IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

ARTHUR DAVID LAROSE,
Secretary-Treasurer for the Leech Lake Band of Ojibwe of the Minnesota Chippewa Tribe,
Plaintiff,
v.

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 the President of the Minnesota Chippewa Tribe, Minnesota, and GARY FRAZER, in his official capacity as Executive Director Minnesota Chippewa Tribe and as Tribal Election Court Clerk, and The MINNESOTA CHIPPEWA TRIBE'S TRIBAL ELECTION COURT OF APPEALS in their official capacities as 2022 certification panel,
Defendants.

Case No. 22-cv-1603 PJS/LIB

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO FEDERAL AND TRIBAL DEFENDANTS' MOTION TO DISMISS

Background

In 2004, Plaintiff LaRose had already won elected office for Secretary-Treasurer of the Leech Lake Reservation Business Committee of the Minnesota Chippewa Tribe[1] (MCT). Plaintiff has been elected 6 (six) times, over the past 16 (sixteen) years to the Leech Lake Reservation Business Committee of the MCT. Federal and Tribal Defendants' ultra vires actions and omissions of trust responsibilities to MCT members finally resulted in the unjust taking of Plaintiff's liberty interests and property rights to hold and seek re-election injury on February 16, 2022. It is this particular injury that Plaintiff's standing is recognized under *Hudson v Haaland et al*, (11th 2021).[2] But for the compound ultra vires acts and omissions by Federal and Tribal Defendants, Plaintiff LaRose would have been able to seek re-election to a 7th (seventh) term of office.

Ultra vires acts and omissions.

[1] See *Minnesota Chippewa Tribe et al v United States of America*, Before the Indian Claims Commission Docket 18-B, *Findings of Fact*, Decided June 28, 1960, 8 Ind. Cl. Comm 781-782. The Indian Claims Commission explained in 1960 land claims decision that "The Minnesota Chippewa Tribe [. . .] is a Wheeler-Howard Act Indian corporation duly organized pursuant to the Indian Reorganization Act of June 13, 1934 (40 Stat. 984) under a constitution and by-laws approved by the Secretary of the Interior on July 24, 1936. Its membership includes all Chippewa Indians duly registered on the approved rolls of the White Earth, Leech Lake, Fond du Lac, Bois Fort (Nett Lake) and Grand Portage Reservations and the non-removal Mille Lac Band of Chippewa Indians (Constitution of the Minnesota Chippewa Tribe, Article 11, Sections 1 and 2). The Minnesota Chippewa Tribe is not the successor in interest to the claim presented under Docket No. 18-B but is entitled to maintain this action in a representative capacity on behalf of all descendants of those Chippewa Indians who were parties to the Treaty of February 22, l855 (10 Stat. 1165) [. . .]."

[2] See *Hudson v Haaland et al*, (11th 2021), No. 20-5160, which ORDERED AND ADJUDGED that the judgment of the United States District Court for the District of Columbia (Hudson v Zinke, (No. 1:15-cv-01988)) be VACATED and the case be REMANDED FOR DISMISSAL (for Hudson's lack of standing).

In 2005, Federal and Tribal Defendants, (political predecessors of the Dept. of Interior (DOI) and the MCT's Tribal Executive Committee (TEC)) sought to intentionally circumvent federal laws including; 1) the Indian Civil Rights Act of 1968 (ICRA); and 2) the Minnesota Chippewa Tribe members' Tribal and U.S. Constitutional protections, rights, privileges and guarantees-- to obtain an unconstitutional amendment to the MCT Constitution, which was/is a prima facia violation of the ICRA, MCT and U.S. Constitutions. The 2005 amendment provides that

> No 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*; or of a lesser crime involving theft, misappropriation, or embezzlement of money, funds, assets, or property of an Indian tribe or a tribal organization.

(See Article IV – Tribal Elections, Sec. 4, Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota. As amended per Amendment IV, approved by the Secretary of the Interior on January 5, 2006.)(Emphasis added).

Defendants DOI and MCT both knew or should have known that the language of the amendment requested by the MCT violated; 1) the U.S. Const. Art 1, § 9 (No [. . .] ex post facto law shall be passed by Congress); 2) Fifth Amendment (No person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); 3) MCT Constitution Art. XIII ("All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, **and no member shall be denied any of the**

constitutional rights or guarantees enjoyed by other citizens of the United States . . ."); and 4) the Indian Civil Rights Act of 1968 (25 U.S.C.§ 1302. (a) Constitutional Rights: No Indian tribe in exercising powers of self-government shall: (5) take any property for a public use without just compensation; and (9) pass any [. . .] ex post facto law). DOI and MCT Defendants have willfully and/or ignorantly colluded to deprive all MCT members, including Plaintiff, of the constitutional rights or guarantees enjoyed by other citizens of the United States to achieve an unconstitutional amendment to the MCT Constitution[3], which the MCT Defendants continue to *dutifully implement* in 2022. Here, Federal and Tribal Defendants collective actions and omissions are completely *ultra vires*--beyond the scope of federal and tribal, legislatively expressed authorities of their various and respective laws and constitutional limitations described above (in 2005 and 2006)---and have now injured Plaintiff and caused the deprivation of Plaintiff's long held, liberty interests and property rights (to unjustly take long earned rights to hold and seek re-election to 7th term) by the retroactive application by the MCT Defendants of the ex post facto 2006 Secretary Approved amendment, as determined by the MCT Election Court of Appeals *Decision & Order* dated February 16, 2022. (Pl. Ex. P-1, Ex. 4).

[3] See DOI Exhibit 6 (Doc 24-8) **Memorandum from DOI/BIA Regional Director Virden to Minnesota Agency**, Subject: Minnesota Chippewa Tribe - Proposed Amendments to the Revised Constitution and Bylaws of the Minnesota Chippewa Indian Tribe dated Sept. 26, 2005. (The Minnesota Chippewa Tribal Executive Committee (TEC) submitted Resolution 70-05, enacted on February 17, 2005 requesting a Secretarial election to vote on the adoption/rejection of the proposed amendments pursuant to Article XIII[sic]- Amendments of the Constitution. **Virden memorandum authorizes the election stating "These proposed amendments do not appear to violate federal law."**

Ultra vires acts are not protected by sovereign or other immunity. Consequently, even when a government entity's immunity has not been waived by the Congress or a Tribal government, a claim may proceed against government officials in their official capacity if the plaintiff successfully alleges that the officials have engaged in ultra vires conduct. Federal and Tribal Defendants cannot and do not deny their necessary participation and actions to achieve the prime facia, ex post facto constitutional violations.

