UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ARTHUR DAVID LAROSE, 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 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.	Case No. 22-CV-1603 (PJS/LIB) **Tribal Defendants' Reply in Support of Their Motion To Dismiss**

INTRODUCTION

The Tribal Defendants moved to dismiss the Complaint filed by Plaintiff Arthur LaRose ("LaRose") for lack of subject matter jurisdiction, sovereign immunity, failure to state a claim, and insufficient service of process. (ECF 29). LaRose's opposition to the Tribal Defendants' motion haphazardly addresses the merits of his position but entirely fails to address the fatal jurisdictional defects of the Complaint. (ECF 37) ("Opposition"). LaRose fails to prove why this case, which involves an intratribal dispute upon which tribal courts have already rendered judgment, belongs in federal court.

LaRose does not plead a viable waiver of tribal sovereign immunity or prove that the federal laws he cited provide a basis for federal jurisdiction. Instead, LaRose's opposition raises an entirely new legal theory which he claims warrants federal court jurisdiction. LaRose abandons his initial bases for jurisdiction and instead argues that this court should exercise non-statutory *ultra vires* jurisdiction. To obscure the weakness of his positions, LaRose then focuses an inordinate amount of time on legal issues that have already been correctly decided in tribal court. LaRose's Complaint and Opposition suffer from severe jurisdictional flaws which require dismissal.

ARGUMENT

I. LAROSE FAILS TO ESTABLISH WHY THIS TRIBAL MATTER BELONGS IN FEDERAL COURT

"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)). "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)).

LaRose fails entirely to address why this dispute, which involves an intra-tribal matter, belongs in federal court. LaRose fails to meet his burden of providing subject matter jurisdiction. In fact, he does not even address the arguments raised in the Tribal Defendants' motion relating to the lack of federal subject matter jurisdiction over intra-tribal matters.

Federal courts lack jurisdiction to resolve intra-tribal dispute. *Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832 (8th Cir. 2006); *Runs After v. United States*, 766 F.2d 347, 352-53 (8th Cir. 1985); *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi of Iowa*, 609 F.3d 927, 943 (8th Cir. 2010); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). LaRose's Opposition does not address these dispositive cases.

LaRose spends thirteen pages of his Opposition arguing that the tribal courts that already decided this election dispute got it wrong with regard to his ex post facto theories and the allegedly flawed retroactive application of constitutional amendments by the MCT. These issues are matters of tribal law and were already presented and properly decided in the only judicial forums with appropriate subject matter jurisdiction – the tribal courts of the Minnesota Chippewa Tribe. "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).

II. LAROSE STILL FAILS TO PLEAD A VIABLE WAIVER OF TRIBAL SOVEREIGN IMMUNITY

LaRose abandons his initial bases for jurisdiction and instead argues that this court can exercise jurisdiction even in the absence of a viable waiver of tribal sovereign immunity. LaRose appears to argue that a statutory cause of action or viable waiver of sovereign immunity does not need to be proven if the Tribal Defendants are found to have engaged in *ultra vires* conduct. As is the case with many of LaRose's arguments, he does not cite to relevant precedent in support of his position. LaRose does not cite to *Ex Parte*

Young or the *Larson-Dugan* doctrine in support of the exercise of jurisdiction in the absence of a waiver of sovereign immunity.

Ex Parte Young can provide 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). Even if properly pled by LaRose, *Ex parte Young* does not apply to this case. The *Ex Parte Young* 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).

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 also failed to allege how the 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).

None of the 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* does not apply 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).

The *Larson-Dugan* doctrine can also provide a narrow exception to sovereign immunity. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *accord Dugan v. Rank*, 372 U.S. 609 (1963). LaRose does not cite to a single case in which the *Larson-Dugan* doctrine has been applied to Indian tribes or tribal officials.

Even if *Larson-Dugan* could be applied to Indian tribes, it requires a specific type of relief which is not present in this case. The request for relief must be simple and remedied by the mere ordering of a cessation of the conduct in question. A suit is barred by sovereign immunity "[i]f the relief requested cannot be granted by merely ordering the cessation of the conduct contemplated of but will require affirmative action by the sovereign." *Larson*, 337 U.S. at 691, n.11. The *ultra vires* exception to sovereign immunity does not apply where a plaintiff's proposed remedy "will require affirmative action by the sovereign." *Missouri State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973)(*quoting Larson*, 337 U.S. at 691 n.11).

LaRose is not seeking relief that can be granted by an order requiring the cessation of the conduct contemplated as required by *Larson*. LaRose instead seeks an order rescinding, setting aside, and holding unlawful the 2005 MCT Secretarial Election and "prohibiting any activity in furtherance of the 2022 MCT election for the LLRBC Secretary-Treasurer including the swearing in of the other candidate." (ECF No. 3, at p.

23-24). LaRose requests relief that would require affirmative action by the MCT to overturn an already conducted tribal election. Alternatively, LaRose requests the unprecedented relief of having a federal court invalidate constitutional amendments which have been in place for nearly two decades. This would also require affirmative action by the MCT.

The *Ex Parte Young* and *Larson-Dugan* exceptions to sovereign immunity are inapplicable and this suit should be dismissed on sovereign immunity grounds.

III. LAROSE'S COMPLAINT SHOULD ALSO BE DISMISSED FOR INSUFFICIENT SERVICE OF PROCESS

LaRose concedes that he did not properly serve the summons and complaint on the Tribal Defendants. "Plaintiff's counsel did experience a variety of difficulties with filing the case electronically with [the] Clerk's office and multiple resets of filings and admits to less than perfect service." (ECF 37 at p. 32). Although LaRose apologizes for not complying with Fed. R. Civ. P. 4, his justification pertains to filing and demonstrates his misunderstanding of the Rule pertaining to service of the summons and complaint.

The electronic filing difficulties have nothing to do with personal service or the obligation to obtain a waiver of service for the summons and complaint. Rather than try to personally serve the Tribal Defendants or request the undersigned to waive personal service, LaRose instead chose to adhere to his error. Because the Tribal Defendants were not properly served with the summons and complaint, "the district court lack[s] jurisdiction over that defendant whether or not it had actual notice of the lawsuit." *Adams v. Allied*

Signal General Aviation Avionics, 74 F.3d 882, 885 (8th Cir. 1996). Accordingly, LaRose's Complaint should also be dismissed for his admitted insufficient service of process.

CONCLUSION

For the reasons set forth in the MCT's motion to dismiss and this reply, the Court should dismiss LaRose's Complaint with prejudice for lack of jurisdiction.

November 2, 2022

/s/ Philip Brodeen
Philip Brodeen (#0393568)
Brodeen & Paulson P.L.L.P.
610 Searles St.
New Brighton, MN 55112
218-780-9011
phil@brodeenpaulson.com

/s/ Greg S. Paulson
Greg S. Paulson (#0250478)
Brodeen & Paulson PLLP
610 Searles St.
New Brighton, MN 55112
612-226-5968
greg@brodeenpaulson.com

Attorneys for Tribal Defendants