UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ARTHUR DAVID LAROSE, Plaintiff, vs. UNITED STATES DEPARTMENT OF THE INTERIOR; DEB HAALAND, in her official capacity as Secretary of the Interior; MINNESOTA CHIPPEWA TRIBE; CATHERINE CHAVERS, in her official capacity as President of the Minnesota Chippewa Tribe; GARY FRAZER, in his official capacity as Executive Director Minnesota Chippewa Tribe and as Tribal Election Court Clerk; THE MINNESOTA CHIPPEWA TRIBE'S TRIBAL ELECTION COURT OF APPEALS in their official capacities as 2022 certification panel, Defendants.	Civil No. 0:22-CV-1603 (PJS-LIB) **TRIBAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION

This case involves an attempt to relitigate matters of tribal law that have already been decided in the only judicial forums with proper jurisdiction – the tribal courts of the Minnesota Chippewa Tribe. Plaintiff Arthur David LaRose ("LaRose") seeks relief in this suit – an order from a federal court overturning the results of a tribal election – that is as extraordinary as it is unprecedented. LaRose Complaint (ECF No. 3)("Complaint or Compl.") at p. 24.

LaRose concedes that the tribal elections are complete. *Id*. ¶ 62. Candidate certification challenges have been decided in tribal court, primary and general elections have been conducted, ballots have been cast and counted, and the newly elected officials were sworn in and have held office for months. LaRose's Complaint is out of time, out of place, and suffers from fatal jurisdictional flaws. The Minnesota Chippewa Tribe, President Catherine Chavers, Executive Director Gary Frazer, and the Minnesota Chippewa Tribe's Tribal Election Court of Appeals (collectively, "Tribal Defendants") should be dismissed from this suit for four reasons.

First, this court lacks subject matter jurisdiction to decide matters of tribal law or intrude into intratribal matters such as tribal election disputes. Federal courts have repeatedly recognized tribal courts as the exclusive forums for the adjudication of disputes relating to tribal law and the only forums in which tribal election disputes can be litigated. LaRose presents arguments in the Complaint that have already been resoundingly rejected in the tribal courts of the Minnesota Chippewa Tribe.

Second, this court lacks subject matter jurisdiction because the Tribal Defendants are entitled to tribal sovereign immunity. This immunity applies to the Tribe, as a federally-recognized Indian tribe, and extends to tribal officials and employees acting in their official capacities. LaRose has not even plead a waiver of tribal sovereign immunity.

Third, LaRose has failed to state a claim upon which relief can be granted against the Tribal Defendants. None of the federal laws cited by LaRose authorize the relief requested in the Complaint.

Fourth, the Summons and Complaint should be dismissed pursuant to Rule 12(b)(5) for insufficient service of process. LaRose's reliance on "Federal Pacer e-filing service" for service of the Summons and Complaint is insufficient under the Federal Rules of Civil Procedure. LaRose Certificate of Service, (ECF No. 8).

BACKGROUND

The Minnesota Chippewa Tribe ("Tribe" or "MCT") is a federally-recognized Indian tribe organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 5123 *et seq*., as amended. The Tribe is comprised of six reservations: Bois Forte Band; Fond Du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; and White Earth Band. *See* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5464 (Jan. 30, 2022). The duly elected governing body of the Tribe is the Tribal Executive Committee ("TEC") which consists of the Chairpersons and Secretary/Treasurers of the six reservations. *See* Pl.'s Ex. 3 (ECF No. 3-3 at p. 249). Each of the six Bands are federally recognized and exercise powers of self-determination. *See eg.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172

(1999); *See also*, *Mille Lacs Band of Ojibwe v. County of Mille Lacs, Minnesota*, 2022 WL 675980, (D.Minn. 2022).

Catherine Chavers ("Chavers") is the President of the Tribe and the duly elected Chairperson of the Bois Forte Band. The President of the Tribe does not have a role in election matters, including candidate certification challenges, pursuant to the Tribe's uniform Election Ordinance ("MCT Election Ordinance"). *See generally* Pl.'s Ex. 3 (ECF No. 3-3 at p. 70). Gary Frazer ("Frazer") is the Executive Director of the Tribe. The Executive Director serves nominally as the election court clerk pursuant to the MCT Election Ordinance but has no authority over candidate certification matters. *Id*. The MCT's Tribal Election Court of Appeals ("Election Court of Appeals") is a judicial body comprised of law trained judges appointed by each of the six reservations pursuant to the MCT Election Ordinance. Pl.'s Ex. 3 (ECF No. 3-3 at p. 95). The Election Court of Appeals was specifically established under MCT law to decide issues related to tribal elections and retains exclusive jurisdiction to decide candidate certification matters. *Id*. at p. 74-75.

LaRose is a member of the MCT and the former Secretary-Treasurer for the Leech Lake Band's Reservation Business Committee ("LLRBC"). LaRose had been a long-serving elected official. Compl. (ECF No. 3) at p. 1. However, new evidence was presented to the Election Court of Appeals this election cycle regarding LaRose's criminal history that resulted in LaRose not being certified as a candidate for the Secretary-Treasurer position on the LLRBC. Pl.'s Ex. 3 (ECF No. 3-3 at p. 148-149).