The second ultra vires act in 2005 by Federal and Tribal Defendants was the use election waivers to circumvent the MCT Constitutionally required 30% minimum of all MCT members entitled to vote which provides that

> [t]his constitution may be revoked by Act of Congress or amended or revoked by a majority vote of the qualified voters of the Tribe voting at an election called for that purpose by the Secretary of the Interior **if at least 30 percent of those entitled to vote shall vote.** No amendment shall be effective until approved by the Secretary of the Interior. It shall be the duty of the Secretary to call an election when requested by two-thirds of the Tribal Executive Committee.

See MCT Const., Art. XII – Amendment Section 1. (Emphasis added). (*See also* Pl. Ex. ___, Brodeen legal memorandum regarding "Applicability of *Hudson v Zinke*" dated July 13, 2020, to the Minnesota Chippewa Tribe, Tribal Executive Committee, page 1, section A, The Indian Reorganization Act describing that

> Secretarial elections are "federal—not tribal" elections. A tribe must ask the Secretary of the Interior to call and conduct a Secretarial Election to amend an IRA constitution. [. . .] The quorum requirement of the IRA states that "the total vote cast shall not be less than 30 per centum of those entitled to vote."

Id. FNs 3 & 5., and see Id. Section II, MCT Constitution, p. 3 ("if at least 30 percent of those entitled to vote shall vote.")

Ultimately, the Brodeen legal memorandum explains that

> The Federal District court ruled in favor of Hudson by finding that the explicit language in the Tribe's Constitution conflicted with the BIA's regulations. The District Court relied on 25 C.F.R. § 81.2(b) to find that the tribe's interpretation of its own constitution trumps to DOI regulations.

Id. Section B. Secretarial Election at Three Affiliated Tribes. (See also *Hudson v Great Plains Regional Director, Bureau of Indian Affairs*, 61 IBIA 253 (Sept. 15, 2015). The IBIA ruled for the BIA's use of election waivers and Hudson appealed.)

The *Hudson v Zinke* unpublished decision found that the BIA's certification of tribe's secretarial election based on quorum of registered voters was contrary to law, since federal regulation could not amend tribal constitution. This was the first time BIA waivers had been used with a MCT Secretarial Election and therefore the MCT had not previously acquiesced to regulatory definition by holding, certifying, and failing to protest prior secretarial elections under which registered-voter quorum requirement was ever implemented.[4] Plaintiff argues that just as the *Zinke* court's analysis recognized

> calculating the necessary quorum based on "registered" voters conflicts with the meaning of "entitled" in Article X, and therefore the 2025 Secretarial election failed to satisfy the quorum requirement and is invalid. [Plaintiff understands t]he court is hesitant to interpret another sovereign's constitution, especially on an issue of first impression. Cf. Ransom, 69 F. Supp. 2d at 150 ("[C]ourts take care not to intervene into internal tribal affairs."). But as the court cannot certify this question to a tribal court, as it otherwise may to a state supreme court, it is obligated to undertake the task.

[4] Id. 5 U.S.C.A. § 706(2); 25 U.S.C.A. §§ 5123(a)(1), 5127; 25 C.F.R. §§ 52.11 (1981), 81.2(b).

Id. at 437.

In 2005 "[t]otal enrollment for the MCT at the time was approximately 34,000." (See Pl. Ex. P-3, Ex. A, Brodeen Legal Memorandum, Section II B. Retroactive Applicability, p. 3.) The MCT did ask the Secretary of the Interior to call and conduct a Secretarial Election to amend an IRA constitution using the ex post facto language in TEC Resolution 70-05 (See DOI Ex. 3). The Federal Defendants reviewed the TEC Resolution 70-05 amendment language and commented that the proposed amendment "do[es] not appear to violate federal law." Id. DOI Ex. 6, p.1. Ultimately, the Interior Board of Indian Appeals (IBIA) "ruled that the BIA properly ratified the results of the Secretarial Election based upon the registered voter quorum requirements . . . ." with only 6,552 members of MCT registered vote. Id. See *Wadena v Midwest Regional Director*, 47 IBIA 21 (2008). The IBIA explained the mathematical differences and language change from all ***eligible*** voters (27,702) to 6,552 ***registered*** voters in Footnotes stating that

> 12 According to Appellants theory, the calculation for Amendment A might be 4,986 (total number of ballots cast) ÷ 27,702 (number of election packets mailed to potentially ***eligible*** voters). Pursuant to this calculation, ***voter turnout was 18%.***
>
> 13 According to the Regional Director, the calculation for Amendment A would be 4,986 total votes cast ÷ 6,547 ***total number of registered voters = .76 voter participation.***

See Pl. Ex. P-2 *Wadena*, 47 IBIA 26. The BIA election waivers circumvented the rights of all eligible members to be protected by the MCT Const. at least 30% requirement (minimum requirement) of eligible voter's participation, *before* results can even be

considered. The BIA election waivers added a voting obstacle to require MCT members who were already eligible to vote, be required to first register to vote, before those members would be allowed to vote, under a theory to maximize turnout with same day registration. Here, 18% eligible voter participation becomes 76% registered voter participation. The IBIA math reasoning would be essentially the same if 10 (ten) MCT members registered to vote and 7 (seven) registered MCT members actually voted, would also equal 70% voter participation of the tribe.

But for the compound, ultra vires acts and omissions by Defendants of: 1) election waivers granted by the Bureau of Indian Affairs (BIA) for conducting the 2005 Secretarial Election for the MCT, and 2) the BIA's willful ignorance comment *that the proposed amendments do not appear to violate federal law*, the unconstitutional amendment achieved by Defendants violates federal and tribal laws, and should not have been retroactively applied to Plaintiff by Defendants MCT (TEC) and MCT Tribal Election Court of Appeals against Plaintiff LaRose. Here, Federal and Tribal Defendants knew and/or should have known that applying the 2005 amendment retroactivity to Plaintiff's conduct occurring before the 2005 amendment's effective date is unlawful and violates Defendants' oaths to uphold the U.S. and MCT Constitutions, and are therefore ultra vires (beyond the lawful scope of authority) to willfully violate rights of MCT members (especially Plaintiff herein) and a variety of their federal and tribal constitutional protections and guarantees. The appropriate remedy is to declare that the ultra vires acts by Defendants' violated significant and fundamental rights of Plaintiff and all MCT members, which requires the decertification and withdrawal of the 2006

Secretarial approval, and that the amendment is *void ab initio* and stricken from the MCT Constitution, and require Tribal Defendants to dutifully implement the lawful MCT constitution and MCT election ordinance (without the ex post facto tribal election amendment and retroactive application) for the *corrected* 2022 Secretary-Treasurer elections on the Leech Lake Reservation of the MCT. This would be the fair and equitable remedy Plaintiff seeks from the Court.

