UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DONALD AND BONNIE POLLARD,
et al.

Plaintiffs,

v.

Case No. 3:23-cv-135

JOHN JOHNSON, SR.,
et al.

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Donald and Bonnie Pollard, James and Karen Baird, Sandra P. Thompson, James William Milne, Big Crooked Big Top, LLC, Kevin and Barbara Christensen, David and Teresa Kievet, as trustees of the David M. and Teresa R. Kievet Living Trust Dated May 27, 2020, Sue Peterson, as co-trustee of the Mark J. Peterson and Susan M. Peterson Revocable Living Trust Dated March 22, 2001, Spanton Contracting LLC, Michael and Nancy Clark, Joseph and Sally Fermanich, Joseph and Martha Hunt, Stanley Johnson and Jennifer Gridley Johnson, Dennis and Rachel Pearson, Michael Hornbostel and Marsha Panfil, Anthony and Nancy Markovich, David P. Miess, Sandra J. Schlosser, Robert and Nicole Beer, John Disch and Mary Possin, Julie M. Kilger, Gary and Christine Huck, as trustees of the Gary J. Huck Trust, Steven and Sharon Lefeber, and Ryan Lefeber, as trustees of the Steven P. Lefeber Trust, Michael and Victoria Thomas, and Thomas and Julie Walsh (collectively, "Plaintiffs") by and through their attorneys, Reinhart Boerner Van Deuren s.c., submit this Brief in support of their Amended Motion for a Preliminary Injunction (the "Motion") filed contemporaneously with this Brief.

INTRODUCTION

The Defendants are members and/or officials of the Tribal Council of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe"). Individually and/or in concert, the Defendants unlawfully barricaded, or caused to have unlawfully barricaded, four public roads in the Town of Lac du Flambeau (the "Town"). The four roads at issue are Annie Sunn Lane, Center Sugarbush Lane, East Ross Allen Lake Lane and Elsie Lake Lane (each, "Roadway," and collectively, the "Roadways"). The Roadways were built more than fifty years ago. Each is a public road under federal law, including the portion of each that was barricaded by the Defendants.

Defendants' barricades closed the roads in violation of federal law, including the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. § 101 *et seq*. (the "Federal-Aid Highway Act"), its Tribal Transportation Program, 23 U.S.C. §§ 201–202 (the "Tribal Transportation Program" or "TTP"), and implementing regulations at 25 C.F.R. Part 170 (the "federal Tribal Transportation Program implementing regulations"). The Roadways provide the only road access to the Plaintiffs' homes.

Although the chains connecting the two cement blocks on each of the four Roadways were recently unlocked and removed due to 30-day, revocable temporary access permits that Defendants issued to the Town[1] so that Plaintiffs and others similarly situated can "traverse [t]ribal [l]and"[2] in exchange for substantial compensation to the Tribe, the cement blocks remain on the Roadways.[3] The Defendants have made clear that this chain removal is only temporary. Defendants also

[1] Notably, the Plaintiffs are not permittees; they are not even mentioned in the permits. Supplemental Declaration of Bridget M. Hubing ("B. Hubing Suppl. Decl.") ¶ 3, Ex. A at 3–6.)

[2] *Id.*

[3] The placement of the cement blocks may restrict larger vehicles from using the Roadways. They also serve as a constant reminder to Plaintiffs that Defendants assert they are able to, and will again soon, close the Roadways at to prevent Plaintiffs from freely and reasonably going to and from Plaintiffs' homes.

indicate that the barricades may be fully reconstructed at any time in the Defendants' sole discretion and that, upon the revocation or expiration of the revocable short-term temporary access permits, the barricades will be fully reconstructed. Therefore, it is only a matter of time before the Defendants reconstruct the full barricades on these roads and yet again further irreparably harm the Plaintiffs.

Defendants requiring permits to use or access the Roadways is proscribed by federal law, including the Federal-Aid Highway Act, TTP, and federal TTP implementing regulations, because the Defendants' permits-issuance regime is a restriction on use of public roads under the Federal-Aid Highway Act, TTP, and federal TTP implementing regulations that can only be undertaken by the Secretary of the Interior. Thus, despite the chains being removed, Defendants' violation of federal law is ongoing. Additionally, Defendants' restrictions relating to the Roadways exceed the Tribe's authority under federal Indian common law because Defendants lack the authority to regulate (including prohibiting or restricting) non-members' (Plaintiffs') use of roads that are public roads under federal law. Defendants' foregoing actions all violated, violate, and will violate federal law and thus go beyond the authority of the Tribe; therefore, Defendants' actions are, were, and will be *ultra vires*.

The Defendants' permit-issuance regime and placing cement blocks on the Roadways are ongoing restrictions on road use, which Defendants cannot lawfully do, because restrictions on road use or road closure may only be lawfully done by the Secretary of the Interior, in consultation with the Tribe and the Plaintiffs as applicable private landowners. Specifically, the Tribe voluntarily elects to participate in the federal Tribal Transportation Program.[4] The Tribe has

[4] The Tribal Transportation Program is established by 23 U.S.C. §§ 201–202. It is a part of and subject to the provisions of the Federal-Aid Highway Act.

identified roads that are part of its "Tribal Transportation System." These roads are listed in an inventory of tribal transportation facilities maintained by the Secretary of the Interior in cooperation with the Secretary of the Federal Highway Administration. 23 U.S.C. § 202(b)(1)(A).[5] The inventory is referred to as the National Tribal Transportation Facilities Inventory ("NTTFI"). By law, the roads listed in the NTTFI are "public roads," i.e., roads that are under the jurisdiction of and maintained by a "public authority" (a federal, state, county, town or township, Indian Tribe, municipal or instrumentality with authority to maintain the road) (23 U.S.C. §§101(a)(22), (23), and (33); 23 U.S.C. §§ 201–202; 25 C.F.R. § 170.5; and 25 C.F.R. § 170.114(a)) and that are open for public travel. All roads listed in the NTTFI must be open and available for public use as required by 23 U.S.C. §§ 101(a)(22), (23), and (33); 23 U.S.C. §§ 201–202; and 25 C.F.R. §§ 170.5 & 170.114(a). Crucially, the Roadways at issue in this case are each listed in the NTTFI. Only the Secretary of the Interior or the public authority having jurisdiction over a road listed in the NTTFI may restrict road use or close roads temporarily. The Secretary may do so only in very limited circumstances and must "consult[] with the Tribe and applicable private landowners" in doing so, unless there is a concern about "immediate safety or life-threatening situation[]." 25 C.F.R. §§ 170.114(a)-(b).[6]

The Tribe is a voluntary participant in and beneficiary of the Federal-Aid Highway Act's TTP. Thus, the Tribe cannot (i.e., does not have authority under federal law to) unilaterally close

[5] 23 U.S.C. § 202(b)(1)(A) provides:

(b) Funds Distribution.—
(1) National tribal transportation facility inventory.—
(A) In general.—
The Secretary of the Interior, in cooperation with the Secretary, shall maintain a comprehensive national inventory of tribal transportation facilities that are eligible for assistance under the tribal transportation program.