The Tribe is governed by a Revised Constitution and Bylaws ("MCT Constitution") that was originally enacted in 1936 and amended numerous times, most recently in 2005.

See Pl.'s Ex. 3 (ECF No. 3-3 at p. 249). In 2005, the Bureau of Indian Affairs ("BIA") conducted a Secretarial Election at the request of the Tribe to amend the MCT Constitution. (ECF No. 3) at p. 4.[1] The 2005 amendment included language that prohibited individuals convicted of a felony from being eligible to serve as tribal elected officers. *Id*.

The MCT Constitution's felony disqualification provision is the subject of this election dispute and provides that "[n]o member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, if he or she has ever been convicted of a felony of any kind…" *See* Pl.'s Ex. 3 (ECF No. 3-3 at p. 250)(citing Article IV, Section 4 of MCT Constitution). Over four thousand Tribal members voted in favor of the felony disqualification provision. *See* Pl.'s Ex. 2 (ECF No. 3-2 at p. 32). The provision was added to the MCT Constitution and has been applied to candidate certification matters for seventeen years.

The 2005 Secretarial Election was timely appealed to the Interior Board of Indian Appeals ("IBIA"). *Wadena v. Midwest Regional Director*, 47 IBIA 21 (April 23, 2008); Pl.'s Ex. 2 (ECF No. 3-2 at p. 1). The *Wadena* case was filed by three tribal members, including LaRose's counsel in this matter – Frank Bibeau (collectively referred to as the "Bibeau litigants"), and challenged various BIA actions. Before the IBIA, the Bibeau litigants alleged that: 1.) the Tribe's request for a Secretarial Election was invalid; 2.)

[1] The MCT Constitution requires that constitutional amendments be voted on by qualified voters "at an election called for that purpose by the Secretary of the Interior." Pl.'s Ex. 3 (ECF No. 3-3 at p. 254)(citing Article XII of MCT Constitution). Such elections are known as Secretarial Elections.

insufficient notice of the election was provided; 3.) the BIA failed to notify tribal members of the waiver of regulations; 4.) voters were improperly allowed to register to vote on Election Day; 5.) an insufficient number of votes were cast for the election to be valid; and 6.) due process and equal protection rights were violated. 47 IBIA at 21. The IBIA ruled against the Bibeau litigants on all grounds.

With regard to the election waiver arguments that are central to LaRose's complaint[2], the IBIA held that "[a]ppellants simply do not show how these alleged errors – even assuming they rose to the level of actionable procedural errors – likely, and adversely, affected the election results." *Id*. at 29. The IBIA also upheld the Regional Director's calculation of the sufficiency of voter turnout for Secretarial election purposes.

> Both Federal law and tribal law require a minimum turnout of 30% of those "entitled" to vote in order to have a valid Secretarial election. See 25 U.S.C. § 478a; 25 C.F.R. § 81.7; Tribe's Constitution, Art. XII. Appellants maintain that the voter turnout must be a minimum of 30% of all voters eligible to register to vote; the Regional Director maintains that voter turnout must meet or exceed 30% of those who are eligible and who register to vote in the Secretarial election. We conclude that the Regional Director is correct.

Id. at 30. Finally, the IBIA ruled against the Bibeau litigants' amorphous due process and equal protection claims. "[E]ven assuming that due process or equal protection rights are somehow implicated by these waivers, we are hard-pressed to find any violations of these rights." *Id*. at 32. The IBIA's decision against the Bibeau litigants was final agency action for purposes of the Administrative Procedure Act ("APA), 5 U.S.C. §§551-559.

[2] See Compl. ECF 3, Introduction, ¶¶17, 19, 38, 39, and 44.

The APA provides the sole mechanism for challenging the final agency action of the BIA related to the MCT Constitutional Amendment of 2005. 43 C.F.R. §§ 4.21(d), 4.312, 4.314. Neither the Bibeau litigants nor anyone else filed an APA challenge related to the 2005 Constitutional amendment process. The APA's six-year statute of limitation expired nearly a decade ago.

With regard to the 2022 MCT elections, the MCT Constitution provides that "[a]ll elections held on the six (6) Reservations shall be held in accordance with a uniform election ordinance to be adopted by the Tribal Executive Committee." *See* Pl.'s Ex. 3 (ECF No. 3-3 at p. 249-250)(MCT Constitution, Article IV, Section 1). The TEC enacted a uniform Election Ordinance ("MCT Election Ordinance") that governs all tribal elections. *See* Pl.'s Ex. 3 (ECF No. 3-3 at p. 70). The MCT Election Ordinance is the primary source of authority for election related matters. It provides exclusive jurisdiction over candidate certification matters to the Election Court of Appeals. *See* Pl.'s Ex. 3 (ECF No. 3-3 at p. 74-75)(Section 1.3(C)(6) of MCT Election Ordinance).