Defendants Retroactive Application of the 2006 Amendment to Plaintiff's Prior Conduct Occurring Before the Amendment's Enactment Violates ICRA and Entitles Plaintiff to Habeas Relief.

The Indian Civil Rights Act (ICRA) provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall … deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law[.]" 25 U.S.C. § 1302(a)(8). ICRA provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. "By enacting the ICRA, Congress 'impos[ed] certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Cross v. Fox*, 23 F.4th 797, 802 (8th Cir. 2022) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978)).

ICRA's "detention" requirement "does not necessarily mean that the Plaintiff must show he or she is in actual physical custody." *Nygaard v. Taylor*, 563 F. Supp. 3d 992, 1012 (D.S.D. 2021); *see also Poodry v. Tonawana Band of Seneca Indians*, 85 F.3d 874, 893 (2d Cir. 1996) ("It is well established that actual physical custody is not a

jurisdictional prerequisite for federal habeas review."); *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 714 (2d Cir. 1998) ("Habeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and permanent banishment."). "The important thing is … that the Plaintiff name as Defendant someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the Plaintiff what he seeks if the petition has merit—namely, his unconstitutional freedom." *Poodry*, 85 F.3d at 899 (citation omitted).

In this case, Defendants DOI and MCT both knew or should have known that applying the 2005 amendment retroactively to Plaintiff's conduct occurring before the 2005 amendment's effective date violates the protections and guarantees of U. S. and MCT Constitutions and the ICRA. However, according to DOI Exhibit 6 (Doc 24-8) DOI/BIA Regional Director Virden authorized the 2005 Secretarial Election stating "[t]hese proposed amendments do not appear to violate federal law." Id. p. 1. Here, the Federal Defendants who have a *trust responsibility*[5] to the Treaty beneficiary Indian wards, failed to protect and conduct a reasonable, due diligence legal review ***to actually determine*** *if these proposed amendments do not appear to violate federal law*. Here, Federal Defendants failed to perform the reasonable legal review necessary and relied on the guess of the Midwest Regional Director for his opinion about whether the ex post

[5] See *Seminole Nation v. United States*, 316 U.S. 310 (1942). The U.S. Department of Interior acts in a 'trust responsibility' as stated in the bia.gov website states, "The federal Indian trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes.

facto amendment *appears to* violate federal law. The result is Federal Defendants failed due diligence and their actions and omissions are the direct and proximate cause of permitting the unconstitutional acts and omissions by MCT Defendants.

The proposed ex post facto amendment language of TEC Res. 70-05 was intended by the TEC to be retroactively applied, but MCT Defendants failed to mention or warn Federal Defendants of the intended retroactive application. Tribal Defendants knowingly acted outside the scope of their legal authority and express restraints under the Indian Civil Rights Act of 1968, but relied on DOI/BIA approval to legitimize the planned Secretarial Election, with use of election waivers to avoid the at least 30% requirement of eligible voters participation to obtain the unconstitutional amendment.

Not long after the Secretary Approval in 2006, litigation about whether then Leech Lake Chairman Goggleye was a convicted felon was filed in the Leech Lake Tribal Court. See *Gotchie v Goggleye*, No. CV-06-07 (Pl. Ex. P-1, Exs. 1, 2, and 3). MCT Defendants have been aware of the retroactivity issue since 2006 when Leech Lake Tribal Court Judge Korey Wahwassuck certified the following questions to the MCT TEC for an opinion pursuant to a Tribal Constitution Interpretation:

1. Is Revised MCT Constitution Article IV intended to apply to Tribal Council member elected to office prior to the date of enactment on January 5, 2006?

2. Does application of Revised MCT Constitution Article IV to sitting Tribal Council members (elected prior to the date of enactment) constitute a retrospective application of the law?

Gotchie v. Goggleye, No. CV-06-07, *Request for Opinion From Tribal Executive Committee* at 2 (Leech Lake Tribal Ct. Dec. 8, 2006)(**Exhibit P-1**).

The MCT has thus been officially on notice of the retroactivity issue for over 15 years. Despite Plaintiff falling squarely within the category of persons elected to Tribal office prior to the 2006 Amendment's enactment, the TEC has failed to provide any interpretation on the two questions certified by Judge Wahwassuck. In this case, MCT Defendants' retroactive application of the 2006 Amendment to deny Plaintiff certification in the 2022 election is a sufficiently severe restraint on liberty to constitute "detention" to invoke federal habeas corpus jurisdiction under Section 1303 of ICRA. Under the MCT candidate eligibility criteria in effect at the time of Plaintiff's 1992 conviction, a person with a felony could be certified as a candidate for the Secretary-Treasurer position. In the past several election cycles, Plaintiff has consistently been certified as a candidate for the Secretary-Treasurer position of LLRBC under the 2006 Amendment, and thus has vested rights in the Secretary-Treasurer position. MCT Defendant's applying the 2006 Amendment to Plaintiff's 1992 conviction violates the traditional presumption against retroactivity and Plaintiff's rights without due process of law.

"As a general, almost invariable rule, a legislature makes law for the future, not for the past." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, at 261 (2012). "Even when they do not say so (and they rarely do), statutes will not be interpreted to apply to past events." *Id.* Under the "well-settled presumption" against retroactivity, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), laws are to be read "prospective in application unless [the legislature] has unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012). The presumption against retroactivity is "[t]he principle that legislation usually applies only prospectively [which]

'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" *Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)). The presumption against retroactivity may apply to amendments to tribal constitutions. *See Ballini v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 107, 117 (Confederated Tribes of the Grand Ronde Cmty. Ct. App. 2003) ("[W]e adopt the presumption against retroactive legislation as explained in *Landgraf*, understanding 'legislation' to include not only the Tribal Council's enactments but also voter-approved constitutional amendments.").

