quasi-fourth-amendment litigation[,]" requiring state courts to relitigat[e] every issue in the field of Fourth Amendment jurisprudence[.]" *Id*. at 40-41; *see also id.* at 32 (same).

Defendants make no attempt to reconcile this argument with *Cooley* and other cases that recognize the existence of inherent tribal law enforcement authority to investigate non-Indian violations of federal and state law. They point to no state where federal and/or state

courts have recognized this authority (including Arizona, California, Minnesota, Montana, New Mexico, Oregon and Washington) in which such a "practical nightmare" has ensued. Instead, as the United States has explained, "courts have interpreted [the ICRA] *in pari materia* with the Fourth Amendment." Brief of the United States at 34-35, *United States v. Cooley* (U.S. June 1, 2021) (No. 19-1414) (https://www.supremecourt.gov/DocketPDF/19/19-1414/165737/20210108153036386_19-1414tsUnitedStates.pdf) (citing, *inter alia*, *United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981)); *see also Thompson*, 937 N.W. 2d at 422 n.3. The Supreme Court's rejection of a unique standard for tribal police because it would "introduce[] a new standard into search and seizure law[,]" *Cooley*, 141 S. Ct. at 1645, supports this approach. Under it, non-Indians will continue to enjoy the same protections from unreasonable searches and seizures by tribal officers as they do from state officers, including in their homes, and no new field of jurisprudence will be needed.

Fifth, defendants argue that because plaintiffs' requested relief does not waive the Band's immunity from suit, it could leave individuals whose rights are violated with no remedy outside tribal court. Doc. 327 at 33. Again, defendants fail to reconcile this argument with *Cooley* and other cases recognizing the existence of inherent tribal law enforcement authority to investigate federal and state law violations on their reservations. Indeed, *Cooley* rejected cooperative agreements as an alternative to inherent tribal authority in part because of such demands for immunity waivers. 141 S. Ct. at 1645-46 (citing Brief for Cayuga Nation et al. as *Amici Curiae* at 7-8, 25-27, *United States v. Cooley*

(U.S. June 1, 2021) (No. 19-1414) (https://www.supremecourt.gov/DocketPDF/19/19-1414/166498/20210115133631591_19-1414%20tsac%20The%20Cayuga%20Nation.pdf)).[12] It bears repeating that the County Attorney retains discretion to decline prosecution if he believes Band officers violated a suspect's rights and, if charged, suspects can move to exclude evidence obtained in violation of their rights. *See*, *e.g.*, *Thompson*, 937 N.W. 2d at 422 n.3. And, while defendants may not respect tribal courts, those courts "are available to vindicate rights created by the ICRA[.]" *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 700 (8th Cir. 2019) (internal quotation omitted).

Sixth, defendants argue plaintiffs have failed to demonstrate the need for a permanent injunction to prevent future irreparable harm, noting "the County and the Band have been working together under a cooperative agreement since 2018" and asserting plaintiffs do not argue defendants "will violate the declaratory judgment that Plaintiffs seek." Doc. 327 at 36-37. However, this Court has twice rejected defendants' argument that the 2018 agreement moots plaintiffs' claims, *see* Doc. 312 at 12-19, and defendants' past conduct hardly inspires confidence they will adhere to the Court's declaratory judgment. They disregarded (and continue to disregard) Eighth Circuit precedent, *see* Doc.

[12] The Cayuga brief cited the Mille Lacs Band's experience in supporting the United States' argument that "'Tribes should not have to sacrifice even *more* of their limited sovereignty merely to preserve law and order within reservation boundaries.'" Cayuga Br. at 27 (quoting United States Br. at 47) (emphasis in original).

312 at 21-22[13]; have repeatedly sought to re-open previously decided matters in this case; have repeatedly denied responsibility for the injuries they inflicted on plaintiffs; and now insist recognizing plaintiffs' authority would be "a practical nightmare[.]" *See* Doc. 327 at 40.

In addition to actual success on the merits, all four requirements for permanent injunctive relief are present here. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). The first requirement, irreparable injury, was established factually when the Court granted plaintiffs' summary judgment motion on standing. Doc. 217 at 30-34; *see also* Doc. 319 at 32-33 & n.7 (infringement of tribal sovereignty is an irreparable injury). Defendants' argument that past exposure to illegal conduct does not show a present case or controversy regarding injunctive relief, Doc. 327 at 37, is the same mootness argument already rejected by this Court. Defendants also suggest "a pattern of violating a court judgment is a prerequisite to a permanent injunction," *id.*, but cite no case that so holds. What is required is "an irreparable injury[,]" *Monsanto*, 561 U.S. at 156, which is present here.