LaRose filed a Notice of Candidacy for the 2022 MCT Election that was held for the Secretary-Treasurer position for the LLRBC. LaRose's certification as a candidate was duly challenged to the Election Court of Appeals pursuant to the MCT Election Ordinance. *See* Pl.'s Ex. 1 (ECF No. 3-1 at p. 30). On February 16, 2022, the Election Court of Appeals issued a Decision and Order which held that LaRose was ineligible to be certified as a candidate in the upcoming tribal elections. *Id.* The Election Court of Appeals unanimously determined that LaRose had been "convicted of a felony and therefore ineligible to be a

candidate for LLRBC Secretary/Treasurer" in accordance with the eligibility requirements set forth in the MCT Constitution and MCT Election Ordinance. *Id*. at 32.

LaRose then exerted political pressure in an effort to halt the 2022 MCT elections and to get his name placed back on the ballot. *See* Pl.'s Ex. 1 (ECF No. 3-1 at p. 83). LaRose's efforts were unsuccessful even after he forced the TEC to conduct a Special Meeting with the sole focus of getting his name back on the ballot. *See* Pl.'s Ex. 1 (ECF No. 3-1 at p. 88). The TEC held fast to its original position that it lacked authority to overturn the decision of the Election Court of Appeals. *See* Pl.'s Ex. 1 (ECF No. 3-1 at p. 90).

Having failed to gain traction through political maneuvering, LaRose turned to the Tribal Court of the Leech Lake Band of Ojibwe ("LLBO Tribal Court") for relief and filed suit on April 29, 2022. *See* Pl.'s Ex. 3 (ECF No. 3-3 at p. 2).The suit named Chavers, Frazer, and the Election Court of Appeals as Respondents. The Complaint alleged that the actions of Chavers, Frazer, and the Election Court of Appeals, specifically the non-certification of LaRose, violated his constitutional rights. *Id*. at 6. LaRose raised the same arguments in LLBO Tribal Court as he now raises in federal court. *Id*. LaRose sought an order from the LLBO Tribal Court declaring that his civil rights had been violated and injunctive relief requiring the Tribe to stop going forward with the 2022 MCT election without LaRose on the ballot. *See* Pl.'s Ex. 3 (ECF No. 3-3 at p. 26).

The LLBO Tribal Court issued an order dismissing LaRose's Complaint on May 5, 2022. *See* Pl.'s Ex. 4 (ECF No. 3-4 at p. 27). "This Court has reviewed the MCT Election Ordinance, as well as the MCT Constitution and laws of the Band, and concludes that

absent a clear violation of due process of law by the MCT Court of Election Appeals[,] this Court lacks the subject matter jurisdiction to intervene into this dispute and thus grants the motion to dismiss for want of jurisdiction." *Id* at. 29. The LLBO Tribal Court determined that LaRose received adequate due process. "The MCT Court of Appeals received a challenge to the Petitioner's eligibility, it gave him notice of the challenge and the right to respond, and then it considered the challenge and his response to conclude that he was ineligible. This constitutes due process…" *Id*. at 33.

LaRose filed a Motion for Reconsideration with the LLBO Tribal Court on May 10, 2022. *See* Pl.'s Ex. 4 (ECF No. 3-4 at p. 9). The LLBO Tribal Court denied the Motion for Reconsideration and found that the decision of the MCT Election Court of Appeals did not violate due process. *See* Pl.'s Ex. 4 (ECF No. 3-4 at p. 3). "This Court finds that the MCT Election Court of Appeals' application of the 2006 constitutional amendment to uphold the challenge to the Petitioner's eligibility to run is not violative of the Indian Civil Rights Act due process clause because it is not an ex post facto law." *See* Pl.'s Ex. 4 (ECF No. 3-4 at p. 4).

LaRose appealed the Tribal Court's decision to the Tribal Court of Appeals for the Leech Lake Band of Ojibwe ("LLBO Court of Appeals"). On June 8, 2022, the LLBO Court of Appeals held that the Election Court of Appeals properly exercised its exclusive jurisdiction. It also found that LaRose's due process rights had not been violated. *See* Pl.'s Ex. 5 (ECF No. 3-5 at p. 2).The LLBO Court of Appeals ruled against the ex post facto arguments that LaRose now seeks to relitigate in federal court. *Id*. at 9. "In this case, the Tribal Court is correct: the felony disqualification provision in the MCT Constitution and

Election Ordinance is non-punitive…[w]e agree that the provisions do not violate his due process rights." *Id*. at 11.

The 2022 MCT elections occurred as scheduled. LaRose concedes that the elections are complete. Compl., (ECF No. 3 ¶ 62). The General Election for the LLRBC position of Secretary/Treasurer occurred on June 14, 2022. The winning candidate, Leonard Fineday, was sworn into office as the new Secretary/Treasurer of the LLRBC on July 1, 2022.

LaRose filed this case in federal court seeking declaratory and injunctive relief. Compl. (ECF No. 3). The alleged bases for this court's jurisdiction are the 1855 Treaty; the Indian Reorganization Act of 1934 ("IRA") 48 Stat. 984 (codified as amended at 25 U.S.C. § 5101; 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. §§ 2201-2202; and the habeas corpus provisions of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303. Compl. (ECF No. 3, ¶¶ 1, 2, 3, 4, 5).