[6] On the NTTFI, the Tribe has identified the "owner," i.e., "the public authority responsible for operating or maintaining a particular road," as the Town or Vilas County for each of the Roadways. 52 IAM 9-H, § 2.2(2).

or restrict access to the Roadways. Doing so is beyond the Tribe's authority under federal law and federal Indian common law. Therefore, Defendants' actions of prohibiting use of the Roadways by barricading them (which prevents Plaintiffs from accessing and freely going to and from their homes and prevents the public from accessing or using the Roadways), requiring permits to use or access the Roadways (which restricts Plaintiffs from accessing and freely coming from and going to their homes and restricts the public from accessing or using the Roadways), threatening to fully re-barricade the Roadways again soon, and the imminent, likely act of actually fully re-barricading the Roadways again soon are all *ultra vires* and caused irreparable harm, continue to cause irreparable harm, and will cause further irreparable harm to the Plaintiffs.

The Plaintiffs, who are innocent parties, were held hostage for six weeks like powerless pawns. Because of Defendants' unlawful (and *ultra vires*) actions, the Plaintiffs, whose road access to their homes is only by way of the Roadways, were unable to get to and from their homes via the Roadways for a period of six weeks. (Plaintiffs' Proposed Findings of Fact in Support of Amended Motion for Preliminary Injunction "Am. SOF" ¶¶ 65-87.) Without an entry of a preliminary injunction requiring Defendants to remove the remaining portions of the barricades, prohibiting Defendants from reconstructing them, and prohibiting any type of permit-issuance regime like Defendants currently have in effect, Defendants will continue to violate federal law and take actions that exceed the Tribe's authority, and Plaintiffs will continue to suffer irreparable harm. (Am. SOF ¶¶ 220-225, 232-234, 265.)

By their Amended Motion, Plaintiffs seek to enjoin the Defendants from their ongoing violation of federal law (and *ultra vires* actions) and further causing an imminent threat to the safety, health, and well-being of, and irreparable harm to, Plaintiffs and others similarly situated. Plaintiffs seek a preliminary injunction enjoining Defendants from limiting any use of or access to

the Roadways, such as via issuance of permits in violation of federal law (like Defendants are currently doing), enjoining Defendants from replacing or reconstructing the barricades that, in violation of federal law (including the Federal-Aid Highway Act and the federal Tribal Transportation Program implementing regulations envisioned in Chapter 2 (23 U.S.C. §§ 201–202) of the Federal-Aid Highway Act), they erected, or caused to be erected, to prevent ingress and egress over public roads to access Plaintiffs' homes, and requiring Defendants to remove the cement blocks currently on the Roadways.

Plaintiffs also seek injunctive relief to prevent an anticipated or threatened nuisance, i.e., the harm that will result when the Defendants fully reconstruct the barricades on the Roadways soon, which is a permissible request under Wisconsin law to a court sitting in equity.

FACTS

A. The Roadways At Issue

The Roadways all cross over sections of Indian land and non-Indian land within the exterior boundaries of the Lac du Flambeau Reservation.[7] (Am. SOF ¶ 89.) Each Roadway, including the portions that cross Indian land and the portions that cross non-Indian land, is a "public road," as defined in 23 U.S.C. § 101(a)(23). (Am. SOF ¶ 90.) The Roadways are each listed on the National Tribal Transportation Facilities Inventory ("NTTFI") that is authorized by the Federal-Aid Highway Act and the federal Tribal Transportation Program implementing regulations (23 U.S.C. § 101 *et seq.*; 23 U.S.C. §§ 201–202; and 25 C.F.R. Part 170); and, by law, with very limited exceptions not applicable in this case, must remain open for public travel. (Am. SOF ¶¶ 90-103.)

[7] The Reservation has within its borders multiple pockets of non-Tribal land owned in fee simple by non-Tribal members, including the Plaintiffs, as well as having large areas of Tribal trust land and other land owned by Tribal members, resulting in almost a checkerboard pattern in some areas. (*See* ECF No. 12, Declaration of Bridget M. Hubing ("B. Hubing Decl.") ¶ 27.)

The total length of the four Roadways is just over 1.25 miles. (B. Hubing Decl. ¶¶ 12-15.) The portions of Annie Sunn Lane that cross over Indian land is a section of about 1916.1 feet (approximately .36 miles) and a second section of roughly .5 miles. (B. Hubing Decl. ¶ 12, Ex. A.) The portion of Center Sugarbush Lane that crosses over Indian land is about 745.4 feet (approximately .14 miles). (*Id*. at ¶ 13, Ex. B.) The portion of East Ross Allen Lake Lane that crosses over Indian land is about 159.5 feet (approximately .03 miles). (*Id*. at ¶ 14, Ex. C.) The portions of Elsie Lake Lane that cross over Indian land is a section of about 450.2 feet (approximately .085 miles) and a second section of 781.2 feet (approximately .15 miles). (*Id*. at ¶ 15, Ex. D.)

Plaintiffs' Access To And From Their Homes Was Blocked for Six Weeks

On January 31, 2023, the Defendants or those acting in concert with them placed or caused to be placed barricades on each of the Roadways, consisting of large concrete blocks with chains between the blocks as well as wooden barricades in front of the chains. (Am. SOF ¶¶ 3, 61-64, 110.)

Immediately below is a photo of Defendants' fully constructed barricade blocking Center Sugarbush Lane. Presently, the wooden barricade is not in the depicted location and the chain

does not currently connect the two concrete or cement blocks. However, the two concrete or cement blocks currently remain in place on the Roadway.

(B. Hubing Decl. ¶ 17, Ex. F.)

Immediately below is a photo of Defendants' fully constructed barricade blocking Annie Sunn Lane. Presently, the wooden barricade is not in the depicted location and the chain does not currently connect the two concrete or cement blocks. However, the two concrete or cement blocks currently remain in place on the Roadway.

(*Id*. at ¶ 16, Ex. E.)

Immediately below is a photo of Defendants' fully constructed barricade blocking East Ross Allen Lake Lane. Presently, the wooden barricade is not in the depicted location and the chain does not currently connect the two concrete or cement blocks. However, the two concrete or cement blocks currently remain in place on the Roadway.:

(*Id*. at ¶ 18, Ex. G.)

Immediately below is a photo of Defendants' fully constructed barricade blocking Elsie Lake Lane. Presently, the wooden barricade is not in the depicted location and the chain does not

currently connect the two concrete or cement blocks. However, the two concrete or cement blocks currently remain in place on the Roadway.:

(*Id*. at ¶ 19, Ex. H.)

Each of the Plaintiffs (with the exception of the Lefebers whose residence is north of Elsie Lake Lane) only have road access to their properties via one of the four Roadways, which access was wholly blocked by the barricades the Defendants, or those acting in concert with them, placed or caused to be placed across each of the Roadways. (Am. SOF ¶¶ 65-87.) Due to snowbanks, trees, and/or natural terrain, vehicles likely cannot get around the fully constructed (chained across) barricades when they are in place. (Am. SOF ¶ 219.) Cameras were later installed on each of the Roadways to monitor any use. (B. Hubing Decl. ¶ 20, Ex. I).