[13] Defendants argue the County Attorney's Opinion and Protocol were based on a reasonable understanding of the law when issued, Doc. 327 at 40 n.19, but, at that time, an Eighth Circuit decision and decisions from other state and federal courts unanimously held tribes have inherent authority to investigate violations of federal and state law within Indian country. *See* Doc. 312 at 21-22. The Ninth Circuit's decision in *Cooley* is unavailing because: (1) it was issued *after* the County Attorney's Opinion and Protocol; and (2) it too recognized that, on tribal lands where a tribe has the power to exclude, "tribal officers can *investigate* crimes committed by non-Indians[.]" *United States v. Cooley*, 919 F.3d 1135, 1141 (9th Cir. 2019) (emphasis added), *rev'd on other grounds*, 141 S. Ct. 1638 (2021).

Defendants do not deny the second requirement, inadequacy of remedies at law, is satisfied here.

Defendants argue the third requirement, that the balance of harms favors injunctive relief, is not satisfied. Doc. 327 at 40-42. Their principal argument is that plaintiffs' proposed order prohibits interference with Band authority "but does not define, list, or explain what does or does not constitute interference[,]" handing plaintiffs "the Sword of Damocles" and creating an "*in terrorem* effect[.]" Doc. 327 at 41.[14] This overheated rhetoric is misplaced. Plaintiffs' proposed order specifically identifies the enjoined actions as: "(a) prosecuting, threatening to prosecute, arresting or threatening to arrest Band police officers for exercising their authority as declared by the Court; and (b) interfering with or taking over investigations from Band police officers that are within" such declared authority. Doc. 320 at 3-4. It goes on to state:

> Nothing herein shall preclude the … Sheriff from exercising discretion in referring calls for service to law enforcement officers or in responding to such calls, so long as the exercise of such discretion is not based on a denial of the authority of the Band or Band police officers as declared herein. Similarly, nothing herein shall preclude the … County Attorney from exercising discretion in deciding whether to charge an individual with a criminal offense or in the prosecution of any such individual, so long as the exercise of such discretion is not based on a denial of the authority of the Band or Band police officers as declared herein.

[14] Defendants also argue future harm is speculative because plaintiffs have not proved injury and the case is moot, *see* Doc. 327 at 40, but these recycled arguments lack merit.

Id. at 4. This narrowly tailored order prohibits specific actions—prosecutions and arrests, and threats of prosecutions and arrests, of Band officers for exercising their authority as declared by the Court, and actual interference with investigations by Band officers as occurred in this case. It fully preserves the existing authority of the Sheriff and County Attorney in all other respects and preserves their existing discretion as long as they do not deny plaintiffs' authority. This narrowly focused relief is analogous to relief provided by federal courts in other cases in which defendants' actions violated plaintiffs' federal rights causing real and substantial injuries. *See* Doc. 173 at 31-35. Because it does not restrict defendants from exercising their own authority, the balance of hardships supports such relief. *See Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1007 (10th Cir. 2015).

The fourth requirement is that the requested relief serve the public interest. Defendants argue Congress and the Minnesota Legislature "struck a different policy balance than the one Plaintiffs ask the Court to impose." Doc. 327 at 42. However, defendants' reliance on Public Law 280, *id*., is misplaced because Public Law 280 did not divest the Band of its inherent law enforcement authority. Indeed, *Cooley*, 141 S. Ct. 1646, concluded that "existing legislation and executive action appear to operate on the assumption that tribes have this retained authority." *See also* 18 U.S.C. § 1162(d)(2) (recognizing concurrent federal, state and tribal jurisdiction). Defendants' reliance on

state law is misplaced because state law *cannot* deprive a tribe of its inherent authority and, in any event, did not purport to do so. *See* Minn. Stat. § 626.90, subd. 6.

Defendants' unlawful restrictions on plaintiffs' law enforcement authority led to substantial injuries to the Band's sovereignty and a decline in law enforcement and public safety on the Reservation. *See* Doc. 217 at 19-20, 30-34. Because plaintiffs' requested relief "is specifically designed … to recognize and restore the Band's sovereign law enforcement authority," *id*. at 34, it will prevent such injuries in the future and is in the public interest.

The Court should grant plaintiffs' requested relief.

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