Count I of LaRose's Complaint alleges that the BIA's certification of the 2005 Secretarial election violated the IRA and the MCT Constitution. Compl. (ECF No. 3, at p. 18). Count II of LaRose's Complaint alleges that the Tribe's application of the 2005 constitutional amendment violates ICRA and entitles LaRose to habeas relief. *Id*. at 19-20. Ultimately, LaRose seeks a declaration that Defendant's violated the IRA, the MCT Constitution, the ICRA, and unspecified federal and tribal laws related to free and fair elections. *Id*. at 23-24. LaRose also seeks injunctive relief rescinding, setting aside, and holding unlawful the 2005 MCT Secretarial election, requiring Defendants to fully comply with the IRA, MCT Constitution, and ICRA, and "prohibiting any activity in furtherance

of the 2022 MCT election for the LLRBC Secretary-Treasurer including swearing in of the other candidate." *Id*.

LEGAL STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) challenges the jurisdiction of a court to hear a case. "Federal courts are courts of limited jurisdiction, 'possessing' only that power authorized by Constitution or statute.'" *Eckerberg v. Inter-State Studio & Publ'g Co.*, 860 F.3d 1079, 1084 (8th. Cir. 2017)(quoting *Gunn v. Minton*, 568 U.S. 251, 256 (2013)). Before reaching the merits of a case, a federal court must first address the "threshold issue" of its subject matter jurisdiction. *U.S. Water Servs. v. Chemtreat, Inc.*, 794 F.3d 966, 971 (8th Cir. 2015). "The plaintiff bears the 'burden of providing subject matter jurisdiction.'" *Aly v. Hanzada for Imp. & Exp. Co., LTD*, 864 F.3d 844, 847 (8th Cir. 2017)(quoting *V S Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000)). A motion to dismiss based on sovereign immunity is also analyzed under Fed. R. Civ. P. 12(b)(1). *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F3d 1040, 1043 (8th Cir. 2000).

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court accepts well-pleaded factual allegations as true, but disregards conclusory allegations. *Iqbal*, 556 U.S. at 678. If the plaintiff fails to "raise a right to relief above the speculative level," then Rule 12(b)(6) dismissal is warranted. *Twombly*, 550 U.S. at 555.

Under Rule 12(b)(5), a plaintiff must respond to a motion to dismiss by establishing prima facie evidence that there was sufficient service of process. *See eg*., *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A*., 51 F.3d 1383 (8th Cir. 1995).

As a general rule, a court may not consider materials "outside the pleadings" on a motion to dismiss. Fed. R. Civ. P. 12(d). However, the court "may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings" without converting the motion into one for summary judgment. *Little Gem Life Sciences, LLC v. Orphan Medical, Inc.*, 537 F.3d 913, 916 (8th Cir. 2008) (quotation omitted). Matters necessarily embraced by the complaint include "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings." *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012). Courts consider, "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Miller v. Redwood Toxicology Lab, Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012) (quoting 5B Wright & Miller, Federal Practice & Procedure § 1357 (3d ed. 2004)).

ARGUMENT

I. FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO RESOLVE INTRA-TRIBAL DISPUTES

This case involves an intra-tribal election dispute that LaRose litigated and lost before three separate tribal judicial bodies. The Election Court of Appeals, the LLBO

Tribal Court, and the LLBO Court of Appeals all ruled against LaRose on the arguments raised in LaRose's federal Complaint. Those courts ruled that the application of the 2005 constitutional amendments to LaRose in the 2022 MCT election complied with tribal law, that LaRose's civil rights recognized by the MCT Constitution and ICRA were not violated, and that LaRose received adequate due process.

The claims brought directly against the Tribal Defendants relate purely to intra-tribal matters and should be dismissed for lack of subject matter jurisdiction. LaRose's request to overturn final agency action that occurred over fourteen years ago and effectively rewrite the MCT Constitution should also be dismissed.

Despite the imaginative legal theories set forth in the Complaint, the allegations in this case involve purely tribal matters. At its core, LaRose's lawsuit disagrees with the way the Tribe, its officers and officials, and the tribal judiciary applied the MCT Constitution and the MCT Election Ordinance to his candidacy for office. LaRose's primary goal is for this federal court to overturn the Tribal Courts' certification decisions to force his way back into the running for Secretary-Treasurer of the LLRBC.

Federal courts have long held that they lack jurisdiction to resolve intra-tribal disputes such as the present election dispute. *Runs After v. United States*, 766 F.2d 347, 352-53 (8th Cir. 1985) (holding that interpretation of tribal resolutions was a matter for tribal courts); *Sac and Fox Tribe of the Miss. in Iowa v. Bear*, 258 F.Supp. 2d 938, 944 (N.D. Iowa 2003)(rejecting an attempt to frame an alleged violation of tribal law as a RICO claim), aff'd 340 F.3d 749 (8th Cir. 2003). This is particularly true when the intra-tribal dispute involves the interpretation of tribal constitutions and tribal laws. "Such an action

would necessarily require the district court to interpret the tribal constitution and tribal law. We believe the district court correctly held that resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court." *Runs After*, 766 F.2d at 352. *See also*, *Ordinance 59 Ass'n v. Babbitt*, 970 F.Supp. 914 (D. Wyo. 1997).