In conjunction with placing the barricades to block the Roadways, Defendant Johnson and individuals acting in concert with him announced that any non-Tribal members who went around the barricades to travel on the closed portions of the Roadways would be considered "trespass[ers]." (Am. SOF ¶ 148.) Defendant Johnson has publicly stated that the barricades on

the Roadways would not be removed until compensation and damages are paid. (B. Hubing Decl. ¶ 21, Ex. J.) The Tribe's last demand to keep the four Roadways open to the public was a total of $20,000,000, after previously demanding $10,000,000 ($7,000,000 for East Ross Allen Lake Lane (159.5 feet) and a million for each of the other four Roadways). (*Id*. at ¶ 22, Ex. K).

By March 10, 2023, the Tribe and the Town had negotiated terms to temporarily reopen the Roadways that the Tribal Council purportedly approved in the form of a resolution on the same day. (B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1–2.)[8] These negotiations culminated in the Tribe issuing *revocable temporary access* "permits" to the Town, with issuance dates of March 13, 2023, for use of each of the four Roadways, subject to certain conditions and the Defendants' unilateral right to terminate them ("Revocable Temporary Access Permits"). (Am. SOF ¶ 112; B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1–6.) Importantly, for the purposes of the pending Amended Motion, each of the Revocable Temporary Access Permits is valid only for a period of 30 days and may be renewed only twice at the Defendants' unilateral discretion (such that each Revocable Temporary Access Permit permits the use of the Roadway for a potential total of 90 days). (Am. SOF ¶¶ 122-123; B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1–2 ("The Temporary Access Permits may be issued to the Town of Lac du Flambeau for a duration of 30 days, for the [four Roadways] . . . . [T]he LDF Land Management Department [is authorized] to re-issue the Temporary Access Permits two additional times, for a total maximum period of 90 days of temporary access, or until negotiations have been successfully resolved as determined by the Tribal Council.").) The Tribe demanded and received

[8] The Plaintiffs are not parties to the Revocable Temporary Access Permits. The Revocable Temporary Access Permits are an apparent agreement between the Tribe and Town. (Am. SOF ¶ 114; B. Hubing Suppl. Decl. ¶ 3, Ex. A at 3–6 ("Name: Town of Lac du Flambeau").) Thus, Plaintiffs are not permittees and so Plaintiffs have no rights or protections under the permits. Also, Resolution No. 67(23) that approved the Revocable Temporary Access Permits indicates that the purpose of issuing the permits is to "facilitate negotiations between the Tribe and Town of Lac du Flambeau concerning remedies for past trespass violations, and possible future access solutions[.]" (B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1, eighth "Whereas" paragraph).

from the Town $5,000 for each 30-day Temporary Access Permit, and the Town must pay an additional $5,000 for each potential renewal, for a total of $60,000 to potentially reopen each of the four Roadways for a period of 90 days. (Am. SOF ¶ 113; B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1–6 ("Permit Fee $5,000.00").)

Because the Revocable Temporary Access Permits are revocable at the Defendants' unilateral discretion, the initial 30-day term and two potential 30-day renewals are not ensured. The Revocable Temporary Access Permits create the illusion, but not the reality, that the Roadways allow for public use. The Revocable Temporary Access Permits do not cure Defendants' violation of the Federal-Aid Highway Act, which remains ongoing.

On March 13, 2023, pursuant to the Revocable Temporary Access Permits, the Defendants partially removed, or caused to have partially removed, the barricades. (Am. SOF ¶¶ 111-112; M. Hornbostel Decl. ¶ 8.) Specifically, the chains connecting the two cement blocks at each of the barricades were unlocked, but the cement blocks remain in place at each of the barricade sites—serving as an ominous sign of what is very likely the imminent relocking of the chains that connect the adjacent cements blocks (i.e., full reconstruction of the barricades). (Am. SOF ¶¶ 111-112.)

The Revocable Temporary Access Permits are set to expire on April 12, 2023—assuming the Tribe does not revoke the permits or renege on the permits' terms, which Plaintiffs fear is certainly a possibility. (B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1–6 ("Date of Expiration[:] 4/12/2023"); M. Hornbostel Decl. ¶ 9.) Assuming temporary access via the "permits" does not lapse between the two potential renewals of the "permits," the barricades will be fully reconstructed on or immediately after June 13, 2023. (B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1–6.)

When the barricades are in place, Plaintiffs are unable to use the Roadways to freely come and go from their residential neighborhoods, even to obtain basic necessities such food, pet

supplies and home repair materials. (Am. SOF ¶¶ 110, 136, 144, 216, 220.) During the approximately six-week period when the barricades were fully constructed, Plaintiffs were only permitted to leave via the Roadways for medical appointments; if they left their residence for any reason other than a medical appointment, they would not have been allowed back through the barricades to return home. (B. Hubing Suppl. Decl. ¶ 4, Ex. B, "LDF Emergency Service Aid in Action for Home Owners" [sic], at 1 ("At no time will the LDF Tribal Council deny anyone who wants to leave but currently will not approve re-entry at this time.").) But even to attend medical appointments, Plaintiffs had to call tribal police to unlock the chains on the barricades. (Am. SOF ¶ 177; B. Hubing Suppl. Decl. ¶¶ 4-5, Exs. B & C.)

Upon the issuance of the revocable temporary access permits on March 13, 2023, the Plaintiffs were provided with an updated "LDF Emergency Service Aid in Action for Home Owners [sic] (TEMPORARY SUSPENDED as of March 13, 2023)." (B. Hubing Suppl. Decl. ¶ 5, Ex. C (capitalization in original).) The document could hardly be any clearer in emphasizing the temporary and unilateral discretionary nature of the partial deconstruction of the barricades, given the first page's all-capital, yellow-highlighted text: "LDF EMERGENCY SERVICE AID IN ACTION FOR HOMEOWNERS IS TEMPORARILY SUSPENDED UPON THE APPROVAL OF TEMPORARY ACCESS PERMITS FOR ANNIE SUNN LANE, CENTER SUGARBUSH LANE, EAST ROSS ALLEN LAKE LANE, AND ELSIE LAKE LANE FROM THE LDF LANDS MANAGEMENT DEPARTMENT. IN THE EVENT A TEMPORARY ACCESS PERMIT IS DENIED, AUTOMATICALLY THE LDF EMERGENCY SERVICE AID IN ACTION FOR HOMEOWNERS WILL BE REINSTATED." (*Id.* at 1 (capitalization and yellow highlight in original).)

B. Plaintiffs Suffered Irreparable Harm While the Barricades Were In Place, and Continue to Suffer Irreparable Harm As Long As the Threat of Replacing the Barricades Remains, and Will Suffer Further Irreparable Harm When the Defendants Fully Reconstruct the Barricades on the Roadways.

As a result of Defendants' actions and failure to remove the barricades for six weeks despite repeated requests, Plaintiffs suffered irreparable harm, continue to suffer irreparable harm, and will soon likely suffer further irreparable harm in the absence of injunctive relief. The Declarations submitted with Plaintiffs' original Motion for a Temporary Restraining Order and Preliminary Injunction, as well as the additional Declarations submitted herewith, describe how the Defendants' unlawful barricades—and the continued threat of their replacement and very likely, imminent reconstruction of them—personally affected the Plaintiffs, and caused, continue to cause, and will further cause Plaintiffs irreparable harm.