To have retroactive effect, the statutory language must be "so clear that it could sustain only one interpretation." *I.N.S. v. St. Cyr*, 533 U.S. 289, 316–17 (2001).[6] Specifically, there must be an "express command" or "unambiguous directive" in order to apply laws retroactively. *Martin*, 527 U.S. at 354 (quoting *Landgraf*, 511 U.S. at 263, 280); *Reynolds v. McArthur*, 27 U.S. 417, 434 (1829) ("[L]aws by which human action is to be regulated … are never to be construed retrospectively unless the language of the act shall render such construction indispensable.").

The retroactive application of laws is disfavored due to fundamental and basic concerns about fairness: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the

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[6] *Murray v. Gibson*, 56 U.S. 421, 423 (1853) ("As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only.").

'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraf*, 511 U.S. at 265.[7]

"Several provisions of the Constitution … embrace the doctrine [against retroactive legislation], among them, the *Ex Post Facto* Clause, the Contract Clause, and the Fifth Amendment's Due Process Clause." *Vartelas*, 566 U.S. at 266. "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation." *Landgraf*, 511 U.S. at 267. "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.* at 266–67.

The Supreme Court has set forth a two-part test for evaluating whether a statute applies retroactively. First, the court must "determine whether [the legislature] has expressly prescribed the statute's proper reach." *Martin v. Hadix*, 527 U.S. 343, 352 (1999) (quoting *Landgraf*, 511 U.S. at 280). If there is no "directive on the temporal reach of a statute, [the court] determine[s] whether the application of the statute to the conduct at issue would result in a retroactive effect." *Id.* If so, consistent with the "'traditional presumption' against retroactivity, [the court] presume[s] that the statute does not apply to that conduct." *Id.*

[7] *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset transactions.").

"[D]eciding when a statute operates 'retroactively is not always a simple or mechanical task." *Landgraf*, 511 U.S. at 268. As the Supreme Court explained in *Landgraf*:

> A statute does not operate "retroactively" merely because it is applied in a case arising from conduct antedating the statute's enactment …. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 269–70; *see also Martin v. Hadix*, 527 U.S. 343 (1999) ("The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'") (quoting *Landgraf*, 511 U.S. at 280); *Elbert v. True Value Co.*, No. 07-3629, 2007 WL 4395626 (D. Minn. Dec. 11, 2007) ("One relevant consideration [in determining a law's retroactive effect] is whether parties have 'proceeded on the assumption' that a prior status was in effect"). Several cases have applied the presumption against retroactivity framework, which are instructed for the Court in this case.

For example, in *Vartelas*, the Court considered whether a provision of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which precluded foreign travel by lawful permanent residents, applied retroactively to a lawful permanent resident convicted *before* the IIRIRA's enactment. 566 U.S. at 260. "Guided by the deeply rooted presumption against retroactive legislation," the Supreme Court held that

"the relevant provision of IIRIRA … attached a new disability (denial of reentry) in respect to past events (Vartelas' pre-IIRIRA offense, plea, and conviction)." *Id.* at 261. As such, the Court concluded that the IIRIRA provision "does not apply to Vartelas' conviction" and "brief travel abroad on his permanent resident status is therefore determined not by IIRIRA, but by the legal regime in force at the time of his conviction." *Id.*

In analyzing whether the IIRIRA provision could be applied retroactively, the Court stated that "Congress did not expressly prescribe the temporal reach of the IIRIRA provision in question[.]" *Id.* at 267. This is in contrast to other provisions of the IIRIRA, which "expressly direct retroactive application." *Id.* (citing 8 U.S.C. § 1101(a)(43)) (IIRIRA's amendment of the "aggravated felony" definition applies expressly to "conviction[s] … entered before, on, or after" the statute's enactment date); *see also INS v. St. Cyr*, 533 U.S. 289, 319–20 & n.43 (2001) (setting out further examples in the IIRIRA).

The Court then proceeded to "the dispositive question whether, as Vartelas maintains, application of IIRIRA's travel restraint to him 'would have retroactive effect' Congress did not authorize." *Id.* The Court determined that "Vartelas presents a firm case for application of the antiretroactivity principle" because "[n]either his sentence, nor the immigration law in effect when he was convicted and sentenced, blocked him from occasional visits to his parents in Greece" and the IIRIRA provision, "if applied to him, would thus attach 'a new disability' to conduct over and done well before the provision's enactment." *Id.*

Likewise, in *Martin v. Hadix*, 527 U.S. 343 (1999), the Supreme Court considered whether the Prison Litigation Reform Act of 1995 ("PLRA"), which imposed limits on the fees that could be awarded to attorneys who litigant prisoner suits applied to post-judgment monitoring of defendants' compliance with remedial decrees that had been performed before the PRLA became effective. *Id.* at 347. The text of the PLRA provides that [i]n *any* action brought by a prisoner who is confined [to a correctional facility] … attorney's fees … shall not be awarded, except" as authorized by the statute. 42 U.S.C. § 1997e(d)(1) (emphasis added).

The Court rejected the argument that the statutory phrase "[i]n any action brought by a prisoner who is confined" clearly expresses congressional intent to apply the statute retroactively. *Id.* at 355. The Court pointed out that "Congress has not expressly mandated the temporal reach" of the PLRA. *Id.* Additionally, the Court explained that "although the word 'any' is broad, it stretches the imagination to suggest that Congress intended, through the use of this one word, to make the fee limitations applicable to all fee awards." *Id.* at 354. As the Court detailed: "Had Congress intended [PLRA] to apply to all fee orders entered after the effect date, even when those awards compensate for work performed before the effective date, it could have used language more obviously targeted to addressing the temporal teach of that section. It could have stated, for example, that 'No award entered after the effective date of this Act shall be based on an hourly rate greater than the ceiling rate." *Id.*

In discussing statutory language that might show clear congressional intent to apply the PLRA retroactively the Court explained: "The conclusion that [PLRA] does not

clearly express congressional intent that it apply retroactively is strengthened by comparing [PLRA] to the language that we suggested in *Landgraf* might qualify as a clear statement that a statute was to apply retroactively: '[T]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment.' This provision, unlike the language of the PLRA, unambiguously addresses the temporal reach of the statute. With no such analogous language making explicit reference to the statute's temporal reach, it cannot be said that Congress has 'expressly prescribed' [PLRA]'s temporal reach." *Id.* 354–55. As such, the Court "conclude[d] that the PLRA contains no express command about its temporal reach" and because "the PLRA, if applied to postjudgment monitoring services performed before the effective date of the Act, would have a retroactive effect inconsistent with our assumption that statutes are prospective, in the absence of an express command by Congress to apply the Act retroactively, we decline to do so." *Id.* at 362 (citing *Landgraf*, 511 U.S. at 280).