Federal courts also lack subject matter jurisdiction to resolve tribal election disputes. *See e.g.*, *Runs After*, 766 F.2d at 353. This is because "tribal election disputes, like tribal elections, are key facets of internal tribal governance and are governed by tribal constitutions, statutes, and regulations." Cohen's Handbook of Federal Indian Law § 4.06(1)(b)(i) (2005). "Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions." *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi of Iowa*, 609 F.3d 927, 943 (8th Cir. 2010). *See also Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983). "Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws … lies with Indian tribes and not in the district courts." *Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003). "We have characterized election disputes between competing tribal councils as nonjusticiable, intratribal matters." *Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832 (8th Cir. 2006). *See also*, *Grassrope*, 708 F.2d at 337.

The Supreme Court has long held that federal courts are not an alternative forum to relitigate matters that have been decided in tribal courts. In *Iowa Mutual Insurance Co. v. LaPlante*, the Court held that "[u]nless a federal court determines that the Tribal Court

lacked jurisdiction…proper deference to the tribal court system precludes relitigation of issues raised by the [underlying] claim and resolved in the Tribal Courts." 480 U.S. 9, 19 (1987). "That decision has been understood as establishing 'the rule that federal courts may not readjudicate questions – whether of federal, state, or tribal law – already resolved in tribal court absent a finding that the tribal court lacked jurisdiction…" *Attorney's Process*, 609 F.3d at 942, (quoting *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 904)(9th Cir. 2002)).

LaRose's attempt to challenge the BIA's decision outside of the APA and its statute of limitations is merely an attempt to create a federal question out of a dispute that is purely tribal in nature. However, a plaintiff may not circumvent tribal court jurisdiction through creative pleading. *See Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996)(holding that "upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.").

The present case involves a suit beyond the subject matter jurisdiction of this court. This suit necessarily involves the interpretation of tribal constitutions and tribal laws, specifically the MCT Constitution and the MCT Election Ordinance. Second, it involves a nonjusticiable election dispute. The only difference between this case and the tribal governance disputes cited above is that LaRose is not vying for control against another political faction but is instead fighting the Tribe as a whole. Finally, this case involves legal arguments that have already been litigated and decided against LaRose in tribal court. LaRose does not challenge the jurisdiction of the tribal courts but instead challenges the

decisions made by those tribal courts. For these reasons, this suit should be dismissed with prejudice for lack of subject matter jurisdiction.

II. TRIBAL SOVEREIGN IMMUNITY BARS SUIT AGAINST THE TRIBE, TRIBAL AGENCIES, AND TRIBAL OFFICIALS

Even assuming for sake of argument that LaRose could establish subject matter jurisdiction, this Court must still dismiss the Complaint because the Tribe and its officers and officials are immune from suit.

A. The Minnesota Chippewa Tribe is Immune from Suit

Sovereign immunity is a threshold jurisdictional question that must be addressed before the merits. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 171 (2009); *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011). "Among the core aspects of sovereignty that Tribes possess" is "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)(quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribal sovereign immunity has been described as a "necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 890 (1986). "[I]f the Tribe possesses sovereign immunity, then the district court had no jurisdiction." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995). "[I]t is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434 (2007).

The Minnesota Chippewa Tribe, as a federally recognized Indian tribe, possesses sovereign immunity from suit. *Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996). The Tribe's sovereign immunity also extends to tribal agencies, including the Election Court of Appeals. *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 670 (8th Cir. 2015).

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The burden of showing a clear and unequivocal waiver of sovereign immunity rests upon the party asserting the waiver. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011). The party asserting such waiver cannot carry such burden through implication. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000).

B. The Tribe Has Not Waived Its Sovereign Immunity, Nor Has Congress Clearly Abrogated Tribal Sovereign Immunity

LaRose "bear[s] the burden of proving that either Congress or [the Tribe] has expressly and unequivocally waived tribal sovereign immunity." *Amerind*, 633 F.3d at 685-86; *Smith v. Babbitt*, 875 F. Supp. 1353, 1357 (D. Minn. 1995) (This Court adheres to a "strong presumption in favor of tribal sovereign immunity"). The Complaint makes no allegation of waiver by the Tribe for suits against the Tribe or the Tribal Defendants. In fact, the Complaint does not even contain the word immunity. LaRose has not presented any evidence that the Tribe waived its immunity.