Due to the barricades, many Plaintiffs, such as the Pollards and other residents on these Roadways, were forced to flee their homes (in minus 20-degree weather), which delayed medical care, including for life-threatening illnesses for an elderly man as well as therapy for a special needs child. (ECF No. 13, D. Pollard Decl. ¶¶ 10, 14; ECF No. 17, P. Kester Decl. ¶ 8.) Those who could stay in their homes endured the physical strains of having to trek long distances across frozen lakes, which are now melted or melting, and delays in receiving their prescription medications. (ECF No. 16, Spanton Decl. ¶¶ 9-11; ECF No. 14, R. Pearson Decl. ¶¶ 14-16; J. Hunt Decl. ¶ 21 (describing unreasonable logistics in and untimely manner of obtaining prescription medications because of the barricades on the Roadway and the tribal police not getting Mr. Hunt's medications for him in a timely manner).) Some residents are physically unable to walk across the frozen lake, and therefore, could not risk staying in their homes. (D. Pollard Decl. ¶ 11.) Other Plaintiffs have serious health conditions that make it very hard and risky to their safety to leave their property by means of anything other than a vehicle. (J. Hunt Decl. ¶¶ 12-16; M. Hunt Decl. ¶¶ 16-17.)

In addition, the barricades—and now the continued threat of their imminent full reconstruction—have taken a major toll on the mental health of Plaintiffs and the other residents on these Roadways regardless of whether they were barricaded in or out. (*See, e.g.*, J. Walsh Decl. ¶¶ 7-11.) One child had to be hospitalized due to a panic attack because she was unable to return to her home and school. (P. Kester Decl. ¶¶ 8, 25-26.) Other residents on these Roadways have experienced and are experiencing mental health conditions, such as severe anxiety and stress, due to a variety of things like worsening insomnia, the mere knowledge of losing reasonable (vehicular) access to their homes and soon pedestrian access to their homes due to melting ice on the lakes, fear of retaliation, and significant concerns about delayed response times for emergency vehicles to pass through the barricades. (M. Hornbostel Decl. ¶¶ 9-11; D. Pollard Decl. ¶¶ 12-13, 15-16; J. Spanton Decl. ¶¶ 12-16; J. Kilger Decl. ¶¶ 9-10, 17; R. Pearson Decl. ¶¶ 18-24; B. Hubing Decl. ¶ 10; J. Hunt Decl. ¶¶ 15-19 (describing Mr. Hunt's medical emergency in October 2022 and how, if the incident had occurred while the barricades were up, Mr. Hunt would not have survived, and Mr. and Ms. Hunt's fear that if the barricade is reconstructed, Mr. Hunt will not survive another medical emergency); M. Hunt Decl. ¶¶ 18-19 (same); M. Possin Decl. ¶¶ 9-11 (diagnosed with anxiety disorder as a direct consequence of the Defendants' barricades, and describing ongoing insomnia); S. Fermanich Decl. ¶¶ 11-18, 24 (describing underlying atrial fibrillation condition and episodes that have worsened in frequency and length due to the barricades construction and fear that Defendants will chain back up the barricades at any time); M. Hunt Decl. ¶¶ 33-34 (tripling usual dose of insomnia medication to sleep through the night).) Still others are falling into deep depression to the point of needing mental health services. (R. Pearson Decl. ¶¶ 22-23; P. Kester Decl. ¶¶ 17, 29-30; J. Walsh Decl. ¶¶ 7-11.)

Some Plaintiffs and other residents have also been irreparably harmed, continue to be irreparably harmed, and will be irreparably harmed in the likely event the barricades are fully reconstructed, by being forced to leave a school in which the student was thriving (P. Kester Decl. ¶¶ 8-10, 28-30), being unable to go to work, (J. Kilger Decl. ¶¶ 11-16; R. Pearson ¶¶ 10-14, 16-17), and feeling unsafe in the workplace. (M. Hornbostel Decl. ¶¶ 14, 28 (noting that tribal members travel to Mr. Hornbostel and Ms. Panfil's restaurant to intimidate Mr. Hornbostel).). Moreover, Plaintiffs were cut off from the outside world and face the imminent threat of that happening again in the form of the barricades preventing the United States Postal Service from delivering mail to Plaintiffs' homes. (*See, e.g.*, J. Hunt Decl. ¶ 23; M. Hunt Decl. ¶ 24; M. Possin Decl. ¶ 12.) The Hunts went 21 days without receiving mail because of the barricades (J. Hunt Decl. ¶ 23; M. Hunt Decl. ¶ 24), and the likely threat of a lengthy postal service interruption occurring again further adds to the likely imminent irreparable harm Plaintiffs face in the absence of expeditious court relief.[9]

Plaintiffs were irreparably harmed and continue to be irreparably harmed by the anxiety and emotional stress from knowing that they may soon be once again barricaded from their home. (M. Hornbostel Decl. ¶¶ 9, 11; J. Hunt Decl. ¶¶ 11, 29; M. Hunt Decl. ¶¶ 12, 30; M. Possin Decl. ¶ 15; S. Fermanich Decl. ¶ 24.) The sheer likely prospect of the reconstruction of the barricades irreparably harms Plaintiffs. Plaintiffs fear the barricades will be chained back up at any time, especially because the concrete blocks remain visible on the Roadways, which causes extreme anxiety and emotional distress knowing Plaintiffs may soon once again be barricaded in or out.

[9] Congress takes this harm seriously. It is a federal crime to knowingly and willfully obstruct USPS mail carriers carrying the mail. 18 U.S.C. § 1701.

(M. Hornbostel Decl. ¶¶ 9, 11; J. Hunt Decl. ¶¶ 11, 29; M. Hunt Decl. ¶¶ 12, 30; M. Possin Decl. ¶ 15; S. Fermanich Decl. ¶ 24.)

The uncertainty surrounding the Roadways, extreme passion underlying this roadway access dispute, and threats from tribal members, combined with the irreparable harm that Plaintiffs have faced, continue to experience, and will likely experience upon the reconstruction of the barricades, has caused yet another serious manifestation of ongoing and future irreparable harm: fear of violence and even homicide. (M. Hornbostel Decl. ¶¶ 15-26 & Exs. A & C (describing Ms. Panfil's experience of receiving threats from tribal members and having her face plastered on a tribal "wanted poster," Ms. Panfil believing her life is jeopardy and feeling unsafe, Ms. Panfil's severe emotional reaction to the circumstances and threats, and Ms. Panfil fleeing Wisconsin); *see also* M. Hunt Decl. ¶¶ 37-39 (describing that a tribe member stated, "We know our complaint is with the federal government, but we can't barricade their homes," and describing seeing social media posts from a tribe member saying that they need to leave Lac du Flambeau and not come back).)

The reality is that in the likely event that the Defendants fully reconstruct the barricades at some point soon, the same exact irreparable harm that Plaintiffs and others experienced for six weeks will very likely be replicated and that harm will be compounded by the previous and continuing irreparable harm that Plaintiffs face through the present moment. There is a high likelihood of imminent unbearable irreparable harm that is ominously on the immediate horizon. Moreover, the mere threat of the re-barricading is causing present and continuing irreparable harm to Plaintiffs.