Here, the 2006 Amendment presents a clear case for application of the presumption against retroactivity. First, the 2006 Amendment is entirely silent with respect to the issue of retroactivity and the Amendment's temporal reach. There is no language in the 2006 Amendment that operates as an "unambiguous directive" or "express command" to apply the Amendment retroactively to convictions taking place prior to its effective date. The 2006 Amendment does not speak to persons who have previously been certified as a candidate for Tribal office under the prior version of the MCT Constitution and have been convicted *before* the Amendment's enactment. An express directive of the 2006 Amendment's retroactive application must have clear and

unambiguous language mandating retroactive application. *See Vartelas*, 566 U.S. at 267 (stating that IIRIRA's amendment of "aggravated felony" definition applies expressly to "conviction[s] … entered before, on, or after" the statute's enactment date); IIRIRA § 321(c) ("The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred …."); IIRIRA § 322(c) ("The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act"); *Landgraf*, 511 U.S. at 255–56 & n.8 (stating that the language "all proceedings pending on or commenced after the date of "enactment" amount to "an explicit retroactivity command").[8] The 2006 Amendment says absolutely nothing about convictions entered before its enactment.

Moreover, while the phrase "ever been convicted of a felony of any kind" may read broadly, it is a far stretch to suggest that the MCT people intended, through the use of the word "ever," to make the 2006 Amendment applicable to all convictions, including those entered prior to its enactment. *See Martin*, 527 U.S. at 343 (explaining that "although the word 'any' is broad, it stretches the imagination to suggest that Congress intended, through the use of this one word, to make the fee limitations applicable to all

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[8] *See also Al Bahlul v. United States*, 767 F.3d 1, 12 (D.C. Cir. 2014) (holding that statutory language conferring jurisdiction on military commissions to try "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001" constitutes a "clear[] statement of the Congress's intent to confer jurisdiction on military commissions to try the enumerated crimes regardless whether they occurred 'before, on, or after September 11, 2011").

fee awards" in the phrase "[i]n any action brought by a prisoner who is confined").[9] At most, the "ever been convicted" language in the 2006 Amendment raises an ambiguity as to whether it applies to a person committed a felony prior to its enactment and has previously been certified as a candidate for Tribal office. The language in the 2006 Amendment thus "falls short … of the 'unambiguous directive' or 'express command' that the [2006 Amendment] is to be applied retroactively." *Martin*, 527 U.S. at 354. Had the MCT voters intended the 2006 Amendment to apply to criminal convictions entered prior to its effective date, they "could have used language more obviously targeted to addressing the temporal reach of that section." *Id.* But they choose to not do so.

Because the 2006 Amendment contains no "language making explicit reference to [its] temporal reach," *Martin*, 527 U.S. at 355, the Court must "proceed to the second step of *Landgraf*['s] retroactivity analysis in order to determine" whether the 2006 Amendment has a retroactive effect on the rights of Plaintiff in this case. *St. Cyr*, 533 U.S. at 320. It is clear that neither Plaintiff's conviction, nor the MCT Constitution in effect when he was convicted, barred him from running for Tribal office. The 2006 Amendment, if applied to Plaintiff, would thus attach "a new disability" to "conduct over and done well before the [Amendment's] enactment." *See Vartelas*, 566 U.S. at 267. The denial of Plaintiff's certification is directly at odds with "familiar considerations of fair notice, reasonable reliance, and [Plaintiff's] settled expectations." *Landgraf*, 511

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[9] *See also Scott v. Boos*, 215 F.3d 940, 944 (9th Cir. 2000) ("The fact that [a] statute applies to all people and is very clear in its mandate … does not necessarily mean that it should apply retroactively.").

U.S. at 270. Without a doubt the retroactive application of the 2006 Amendment "would impair rights [Plaintiff] possessed when he acted, increase [his] liability for past conduct, [and] impose new duties with respect to transactions already completed." *Id.* at 280. Because application of the 2006 Amendment to Plaintiff's prior conduct would have a "retroactive effect inconsistent with [the] assumption that [laws] are prospective," *Martin*, 527 U.S. at 362, the Court should thus find that Defendants' retroactive application of the 2006 Amendment to deny Plaintiff certification in the 2022 election is a sufficiently severe restraint on liberty to constitute "detention" to invoke federal habeas corpus jurisdiction under Section 1303 of ICRA.

Finally, the facts of this case are distinguishable from *Lewis v. White Mountain Apache Tribe*, No. CV-12-8073-PCT-SRB (DKD), 2013 WL 510111 (D. Ariz. Jan. 24, 2013), in which the court found that it the Plaintiff's denial of certification to run for tribal office was not a "severe restraint on his liberty" to bring a habeas petition under ICRA. *Id.* at *6. The court in *Lewis* explained that "[w]hile Plaintiff was precluded from running for the office of Tribal Council Member in *one* election, he has not been barred from running in future elections" and "[n]o court has held that a Plaintiff's inability to run for office in one election is such a severe limitation on liberty that would rise to the level of a detention." *Id.* *Lewis* is distinguishable from this case. First, in *Lewis*, there was no indication that the Plaintiff was ever certified as a candidate for tribal office. Conversely, in this case, Plaintiff has been certified as a candidate several times—both before and after the 2006 Amendment's enactment. Plaintiff thus holds vested rights in holding Tribal office, while the Plaintiff in *Lewis* did not. Second, *Lewis* did not involve

the retroactive application of a constitutional provision regarding a candidate's eligibility for tribal office. The retroactive application of the 2006 Amendment to deny Plaintiff certification in this case violates Plaintiff's rights and raises to the level of a "detention" for purposes of ICRA. Third, while the denial of the Plaintiff's certification in *Lewis* did not bar him from running for tribal office in future elections. In this case, the denial of Plaintiff's certification by the MCT Tribal Court of Appeals on Feb. 16, 2022, (Pl. Ex. 4) retroactively applying the ex post facto law, which ignored Plaintiff's raised ex post facto defenses, would set precedent for him to be barred him running for tribal office in future elections for the LLRBC.