None of the federal laws cited in the Complaint waive the Tribe's immunity. The IRA does not provide subject matter jurisdiction or provide a waiver of the sovereign immunity of the Tribe. *Twin Cities Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967). The ICRA does not waive the Tribe's sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). 28 U.S.C. § 1331 does not provide a free-standing waiver of tribal sovereign immunity. *Twin Cities Tribal Council*, 370 F.2d at 532. *See also*, *Miner Elec. Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007). 28 U.S.C. § 2201 does not provide an independent basis for federal court jurisdiction and cannot be relied upon as an abrogation of sovereign immunity. *See, e.g., Skelly Oil Co. v. Phillips Petroleum Co*., 339 U.S. 667 (1950). Finally, LaRose can point to no existing legal authority which finds that the 1855 Treaty waives tribal sovereign immunity. Neither Congress nor the MCT has waived sovereign immunity in this case.

C. The Tribal Defendants, Acting in Their Official Capacities, Share the Tribe's Sovereign Immunity

Generally, "tribal officers are clothed with the Tribe's sovereign immunity." *Baker Elec. Co-op v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994). Tribal employees and officials sued in their official capacities share the Tribe's immunity, because "[a] suit against a governmental actor in his official capacity is treated as a suit against the government itself." *Brokinton v. City of Sherwood, Ark.*, 503 F.3d 667, 674 (8th Cir. 2007). "[A] plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Cook v. AVI Casino Enters., Inc.*,

548 F.3d 714, 727 (9th Cir. 2008). Naming a tribal official as a defendant does not operate as an end around sovereign immunity:

> A suit against the tribe and its officials in their official capacities is a suit against the tribe and is barred by tribal sovereign immunity unless that immunity has been abrogated or waived. Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority.

Miller v. Wright, 705 F.3d 919, 927-28 (9th Cir. 2013). LaRose sued Chavers and Frazer in their official capacities as elected or appointed officials of the Tribe. (Compl. ¶¶ 10-11). Such official capacity suits are barred absent a waiver of sovereign immunity.

D. LaRose Fails to Plead a Viable Waiver of Tribal Sovereign Immunity

The Complaint makes no mention of immunity, so it comes as no surprise that LaRose has failed to plead a viable waiver of tribal sovereign immunity. It is possible to plead a narrow exception to the general rule that tribal government officials cannot be sued in their official capacity. *See Ex parte Young*, 209 U.S. 123 (1908). However, the exception "applies only to prospective relief, does not permit judgments against [tribal] officers declaring that they violated federal law in the past, and has no application in suits against [Indian tribes] and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf*, 506 U.S. 139, 146 (1993). In order to obtain relief under *Ex parte Young*, a party must show that "the sovereign did not have the power to make a law" that the official acted under because "then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit." *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993).

Even if properly plead by LaRose, *Ex parte Young* does not apply to this case. The 2022 MCT elections have already occurred, and the newly elected members have been sworn into office. LaRose is no longer seeking prospective relief but instead seeks to undo actions that have already taken place and declare previous actions unlawful.

LaRose has failed to allege how the individual Tribal Defendants acted outside the scope of their authority and how such actions violate federal law. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269 (9th Cir. 1991). The prospective relief requested by LaRose relates exclusively to actions taken by Tribal Defendants under tribal law. *Ex parte Young* is inapplicable to claims involving official actions taken under tribal law. *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F.Supp. 740 (D.S.D. 1995).

None of the individual Tribal Defendants have authority to grant the relief requested by LaRose. They cannot independently or collectively overturn the results of the MCT election or remove the newly sworn in member of the LLRBC from office. *Ex parte Young* is barred by tribal sovereign immunity in matters such as this where the judgment sought "would interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002) (quoting *Shermoen v. United States*, 982 F.2d 1312, (9th Cir. 1992). Finally, *Ex parte Young* is inapplicable where, as here, the requested relief would run against the sovereign instead of the officials. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

III. LAROSE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. The Election Court of Appeals and Defendant Frazer Are Entitled to Absolute Immunity and Quasi-Judicial Immunity

Even if this Court had jurisdiction and sovereign immunity has been abrogated or waived, other immunity doctrines apply to bar the Complaint against the Election Court of Appeals and Frazer. "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419 n. 13 (1976). "Where an official's challenged actions are protected by absolute immunity, dismissal under Rule 12(b)(6) is appropriate." *Sample v. City of Woodbury*, 836 F.3d 913, 916 (8th Cir. 2016).

The Election Court of Appeals is protected by absolute judicial immunity from suit. Absolute judicial immunity shields judges from liability "for judicial act[s] taken within [the] court's jurisdiction." *Cleavinger v. Saxner*, 474 U.S. 193, 199 (1985)(citation omitted). "A judge is entitled to absolute immunity for all judicial actions that are not 'taken in a complete absence of all jurisdiction.'" *Penn v. U.S.*, 335 F.3d 786, 789 (8th Cir. 2003) (quoting *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Federal courts have held that tribal court judges are "entitled to the same absolute judicial immunity that shields state and federal court judges." *Penn,* 335 F.3d at 789. LaRose does not challenge the Tribal Election Court of Appeal's jurisdiction to hear candidate certification challenges. Instead, LaRose seeks to overturn the decisions made by the Election Court of Appeals. *Cleavinger, Penn, and Mireles* clearly provides absolute judicial immunity for the Election Court of Appeals in this instance.