LEGAL STANDARD

Plaintiffs are seeking a preliminary injunction pending resolution of this case on the merits. When faced with a motion for injunctive relief, the gist of the court's undertaking is to "balance the competing claims of injury and … consider the effect on each party of the granting or withholding of the requested relief." *Id.* Injunctive relief is intended to maintain the status quo (or restore the status quo) until the merits of the case are resolved. *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001).

Specifically, injunctive relief must be granted if:

(1) The moving party is likely to succeed on the merits;

(2) The moving party is likely to suffer irreparable harm in the absence of injunctive relief;

(3) The balance of equities tips in the moving party's favor; and

(4) An injunction is in the public interest.

Doe v. Univ. of S. Indiana, 43 F.4th 784, 791 (7th Cir. 2022) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).

Some courts have stated that the moving party must also make a threshold showing that the moving party has no adequate remedy at law, but irreparable harm and inadequate remedy at law are oftentimes addressed together, if not entirely conflated, because the concept of irreparable harm generally accounts for or subsumes the concept of inadequate remedies at law. *See Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages."). *See, e.g.*, *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 946 (W.D. Wis. 2018) (addressing irreparable harm and inadequate remedy at law together; finding that plaintiffs established that they are at risk of irreparable harm because of "serious, ongoing impact[s] on

plaintiffs' [mental and physical] health," which strongly weighs in favor of injunctive relief, and such impacts on plaintiffs show that money damages "would be seriously deficient as compared to the harm suffered."); *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003) (addressing irreparable harm and inadequate remedy at law together; holding that inability to maintain a business relationship and loss of the relationship constitute irreparable harm and, "[b]ecause it is not practicable to calculate damages to remedy this kind of harm, no remedy at law can adequately compensate [plaintiff] for its injury.").

Authority for the Court Sitting in Equity to Alleviate Ongoing Irreparable Harm and to Prevent Near Future Irreparable Harm

The Court, sitting in equity, may enter a preliminary injunction to provide relief to Plaintiffs, as they are currently being irreparably harmed due to the large cement blocks currently on the Roadways which vividly remind Plaintiffs of the trauma and mental anguish they suffered for six weeks when the Roadways were fully barricaded and which vividly remind Plaintiffs of the imminent threat of re-barricading and again facing further irreparable harm. *See Winter*, 555 U.S. at 22. Plaintiffs are also currently being irreparably harmed by the mere threat of Defendants' imminent full reconstruction of the barricades on the Roadways. And Plaintiffs are currently being irreparably harmed by Defendants' permits-issuance regime in that the revocable temporary access permits only seem to allow homeowners along the Roadways (Plaintiffs) to access their homes and ostensibly deny the public access to or use of the Roadways. The public includes Plaintiffs' families, friends, associates, non-plaintiff neighbors, delivery drivers, etc., and thus Defendants are preventing Plaintiffs from maintaining anything close to a normal livelihood, including freedom from isolation and freedom to receive visitors. On these grounds alone, the Court has authority to issue preliminary injunctive relief here. *See Winter*, 555 U.S. at 22.

Even so, the likely, imminent further irreparable harm that Plaintiffs will soon face when the Defendants re-barricade the Roadways suffices to afford Plaintiffs with preliminary injunctive relief.

Although the Defendants unlocked the chains on the barricades on March 13, 2023, the concrete blocks remain in place on the Roadways, and the Defendants will likely replace the barricades soon. (Am. SOF ¶¶ 111-130.) The Revocable Temporary Access Permits are precisely what they are named: not only revocable, but also temporary. (Am. SOF ¶¶ 116-117; B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1-6.) The Town has paid or agreed to pay the Tribe $60,000 in order to maintain the Temporary Access Permits for 90 days, but there is no guarantee that the Tribe will abide by its promise to keep the chains unlocked, nor is there any indication that the Tribe is willing to extend the temporary access permits past the 90-day period, if they do not revoke the permits sooner. (Am. SOF ¶¶ 111-130.) Plus, the Town's roads budget is finite. Thus, although the Plaintiffs are not presently physically restrained by the barricades, Plaintiffs' claim is very specific and narrow as it relates to imminent irreparable harm: injunctive relief to prevent likely and imminent further irreparable harm. Even more specific insofar as near future harm: Plaintiffs only seek injunctive relief for what will cause Plaintiffs further irreparable harm in the absence of an injunction when the barricades are fully reconstructed upon the revocation or expiration of the revocable temporary access permits.

Even if Plaintiffs' immense current ongoing harm does not rise to the level of "irreparable" (we posit that it does), case law and common sense dictate that courts do not have to (and should not) wait to sit in equity to enjoin imminent conduct that will cause harm until someone is experiencing such harm when the person foresees the imminent conduct that will cause the person irreparable harm. *Walling v. T. Buettner & Co.*, 113 F.2d 306, 308 (7th Cir.

1943) ("A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued before the suit for injunction was brought, and where there is no evidence that the offense is likely to be repeated in the future. Courts of equity are not to be used to punish past offenses, but only in a proper case to prevent wrongdoing in the future."). Even if Plaintiffs' immense current ongoing harm does not rise to the level of "irreparable" (again, we posit that it does), Plaintiffs respectfully submit that a court should not require a person who already experienced irreparable harm to be further irreparably harmed before the person can get court relief if that person meets her burden to show likely and imminent irreparable harm for an injunction to issue, as Plaintiffs do through this Brief and supporting filed documents. *See id.*; *Burlington Northern Santa Fe Ry. Co. v. A 50-Foot Wide Easement Consisting of 6.99 Acres More or Less*, 346 F. App'x 297, 301 (10th Cir. 2009) ("[P]revention of impending future injury is a recognized function of a court of equity"); *see also S.E.C. v. Gentile*, 939 F.3d 549, 556 (3rd Cir. 2019) ("[T]he most basic rule of preventive injunctive relief [is] that the plaintiff must show a cognizable risk of future harm." (citing *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333, (1952))).[10]

[10] A corollary of this principle: this case is not moot. As an initial matter, Defendants are committing ongoing violations of federal law and taking action that exceeds the Tribe's authority by limiting use of and access to public roads under federal law via issuance of and requiring permits to access and use the Roadways, as well as maintaining large cement blocks on these public roads that presently cause irreparable harm in part by vividly reminding Plaintiffs of the anguish they faced for six weeks when the barricades were (and will likely again be) fully reconstructed. Moreover, "[i]t is well-settled that the voluntary cessation of allegedly unlawful conduct does not moot a case in which the legality of that conduct has been placed in issue. The rational for this rule is straightforward: 'mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways.'" *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 74–75 (1983) (quoting *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). "Whenever there is a risk that the defendant will return to his old ways, the plaintiff continues to have a stake in the outcome—its interest in not continuing to be subjected to that risk." *Heckler*, 464 U.S. at 75.