***Haaland* Standing.**

Plaintiff has standing to challenge as the duly elected LLRBC Secretary-Treasurer and having filed for re-election. Plaintiff is presently seeking redress for unjust taking of Plaintiff's vested property rights, deprivation of civil rights, and due process and equal protection violations, culminating in the permanently severing and effective banishment of Plaintiff's on-going rights to hold office from the Leech Lake Reservation, by the acts and omissions of Defendants' collectively and individually.

On Appeal from the United States District Court for the District of Columbia, the *Haaland* Appellate Court reversed, remanded and ordered dismissal for *Hudson v Zinke* due to Hudson's lack of standing, because Hudson was only an eligible voter like most all tribal members. The Court reasoned that Hudson needed to be a duly elected office holder on the Reservation Business Committee, like Plaintiff LaRose herein, to have standing to

appeal due to injury and unjust taking of vested property rights in the public office and liberty interests, due process deprivations impacting his rights to hold office.

Plaintiff is being deprived of his *various civil rights* (due process, property, etc.), privileges and immunities because the MCT Tribal Election Court of Appeals and TEC will not recognize and address the ex post facto defenses and protections of Article XIII Rights of Members in the MCT Constitution and Indian Civil Rights Act of 1968. goggleye

The *Hudson v Zinke*[10] federal court decision analysis stood for the at least 30% eligible voter requirement participation for a valid Indian Reorganization Act (IRA) constitutional quorum to amend an IRA constitution, like the MCT constitution. The DC Circuit Court of Appeals held Hudson, in *Hudson v Haaland* now, lacked standing as a voter to argue the 30% requirement, so *Hudson v Zinke* was dismissed. However, the DC Court of Appeals in *Haaland* clearly distinguished and explained that

> the "irreducible constitutional minimum of standing" is that (i) the plaintiff suffered an "injury in fact[,]" meaning "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (ii) the injury must be "fairly traceable to the challenged action of the defendant"; and (iii) a favorable decision by the court must be likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (formatting modified); see also *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) (To present a justiciable claim for relief in federal court, a plaintiff must establish that "he has standing to do so, including that he has a personal stake in the outcome, distinct from a generally available grievance about government.") (formatting modified).

The DC Appellate Court in *Haaland* went on to explain that

> Hudson was not injured by the substantive changes effected by the constitutional amendments. Hudson [was] not a member of the Tribal

[10] See *Hudson v Zinke* (2020)(No. 1:15-cv-01988)(rev's on other grounds)(Id.)

> Business Council and could not be injured by the new rules providing for the recall of its members *or for their potential discharge from the Business Council after a felony conviction*.

(Id. *Emphasis added* for prospective, not ex post facto application)

Here, Plaintiff has the standing where Hudson did not, because Plaintiff meets the "irreducible constitutional minimum of standing" because he was, then, currently holding office as the duly elected Secretary-Treasurer to the Leech Lake RBC. Plaintiff has now in-fact been injured, permanently severed from his rights to hold office and be re-elected, by the MCT Tribal Election Court of Appeals decision, to not certify Plaintiff's candidacy for re-election. Plaintiff is no longer holding office after his term ended this summer.

Plaintiff LaRose has been previously certified as MCT candidate several times since the 2005 felon amendment, in part because the meaning of convicted felon under Minnesota Law was decided by the Leech Lake Tribal Court in Gotchie v Goggleye, after months of written and oral arguments. The *Goggleye* Decision ultimately stated that neither Goggleye nor Plaintiff LaRose therein were convicted felons under Minnesota State laws for purposes of remaining in tribal office. (See Pl. **Ex. P-1 p. 18**, Tribal Court Complaint for Injunctive and Declaratory Relief, Ex. 3, Order by the Honorable Judge Wahwassuck, Chief Judge of LLBO Tribal Court dated Dec. 8, 2006 in CV-06-07). MCT Defendants' actions and omissions are ultra vires, but because the unconstitutional, ex post facto amendment has been approved by the Secretary of the Interior in 2006, MCT Defendants assert dutiful implementation as their constitutional defense.

Statutes of Limitations and Administrative Procedures Act (APA).

The Administrative Procedures Act and associated Statutes of Limitations cannot have limited the time for Plaintiff, because Plaintiff's injury in-fact happened Feb. 16, 2022, when the MCT Tribal Court of Election Appeals decided Plaintiff was not eligible to be a candidate for office based on their retroactive application of the ex post facto amendment to the MCT Constitution.

Federal Defendant's argue that

> Plaintiff's claim against Federal Defendants is untimely. Indeed, Plaintiff brings his claims more than 16 years after the Secretarial election in 2005. But civil actions against the United States must be filed "within six years after the right of action first accrues." 28 U.S.C. § 2401(a). For purposes of § 2401(a), a claim accrues "when the plaintiff either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim." Izaak Walton League of Am., Inc. v. Kimbell, 558 F.3d 751, 759 (8th Cir. 2009) (quotations omitted).
>
> While the Eighth Circuit has declined to rule on whether the six-year time bar set out in 28 U.S.C. 2401(a) is "jurisdictional," and thus not amenable to equitable tolling, that issue is not relevant. Even if 2401(a) is not jurisdictional, Plaintiff still faces a steep hurdle to establish that the statute of limitations should be equitably tolled, and Plaintiff's Complaint provides no basis for tolling. See *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Corps of Eng'rs*, 888 F.3d 906, 917-8 (8th Cir. 2018).

See Memorandum of Points and Authorities in Support of Federal Defendants' Motion to Dismiss dated Sept, 28, 2022, p 18. (ECF No. 34)

Federal Defendants intentionally mislead or misunderstand and misstate, have not read and understood Plaintiff's allegations and exhibits. Federal Defendants cavalierly declare "Plaintiff, who was serving as a Tribal officer at the time *and had a felony conviction from 1992*, knew or should have known at the time of the Secretarial election that his ability to continue to serve as a tribal officer was imperiled. First, Plaintiff was

not convicted of a felony in 1992, Plaintiff was never convicted of a felony. Plaintiff had felony charges, and accepted a plea bargain or deal, satisfied all the conditions for a Stay of Imposition and which resulted in a misdemeanor conviction under Minnesota law.