Frazer is sued in his official capacity as Executive Director of the Tribe and in his capacity as the Court Clerk for the Election Court of Appeals. Quasi-judicial immunity extends the actions of court clerks "for acts that may be seen as discretionary, or for acts taken at the direction of a judge or according to court rule." *Smith v. Finch*, 324 F.Supp. 3d 1012, 1024 (E.D. Mo. 2018) (quoting *Geitz v. Overall,* 62 F.App'x 744 (8th Cir. 2003)). Frazer's actions as Court Clerk are governed exclusively by tribal law and the court rules for the dispute in question are provided by the MCT Election Ordinance. Frazer's actions were in accordance with the applicable court rules and as such are entitled to quasi-judicial immunity.

B. LaRose Cannot Maintain Causes of Action under the 1855 Treaty, the IRA, 28 U.S.C. § 1331, or 28 U.S.C. § 2201

LaRose cites the following laws as providing a basis for his cause of action: the 1855 Treaty; the IRA, 48 Stat. 984; 28 U.S.C. § 1331; 28 U.S.C. §§ 2201-2202; and the habeas corpus provisions of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303. Compl., 10.

The majority of LaRose's claims can be disposed of quickly. The IRA does not provide federal courts with jurisdiction to hear private causes of action against an Indian Tribe. "The Eighth Circuit has explicitly rejected claims brought against an Indian tribe predicated on the IRA." *Smith v. Babbitt*, 875 F.Supp. 1353 (D.Minn. 1995). *Twin Cities Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529* (8th Cir. 1967).

28 U.S.C. § 1331 does not provide a free-standing cause of action. *Twin Cities Tribal Council*, 370 F.2d at 532. *See also*, *Miner Elec., Inc. v. Muscogee (Creek) Nation*,

505 F.3d 1007 (10th Cir. 2007). 28 U.S.C. § 2201 does not provide an independent basis for federal court jurisdiction and cannot be relied upon as an abrogation of sovereign immunity. *See, e.g., Skelly Oil Co. v. Phillips Petroleum Co*., 339 U.S. 667 (1950). Both of these laws depend on an independent federal vehicle for the cause of action to exist. Finally, LaRose can cite to no case that stands for his proposition that the 1855 Treaty provides a private cause of action against the Tribe.

C. LaRose Does Not Have a Protected Property Interest in Public Office

LaRose's attempt to fashion a cause of action out of his purported property interest in elected office is a non-starter. "To have a constitutionally cognizable property interest in a right or a benefit, a person must have 'a legitimate claim of entitlement to it." *Austell v. Sprenger*, 690 F.3d 929, 935 (8th Cir. 2012)(quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. 577. Numerous courts have found that there is no constitutionally protected property interest in elected office. *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)("public offices are mere agencies or trusts, not property"); *Snowden v. Hughes*, 321 U.S. 1, 7 (1944)(finding that the right to state political office is not a right of property); *Parks v. City of Horseshoe Bend, Ark.*, 480 F.3d 837, 840 (8th Cir. 2007)("no constitutional right to be elected to a particular office"); *Velez v. Levy*, 401 F.3d 75, 85-87 (2d Cir. 2005); *Crowe v. Lucas*, 595 F.2d 985, 993 (9th Cir. 1979); *Franzwa v. City of Hackensack*, 567 F.Supp.2d 1097 (D. Minn. 2008). LaRose has not and cannot point to binding legal authority that

supports his contention that he has a federally protected property interest in elected tribal office. The only remaining cause of action plead is habeas relief under the ICRA.

D. LaRose Fails to State a Habeas Claim under ICRA

The only form of federal relief available under ICRA is a writ of habeas corpus. *Runs After v. United States*, 766 F.2d 347, 353 (8th Cir. 1985). A petition for a writ of "habeas corpus entitles [a] prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008); *see also Peyton v. Rowe*, 391 U.S. 54, 58 (1968) ("The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under the law."). LaRose alleges that the acts and omissions of the Tribal Defendants have caused a significant "restraint on [his] property rights and liberty interest, actual and potential, severely severing those long-vest property rights to hold elected office…" Compl. (ECF No. 3 ¶ 58).

To properly bring a petition for habeas corpus under ICRA, a plaintiff must be "detain[ed] by order of an Indian tribe" in a manner contemplated by 25 U.S.C. § 1303. *Moore v. Nelson*, 270 F.3d 789, 790 (9th Cir. 2001) (holding that a tribe's fine of a nonmember for illegal timber cutting was not a sufficient restraint to satisfy the detention element of Section 1303). And although 25 U.S.C. § 1303 uses the word "detention" and not "custody," "[t]here is no reason to conclude that the requirement of 'detention' set forth

in 25 U.S.C. § 1303 is any more lenient than the requirement of 'custody' set forth in the other federal habeas statutes." *Id.* at 791.

The "in custody" requirement, and thereby the "detention" requirement, is equated to a significant restraint on liberty, actual or potential. *Harvey v. State of N.D.*, 526 F.2d 840, 841 (8th Cir. 1975); *see Moore*, 270 F.3d at 790. A litigant seeking to invoke federal court habeas relief must demonstrate "a severe actual or potential restraint on liberty." *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010).