Yet another corollary: Plaintiffs have standing to seek injunctive relief to prevent very likely, imminent further irreparable harm even though the barricades have been partially deconstructed, because Plaintiffs have alleged and demonstrated realistic, likely, and imminent harm, particularly in light of Plaintiffs' past harm by the Defendants' conduct and the current status of the barricades on the Roadways (revocable short-term temporary access permits) that will highly likely again result in the full reconstruction of the barricades and, in turn, cause Plaintiffs further irreparable harm. Plus, Plaintiffs are continuing to be harmed by Defendants' (federally unlawful) revocable temporary access

ARGUMENT

I. Plaintiffs are Likely to Succeed on the Merits of Each of the Claims Set Forth in the Amended Complaint.

To establish a likelihood of success on the merits, plaintiffs must "demonstrate that [their] claim has some likelihood of success on the merits." *Doe,* 43 F.4th at 791. "The likelihood of success on the merits is an early measurement of the quality of the underlying lawsuit, while the likelihood of irreparable harm takes into account how urgent the need for equitable relief really is." *Id.* at 788. Moreover, likelihood of success on the merits and likelihood of irreparable harm in the absence of preliminary relief are interdependent: "the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

Plaintiffs have alleged three causes of action in the Amended Complaint: Declaratory Judgment (Count I); Anticipated Private Nuisance (Count II); and Anticipated Public Nuisance (Count III). As set forth in more detail below, Plaintiffs are likely to succeed on the merits of each of these claims. Thus, this element of the preliminary injunction analysis strongly favors the entry of a preliminary injunction in this matter.

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permits regime. *See Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 862 (E.D. Wis. 2001) ("As long as the pleadings realistically allege actual, imminent harm, standing has been established."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (stating that standing to seek an injunction depends on whether Plaintiffs are "likely to suffer future injury" from the Defendants' contemplated or prospective conduct); *Lewis v. Tully*, 99 F.R.D. 632, 636 (N.D. Ill. 1983) ("[T]he existence of past harm is relevant in showing the likelihood of future harm." (citing *Kolender v. Lawson*, 103 S. Ct. 1855, 1857 n. 3 (1983))).

A. Plaintiffs are Likely to Succeed on the Merits of their Declaratory Judgment Claim.

Here, Plaintiffs are likely to succeed on the merits of their claim for a declaratory judgment. Thus, this element of the injunctive relief analysis strongly favors the entry of an order requiring the Roadways stay open pending the resolution of this matter on its merits.

i. Plaintiffs have satisfied the elements of a claim for declaratory judgment.

The Declaratory Judgment Act provides, "In a case of actual controversy within its jurisdiction … any court of the United States … may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Plaintiffs adequately state a claim for Declaratory Judgment if they "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co*., 312 U.S. 270, 273 (1941)).

Here, there is a real and substantial controversy. Although the chains on the barricades are not currently locked, the concrete blocks remain in place and there is an imminent risk of the chains being re-locked at any time, preventing Plaintiffs from being able to travel to and from their homes and from freely conveying their land and doing with it what they please. (M. Hunt Decl. ¶¶ 31, 37; S. Fermanich Decl. ¶¶ 9-10.) As set forth below, the Defendants' barricades create serious hardships when in place and have caused and are causing irreparable harm even with their chains unlocked. The Court's decision on whether the Roadways are public and must be kept open to the

public pursuant to 23 U.S.C. §§ 101(a)(22), (23), and (33),[11] 25 C.F.R. § 170.5,[12] and 25 C.F.R. § 170.114(a)[13] will resolve the controversy over the barricades. Without a declaratory judgment from the Court, Defendants will continue to violate federal law; re-barricade the Roadways, prohibiting Plaintiffs from going to and from their homes in the process; continue to erroneously claim, and unlawfully threaten the Plaintiffs with, alleged trespass repercussions; and continue to

[11] 23 U.S.C. § 101(a)(22), (23), and (33) provide:

(a) Definitions.—In this title, the following definitions apply:
****
(22) Public authority.—
The term "public authority" means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.
(23) Public road.—
The term "public road" means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.
****
(33) Tribal transportation facility.—
The term "tribal transportation facility" means a public highway, road, bridge, trail, or transit system that is located on or provides access to tribal land and appears on the national tribal transportation facility inventory described in section 202(b)(1).

[12] 25 C.F.R. § 170.5 provides:

§ 170.5 What definitions apply to this part?
****
National Tribal Transportation Facility Inventory (or NTTFI) means at a minimum, transportation facilities that are eligible for assistance under the Tribal transportation program that an Indian Tribe has requested, including facilities that meet at least one of the [seven] following criteria . . . ."

[13] 25 C.F.R. § 170.114 provides:

§ 170.114 What restrictions apply to the use of a Tribal transportation facility?
(a) All Tribal transportation facilities listed in the approved NTTFI must be open and available for public use as required by 23 U.S.C. 101(a)(31). However, the public authority having jurisdiction over these roads or the Secretary, in consultation with a Tribe and applicable private landowners, may restrict road use or close roads temporarily when:
(1) Required for public health and safety or as provided in § 170.116.
(2) Conducting engineering and traffic analysis to determine maximum speed limits, maximum vehicular size, and weight limits, and identify needed traffic control devices; and
(3) Erecting, maintaining, and enforcing compliance with signs and pavement markings.
(b) Consultation is not required whenever the conditions in paragraph (a) of this section involve immediate safety or life-threatening situations.
(c) A Tribal transportation facility owned by a Tribe or BIA may be permanently closed only when the Tribal government and the Secretary agree. Once this agreement is reached, BIA must remove the facility from the NTTFI and it will be ineligible for expenditure of any TTP funds.

cause an existential threat to the safety, health and welfare of residents in Vilas County. Under *MedImmune*, the Plaintiffs satisfy the necessary elements of a Claim for Declaratory Judgment.

ii. Plaintiffs are likely to succeed on the merits of their action for declaratory judgment.

In addition, Plaintiffs are likely to succeed on the merits and obtain the declaration which they seek. The Roadways are public roads under federal law that must be kept open. The Defendants have no right to violate federal law and close the Roadways, and the Court therefore should order the Roadways remain open.

By way of background, the Tribal Transportation Program (the "TTP"), formerly known as the Indian Reservation Roads Program ("IRR"), was established to help provide safe and adequate transportation and public road access to and within Indian reservations and lands. (Tribal Transportation Program, 23 U.S.C. § 201 *et seq*.) The Tribe voluntarily elects to participate in the TTP. (Am. SOF ¶ 96.)

The Tribe has elected to list each of the Roadways in the approved NTTFI, which identifies the tribal "transportation facilities that are eligible for assistance under the Tribal transportation program that an Indian Tribe has requested." 25 C.F.R. § 170.5. The Tribe's recent IRR Official Indian Reservation Road Inventory (the "IRR Inventory"), dated January 24, 2023 (one week before Defendants closed the Roadways), lists the roads and mileage reported by the Tribe in the NTTFI. (B. Hubing Decl. ¶ 23, Ex. L.) By electing to list the Roadways in the IRR Inventory, the Tribe has included the Roadways in the NTTFI. The Tribe's IRR Inventory lists the four Roadways at issue as follows:

- 0.5 miles of Annie Sunn Lane, which includes a substantial portion of the .86 miles at issue on Indian land that has been barricaded;
- 0.8 miles of Center Sugarbush Lane, which includes the 745.4 feet (approximately .14 miles) at issue on Indian land that has been barricaded;

- 0.6 miles of East Ross Allen Lake Lane, which includes the 159.5 feet (approximately .03 miles) at issue on Indian land that has been barricaded; and

- 0.8 miles of Elsie Lake Lane, which includes the 781.2 feet (approximately .15 miles) at issue on Indian land that has been barricaded.