Second, there is not a *2006 MCT Tribal Court* ruling. Tribal Defendants make clear there is not a MCT Tribal Court, other than the MCT Tribal Elections Court of Appeals, which is part of the Elections, only, stating that

> [t]he MCT Constitution does not grant subject matter jurisdiction to any judicial body, including the tribal courts of the individuals Bands, to challenge the decisions of the MCT Election Court of Appeals or the *dutiful implementation of MCT laws* by MCT officials. In fact, the Constitution is completely devoid of any mention of judicial bodies. [FN3]

(See Memorandum of Law in Support of Motion to Dismiss and Opposing Motion for Temporary Restraining Order and Preliminary Injunction[11] dated May 2, 2022, at pp. 6-7 adding FN 3, "Although the Constitution does not mention judicial bodies, the individual Bands are still free to exercise their inherent sovereign authority to create their own tribal courts to decide matters of importance *that do not interfere with those powers reserved by the Constitution to the TEC.*)(*Emphasis added*).

It was the Leech Lake Reservation Tribal Court decision that "Plaintiff attache[d] to his complaint, not a 2006 MCT Tribal Court ruling *that addressed whether*, under Minnesota law, *he was properly deemed as a convicted felon*. See Pl. **Ex. P-1** p. 18, Ex. 3, Findings of Fact, Conclusions of Law & Declaratory Judgment by the Honorable Judge Wahwassuck, Chief Judge of LLBO Tribal Court **dated Dec. 8, 2006** in CV-06-

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[11] See *LaRose v Chavers et al*, Leech Lake Tribal Court Case No.: CIV-22-58, Ex. P-4 at p. 29.

07). The same 2006 Leech Lake Tribal Court order also reviewed and considered Leech Lake Reservation Tribal Council Resolution 2006-76, *Convictions that are deemed to be misdemeanors for certification of tribal election candidates*, adopted 2/23/06, less than 2 (two) months after the Secretarial approval for the amendment. Judge Wahwassuck's decision Dec. 8, 2006 found that "4. Leech Lake Tribal Council Resolution 2006-76, is not inconsistent with Minnesota Law , or Minnesota Chippewa Tribe Election Ord. #10." Id. *And then* Judge Wahwassuck sent the MCT a Request for Opinion from the Tribal Executive Committee dated Dec. 8, 2006. The TEC never responded.

Therefore, Plaintiff did attempt to resolve and safe guard his elected position from confusion about his 1992 conviction. LLRBC Res. 2006-76 is Tribal Law on Leech Lake Reservation. *BUT*, as Tribal Defendants state "[a]lthough the [MCT] Constitution does not mention judicial bodies, the individual Bands are still free to exercise their inherent sovereign authority to create their own tribal courts to decide matters of importance ***that do not interfere with those powers reserved by the Constitution to the TEC.***" *Supra.* Translated by Tribal Defendants to mean that Judge Wahwassuck's Leech Lake Tribal Court decision of Dec. 8, 2006, Res. 2006-76 Feb. 23, 2006 and the unanswered Request for Opinion from the TEC from Judge Wahwassuck also dated Dec. 8, 2006, --- all of those LL Tribal Court orders, tribal resolutions and request for opinions ***interfere with those powers reserved by the Constitution to the TEC.***

Consequently, the MCT Tribal Court of Election Appeals gave no mention of these same documents (LL Tribal Court orders, tribal resolutions and request for opinions), and no consideration or weight because they ***interfere with those powers***

reserved by the Constitution to the TEC. The TEC decides on the MCT Election Ordinance, where they *dutifully implement* the ex post facto amendment *retroactively*. Federal Defendants argue "the application of the resulting amendments to the MCT constitution are the sole purview of the Tribal, not Federal, Defendants. Federal Defendants forget that Congress put in place strict laws about the Indian Civil Rights Act of 1968, and other U.S. and MCT Constitutions protections and guarantees, that have been ignored by Federal and Tribal Defendants.

Third, just because Federal Defendant's have a letter from *some* LLRBC members suggesting undersigned Counsel was "Plaintiff's attorney in 2005 at the time of the election challenge[]" (See Redman Decl., Ex. 10 (ECF No. 24-12) at 3.) does not make it a fact or true. What is relevant is that those same LLRBC members in the Dec. 2, 2005 exhibit Federal Defendant's point to, to draw conclusions and cast dispersions, voted for Res. 2006-76 on Feb. 23, 2006 (Pl. Ex. P-1, Ex. 1) because they were afraid Chairman Goggleye might be determined a felon, retroactively based on his charges and convictions in the 2006 MCT Elections, and not be a certified candidate.

Plaintiff has relied upon decided tribal court law and tribal enacted law on Leech Lake Reservation in 2006, but in 2022, it was ignored by the MCT Tribal Court of Election Appeals. But for and only because the Federal Defendants actions were ultra vires to circumvent the MCT Const. 30% eligible voter requirement for ex post facto amendment, Federal Defendants have enabled on-going, MCT *dutifully implemented*, retroactive review by Tribal Defendants. Therefore, Plaintiff has been diligent and

deserves tolling of time under these unique circumstances and his claims herein should be considered timely filed in 2022.

Courts May Grant Equitable Relief Where Plaintiffs Challenge Executive Action as Ultra Vires.

A recent Amicus brief in *Sierra Club v Trump* outlines the various equitable relief where Plaintiffs Challenge Executive Action as Ultra Vires when

> As the Supreme Court has explained, "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." *Grupo Mexicano*, 527 U.S. at 318 (quotation marks omitted); *Pennsylvania v. Wheeling & Belmont Bridge Co*., 54 U.S. 518, 563 (1851)(same). And at that time, there was already a "long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384 (citing Louis Jaffe & Edith Henderson, Judicial Review and the Rule of Law: Historical Origins, 72 L.Q. Rev. 345 (1956)).
>
> Indeed, the antecedents to modern equitable review go back to medieval England. By the seventeenth century, the King's Bench had developed equitable remedies that were analogous to today's remedies against illegal government action, and "[a]t the time of the American Founding, it was not uncommon for Chancery to enforce the common law through equitable remedies even where the common law might not itself make damages available." John F. Preis, In Defense of Implied Injunctive Relief in Constitutional Cases, 22 Wm. & Mary Bill Rts. J. 1, 15 (2013).
>
> Those equitable remedies were often exercised in response to illegal official action, including by the Crown itself. See James E. Pfander, Sovereign Immunity and the Right To Petition, 91 Nw. U. L. Rev. 899, 909 (1997). When the Constitution's Framers conferred on the federal courts the "judicial Power" to decide "all Cases, in Law and Equity," U.S. Const. art. III, § 2, cl. 1, and when the first Congress gave the federal courts diversity jurisdiction over suits "in equity," see Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78, they incorporated this established understanding about the power of equitable courts to provide redress for illegal state action in the absence of a common law remedy.