LaRose has not plead that he was, is, or could have been detained or put in custody. He has also failed to plead any facts that support a finding that he was detained. His only remaining claim for habeas relief is that a severe actual restraint on liberty has occurred for which the Tribal Defendants are responsible for. The alleged restraints on LaRose's liberty, if they even exist, do not warrant habeas relief.

In *Poodry v. Tonawanda Band of Seneca Indians,* tribal members were stripped of membership benefits, told to leave their homes, and permanently banished from the reservation. 85 F.3d 874 (2nd Cir. 1996). They sought habeas relief and the 2nd Circuit Court of Appeals concluded that permanent banishment from the reservation was a severe and sufficient restraint on liberty to permit a writ of habeas corpus. *Id*. at 895. Conversely, the 9th Circuit Court of Appeals held that tribal disenrollment and a loss of membership benefits was not a significant enough restraint to amount to unlawful detention under § 1303. *Jeffredo*, 599 F.3d at 914.

A federal district court in Arizona applied *Jeffredo* and *Poodry* in a matter with striking similarities to the case at bar. *Lewis v. White Mt. Apache Tribe*, CV-12-8073-PCT-

SRB, 2013 WL 510111 (D. Ariz. Jan. 24, 2013), report and recommendation adopted, CV12-8073-PCT-SRB, 2013 WL 530551 (D. Ariz. Feb. 12, 2013), *aff'd*, 584 Fed. Appx. 804 (9th Cir. 2014)(unpublished). *Lewis* involved a suit brought by a tribal member after the White Mountain Apache Tribal Court denied his bid to run for tribal office. The White Mountain Apache Tribal Court interpreted the provisions of a tribal constitution and election laws to determine that the tribal member was ineligible to run for office. The tribal member filed a Petition for Writ of Habeas Corpus under the ICRA. The *Lewis* court declined to expand the definition of detention beyond existing legal precedent and held that "the refusal to certify Petitioner as a candidate for the Tribal Council election is simply not equivalent to a detention under § 1303. As precedent demonstrates, a writ of habeas corpus is a measure reserved for only the most severe restraints on individual liberty – restraints that amount to detention." *Lewis*, 2013 WL 510111, at *6.

LaRose's habeas claim fails because he has not had a severe restraint on his liberty. He has not been banished from the tribe, subjected to any form of physical custody or arrest, or evicted from the reservations. The only thing that has happened to LaRose in this case is that the tribal courts have told him that he is ineligible to run for office pursuant to tribal law.

Finally, LaRose has not sued the "jailer," or a party that could enforce a successful writ of habeas corpus. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992)(holding that the proper respondent for a federal habeas petition is the petitioner's custodian). None of the individual Tribal Defendants have the power or authority to grant LaRose's requested relief.

IV. THE COMPLAINT SHOULD BE DISMISSED FOR INSUFFICIENT SERVICE OF PROCESS

This Complaint should be dismissed against the Tribal Defendants for insufficient service of process of the summons and complaint. Fed. R. Civ. P. 4(c) describes the appropriate manner of service for a summons and complaint. "Generally speaking, Rule 4 requires a more reliable – and for the server, a more expensive and less convenient – form of service than Rule 5, which applies to the service of all papers after the summons and complaint." *Trustees of the St. Paul Elec. Const. Industry Fringe Benefit Fund v. Martens Elec. Co.*, 485 F.Supp.2d 1063, (D.Minn. 2007). Rule 5 allows for service by mail of many other filings but Rule 4, generally does not allow service by U.S. Mail of the summons and complaint. The only way that personal service for a summons and complaint can be avoided pursuant to the Fed. R. Civ. Pro. or the Minn. R. Civ. Pro. is to request a waiver of personal service. Importantly, reliance on CM/ECF for the service of a summons and complaint is not permitted under the Fed. R. Civ. Pro or Minn. R. Civ. Pro. *See eg.*, *Jomo v. Kallis*, 2022 WL 329405 (D. Minn. 2022)(unpublished).

LaRose has failed to properly serve the Summons and Complaint on the Tribal Defendants. On June 22, 2022, counsel for LaRose filed a letter stating that "Federal Pacer E-filing service" has been accomplished on the undersigned attorney for the Minnesota Chippewa Tribe Defendants. (ECF No. 8). LaRose next mailed the summons and complaint to the undersigned attorney on July 1, 2022. To date, LaRose has not requested a waiver of personal service of the Summons and Complaint pursuant to Rule 4(d) or accomplished personal service pursuant to Rule 4(c). LaRose's efforts to accomplish service of the

Summons and Complaint through CM/ECF and through U.S. Mail are insufficient. For these reasons, the Court may also dismiss LaRose's Complaint.

CONCLUSION

For all of the above reasons, the Tribal Defendants respectfully request that this Court dismiss LaRose's Complaint with prejudice.

Respectfully submitted this 28th day of September, 2022.

s/ Philip M. Brodeen
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