(*See id*.)

23 U.S.C. §§ 101(a)(22), (23), and (33) make clear that any road listed as included in a Tribal Transportation Facility is a "public road." *See supra* at 23-25 & n.11.

Additionally, as set forth in 25 C.F.R. § 170.114(a), when a road is listed on the NTTFI, it must be kept open and available to the public:

> § 170.114 What restrictions apply to the use of a Tribal transportation facility?
>
> (a) **All Tribal transportation facilities listed in the approved NTTFI must be <u>open</u> and <u>available for public use</u> as required by 23 U.S.C. 101(a)(31)**.[14] However, the public authority having jurisdiction over these roads or the Secretary, in consultation with a Tribe and applicable private landowners, may restrict road use or close roads temporarily when:
>
> (1) Required for public health and safety or as provided in § 170.116.
>
> (2) Conducting engineering and traffic analysis to determine maximum speed limits, maximum vehicular size, and weight limits, and identify needed traffic control devices; and
>
> (3) Erecting, maintaining, and enforcing compliance with signs and pavement markings.
>
> (b) Consultation is not required whenever the conditions in paragraph (a) of this section involve immediate safety or life-threatening situations.
>
> (c) A Tribal transportation facility owned by a Tribe or BIA may be permanently closed only when the Tribal government and the Secretary agree. Once this agreement is reached, BIA must remove

[14] It appears that this reference to 23 U.S.C. § 101(a)(31), which references State transportation departments, is a typographical error in 25 C.F.R. § 170.114(a), and instead it should be a reference to 23 U.S.C. § 101(a)(33), which refers to Tribal Transportation Facilities.

> the facility from the NTTFI and it will be ineligible for expenditure of any TTP funds.

25 C.F.R. § 170.114(a) (emphasis added).

Because the Roadways are listed in the NTTFI, only the Secretary of the Interior or a public authority having jurisdiction over the Roadways may restrict road use or close roads temporarily. 25 C.F.R. § 170.114(a).[15] Further, on the NTTFI, the Tribe identifies the Town as the public authority responsible for operating or maintaining the Roadways. (Am. SOF ¶¶ 104-106.) As such, in the parlance of the TTP, the Town is the "owner" of the Roadways. 52 IAM 9-H, § 2.2(2). Notably, even if the Tribe was listed as the "owner" for the Roadways, the Roadways could be closed only in very limited circumstances and only after "consulting both with … **applicable private landowners**" …, unless there is a concern about "immediate safety or life-threatening situation[]." 25 C.F.R. §§ 170.114(a)-(b) (emphasis added). None of the circumstances identified in 25 C.F.R. § 170.114(a) apply in this case. Therefore, the barricades that the Defendants erected or caused to be erected, without consultation with the Plaintiffs, directly violate 25 C.F.R. § 170.114(a).

In addition to the Roadways being subject to the Federal-Aid Highway Act, TTP, and the federal TTP implementing regulations, the Tribe has signed various agreements with the Town over the years, such as the Acknowledgement of Public Authority Responsibility (APAR) in 2007, whereby the Tribe agreed that the Roadways "will continue to be owned by the Town and opened to the public for travel." (B. Hubing Decl. ¶ 24, Ex. M.) In addition, in a letter to the Town, dated

[15] For an excellent discussion of the requirement that roads on the IRR be kept open as public roads, see Leonard, M. Brent (2017) "The Public Nature of Indian Reservation Roads," American Indian Law Journal: Vol. 0: Iss. 1, Article 3. Available at: *https://digitalcommons.law.seattleu.edu/ailj/vol0/iss1/3* (last accessed Feb. 23, 2023).

March 8, 2011, the BIA opined that the Roadways are public and must remain open. (*Id*. at ¶ 25, Ex. N.)

Moreover, the Town maintains Center Sugarbush Lane, East Ross Allen Lake Lane, Elsie Lake Lane and the north-south portion of Annie Sunn Lane. (Am. SOF ¶ 106). Individual landowners who use Annie Sunn Lane for access to their homes maintain the east-west portion. (Am. SOF ¶ 106.) This fact weighs in favor of granting injunctive relief in the balancing of harms analysis discussed below.

Defendants lacked, and continue to lack, the power to restrict access, or close, the Roadways. Further, Defendants failed, and continue to fail to consult with the Secretary of the Interior and the affected landowners, including Plaintiffs, before taking any actions to restrict use of the Roadways such as via the issuance of permits. Despite the Tribe's assurances that the Roadways are public and the fact that federal law clearly requires the Roadways to remain open to the public, the Defendants unlawfully placed barricades on the Roadways on January 31, 2023, or otherwise caused the barricades to be placed on the Roadways, thereby restricting or completely preventing the Plaintiffs from getting to and from their respective homes. (Am. SOF ¶¶ 110.)

B. Plaintiffs are Likely to Succeed on the Merits of their Anticipated Private and Public Nuisance Claims Which Seek Injunctive Relief to Prevent an Anticipated or Threatened Nuisance Under Wisconsin Law.

"A nuisance may be both public and private in character," because "the term public nuisance refers to a broader set of invasions than private nuisance." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶29 n.4, 277 Wis. 2d 635, 691 N.W.2d 658 (2005). "[A] nuisance exists if there is a condition or activity that unduly interferes with the private use and enjoyment of land or a public right. If the interest invaded is the private use and enjoyment of land, then the nuisance is considered a private nuisance. Conversely, if the condition or activity

interferes with a public right or the use and enjoyment of public space, the nuisance is termed a public nuisance." *Id.*, ¶30 (citing cases).

"Nuisance" does not refer to the conduct that causes the harm but rather the type of harm caused by the conduct. Restatement (Second) of Torts § 821A, comments b & c (1979). "[T]he term 'nuisance' generally refers to the invasion of either an interest in the use and enjoyment of land or a common public. . . . It is imperative to distinguish between a nuisance and liability for a nuisance, as it is possible to have a nuisance and yet no liability. A nuisance is nothing more than a particular type of harm suffered; liability depends upon the existence of underlying tortious acts that cause the harm." *Milwaukee Metro.*, 2005 WI 8, ¶¶24-25.