From the early days of the Republic, that equitable power was used to evaluate the lawfulness of executive action. The most prominent early example is *Marbury v. Madison*, 5 U.S. 137 (1803). After determining that William Marbury had "a right to the commission" as Justice of the Peace, id. at 154, the Court concluded that he was entitled to a remedy in the form of a mandamus writ, id. at 163-71, even though no "statute provide[d] an express cause of action for review of the Secretary of State's decision not to deliver up a document he possessed in his official capacity," Jonathan R. Siegel, Suing the President: Nonstatutory Review Revisited, 97 Colum. L. Rev. 1612, 1630 (1997). The Court reasoned that if "a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury*, 5 U.S. at 166. The case is therefore an early example of the Supreme Court devising a remedy—mandamus relief in equity—for a legal wrong committed by an executive officer despite the absence of a statutory cause of action permitting review.

Other Supreme Court cases reflect the same principle. For example, in *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), the Court issued a writ of mandamus requiring the Postmaster General to disburse certain credits to which the plaintiffs claimed they were entitled by statute. The Court's decision made clear that so long as the Court could exercise subject-matter and personal jurisdiction, it could provide a remedy. Id. at 623-24. Similarly, in *Carroll v. Safford*, 44 U.S. 441 (1845), the Court permitted an equitable claim where other legal remedies were inadequate. The Court had "no doubt, that, in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer, for which the law might give no adequate redress." Id. at 463. Likewise, in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), the Court exercised its equitable powers to enjoin unauthorized conduct by federal officials, explaining: "The acts of all [the government's] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." Id. at 108.

More recent cases have similarly permitted equitable relief in the face of illegal executive action, without any statutory cause of action. For example, in *Harmon v. Brucker*, 355 U.S. 579 (1958), the Court held that an Army Secretary's decision was "in excess of powers granted him by Congress" and that the district court erred by concluding it lacked the power to hear the case: "Generally, judicial relief is available to one who has been injured

by an act of a government official which is in excess of his express or implied powers." Id. at 581-82.

Indeed, the Court has consistently decided the merits of challenges to executive action without even addressing the lack of a statutory cause of action permitting such a suit. For instance, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court struck down the President's executive order seizing certain steel mills, which "was not authorized by an act of Congress or by any constitutional provisions." Id. at 583. Importantly, although Youngstown rested heavily on the President's lack of statutory authority for his actions, nowhere in the opinion did the Court discuss the absence of a statutory cause of action permitting the mill owners to file suit challenging the President's action. Likewise, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court addressed the merits of an action seeking an injunction based on a claim that officials "were beyond their statutory and constitutional powers," id. at 667, never once suggesting that the plaintiffs could not seek such equitable relief because they lacked a statutory cause of action.

Most recently, in *Armstrong v. Exceptional Child Center*, although the Court concluded that the Medicaid Act "displace[d] the equitable relief that is traditionally available to enforce federal law," 135 S. Ct. at 1385-86, the Court reiterated that "in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer," id. at 1384 (quoting Carroll, 44 U.S. at 463), and that this equitable power "reflects a long history of judicial review of illegal executive action, tracing back to England," id.

These are only a few examples of the many decisions in which the Supreme Court has permitted equitable review of ultra vires executive conduct without requiring a statutory cause of action. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 165, 170 (1993); *Oestereich v. Selective Serv. Sys. Local Bd*. No. 11, 393 U.S. 233, 235, 238-39 (1968); *Land v. Dollar*, 330 U.S. 731, 734, 736-37 (1947); *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *Santa Fe Pac. R.R. Co. v. Payne*, 259 U.S. 197, 198-99 (1922). In short, "where [an] officer's powers are limited by statute, his actions beyond those limitations . . . are ultra vires his authority and therefore may be made the object of specific relief." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949).

See *Sierra Club, et al v Donald J. Trump, in his official capacity as President of the United States, et al*, Ninth Circuit, 19-16102, Brief of Amici Curiae Federal Court

Scholars in Opposition to Defendants' Motion for Stay, dated 06/11/2019, ECF 32, pp 3-7.

Service and Filing

At the end of their memorandum, Tribal Defendants state that "LaRose has failed to properly serve the Summons and Complaint on the Tribal Defendants [but that they did receive summons and complaint]. LaRose next mailed the summons and complaint to the undersigned attorney on July 1, 2022." (See ECF No. 29, p. 26 Tribal Defendants' Memorandum of Law in Support of Motion to Dismiss dated Sept. 28, 2022.)

Plaintiff's counsel did experience a variety of difficulties with filing the case electronically with Clerk's office and multiple resets of filing, and admits less than perfect service. It is apparent the Court could see the difficulties Counsel was having with service and directed that

> Plaintiff is ordered to immediately serve copies of the motion, memorandum, proposed order, and this order on all defendants.

See Order dated June 28, 2022, by the Honorable Patrick J. Schiltz United States District Judge (ECF No. 14).

Plaintiff's Counsel promptly complied and served Plaintiff's *Notice of Motion for Preliminary Injunction, Habeas and Declaratory Relief, Motion for Preliminary Injunction, Habeas and Declaratory Relief, Memorandum of Law in support of Complaint and Motion for Habeas, Injunctive and Declaratory Relief and Proposed Order [along with the Order (ECF No. 14)]. See Certificate of Service dated June 28,*

2022 (ECF No. 18). Plaintiff's Counsel apologizes for not obtaining a waiver from counsel for mail service.

CONCLUSION

For all of the above reasons, the Plaintiff respectfully requests that this Court hold Federal and Tribal Defendants' accountable for the multiple violations of federal and tribal laws and provide all the requested relief for Plaintiff.

Dated: October 19, 2022

Respectfully submitted,

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