Plaintiffs do not seek to hold the Defendants liable for an existing private nuisance or public nuisance in the sense of proving tortious conduct to recover money damages, i.e., satisfying the elements necessary for Defendants to be found liable for intentionally or negligently causing nuisance to Plaintiffs. Instead, Plaintiffs "present[] an application to a court of equity to restrain a threatened or prospective nuisance." *Wergin v. Voss*, 179 Wis. 603, 606, 192 N.W. 51 (1923). Courts of equity may enjoin a threatened or anticipated nuisance, public or private. *Id.*; *Krueger v. AllEnergy Hixton, LLC*, 2018 WI App 60, ¶14, 384 Wis. 2d 127, 918 N.W.2d 458; *Rogers v. John Week Lumber Co.*, 117 Wis. 5, 93 N.W. 821 (1903). To do so, the court must find that "it clearly appears that a nuisance will necessarily result from the contemplated act or thing which [plaintiffs seek] to enjoin." *Wergin*, 179 Wis. at 606; *Krueger*, 2018 WI App 60, ¶¶13–19 (noting that cases addressing existing private nuisances do not undercut the framework courts should use when dealing with anticipated nuisances under Wisconsin law). The likelihood of the contemplated anticipated conduct occurring is

distinguished from the likelihood that, assuming such conduct does occur, nuisance harm will necessarily result. *See Wergin*, 179 Wis. at 606.

i. Plaintiffs Are Likely to Succeed on the Merits of Their Anticipated Private Nuisance Claim

"Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts." *Milwaukee Metro.*, 2005 WI 8, ¶25 n.4. The Restatement provides: "A private nuisance is a nontrespassory invasion [or interference] of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D (1979). Wisconsin case law consistently uses the term "interference" with one's use and enjoyment of land in describing the essence of a private nuisance. *See, e.g.*, *Milwaukee Metro.*, 2005 WI 8, ¶27 ("The essence of a private nuisance is an interference with the use and enjoyment of land.").

An anticipated private nuisance must include factual allegations that, if true, would support each of the following: the defendants' anticipated, proposed, or threatened conduct will necessarily or certainly create a private nuisance; and the resulting private nuisance from the defendants' anticipated, proposed, or threatened conduct will cause the claimant harm that is inevitable and undoubted. *Krueger*, 2018 WI App 60, ¶29 (citing *Wergin*, 179 Wis. at 606-07).

Additionally, Wisconsin courts have indicated that for anticipated private nuisance claims, Plaintiffs must also show that the defendants' anticipated, proposed, or threatened conduct will be the legal cause of the anticipated nuisance, and that the defendants' anticipated, proposed, or threatened conduct will be intentional and unreasonable. *See Krueger*, 2018 WI App 60, ¶29 & n. 8 (citing *Wergin*, 179 Wis. at 606-07); *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶31, 350 Wis. 2d 554, 835 N.W.2d 160. However, as noted above, the likelihood of the contemplated anticipated conduct occurring is distinguished from the

likelihood that, assuming such conduct does occur, nuisance harm will necessarily result. *See Wergin*, 179 Wis. at 606.

Here, the defendants' anticipated, proposed, or threatened conduct will necessarily or certainly create a private nuisance. The barricades wholly prevented or significantly interfered with Plaintiffs going to and from their homes for a period of almost six weeks, and when the barricades are soon fully reconstructed the same result will certainly occur. Certain Plaintiffs were prevented from freely and reasonably leaving their properties, while others fled their homes and were wholly prevented from returning to their properties, due to the Defendants' placing, assisting in placing, or causing the placement of the barricades on the Roadways. J. Hunt Decl. ¶ 29; D. Pollard Decl. ¶¶ 11-13; R. Pearson Decl. ¶ 18; J. Kilger Decl. ¶ 9; J. Spanton Decl. ¶ 8; P. Kester Decl. ¶ 8; M. Hunt Decl. ¶¶ 13-15; M. Possin Decl. ¶ 7; S. Fermanich Decl. ¶ 19. The imminent and likely re-barricading of the Roadways will undoubtedly recreate the same extreme interference in Plaintiffs' use and enjoyment of their land that Plaintiffs recently experienced for six weeks. J. Hunt Decl. ¶ 29; S. Fermanich Decl. ¶ 24; M. Possin Decl. ¶ 15.

When the barricades are in effect and soon re-constructed, they constitute a condition or activity that interferes with the private use and enjoyment of Plaintiffs' land. Many Plaintiffs are completely unable to return to their respective homes due to the barricades, which is an interference with Plaintiffs' private use and enjoyment of their land, while other Plaintiffs are complete unable to freely or reasonably leave and return to their respective homes, which is another form of interference with Plaintiffs' private use and enjoyment of their land. J. Hunt Decl. ¶ 29; D. Pollard Decl. ¶¶ 11-13; R. Pearson Decl. ¶ 18; J. Kilger Decl. ¶ 9; J. Spanton Decl. ¶ 8; M. Hunt Decl. ¶¶ 13-15; M. Possin Decl. ¶ 7; S. Fermanich Decl. ¶ 19; *see also* P. Kester Decl. ¶ 8. Complete denial of access to Plaintiffs' homes and complete inability to freely or

reasonably leave and return to Plaintiffs' homes are ultimate interferences with Plaintiffs' private use and enjoyment of their land, as the former group of Plaintiffs cannot in any way use their land and thus cannot in any way enjoy their land, and the latter group of Plaintiffs are wholly restricted from any reasonable ingress and egress (J. Hunt Decl. ¶¶ 12-13, 20 (69-and-70-year-old couple have to cross a lake to come and go from their home)) such that they are wholly unable to reasonably receive any family, friends, associates, etc., (unless others are willing to cross over lakes, which is unreasonable), they are not allowed to timely and consistently get essentials like groceries or food (J. Kilger Decl. ¶ 8; R. Pearson Decl. ¶ 15), they have medical needs disrupted (D. Pollard Decl. ¶ 14), they are unable to receive caregivers at their home (*See id.*). Many Plaintiffs' inability to in any way use their land and many other Plaintiffs' complete restriction of any reasonable ingress and egress for their homes, which creates the drastic circumstances identified above, are irrefutable interferences of Plaintiffs' interest in the private use and enjoyment of their land that constitute nuisance and have long been recognized by courts across the country for centuries as constituting nuisance. *San Francisco Sav. Union v. R.G.R. Petroleum & Mining Co.*, 144 Cal. 134, 138 (1904) ("Anything which is injurious to health . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is declared to be a nuisance and the subject of an action."); *Thompson v. Gammon*, No. 12-CV-276 MCA/SMV, 2014 WL 11514673, at *4 (D.N.M. Sept. 29, 2014) ("[Claimants] allege facts which would support a private nuisance claim, including that the landscaping, walls and gates built by [respondents] blocked their access to their property."); *Indiana, B. & W.R. Co. v. Eberle*, 110 Ind. 542 (1887) ("The occupation of a public street in a city for a market, thereby obstructing the street . . . is a public nuisance[and] is also a private nuisance, in so far as it injuriously affects a resident in the vicinity."); *Parker v. People*, 111 Ill.

581, 602 (1884) ("Every [person] who owns property abutting upon a highway has a right of access to and egress from [their] property from and to the highway. This is a private right. That is a private nuisance which injuriously and unwarrantably affects such rights of another as belong to [them] specially and exclusively.").

It can hardly be refuted with a straight face that the resulting nuisance from the defendants' anticipated, proposed, or threatened conduct, i.e., re-barricading the Roadways, will cause Plaintiffs undoubted harm. When the barricades are fully reconstructed and nuisance results, the same irreparable harm that Plaintiffs experienced recently for six weeks will instantly be recreated and past trauma and suffering will compound with the recreation of this restriction on freely coming from and going to Plaintiffs' homes and Plaintiffs' corresponding trauma and mental anguish due to Defendants' barricades causing Plaintiffs to be wholly unable to get to their homes or causing Plaintiffs to be completely restricted from reasonably entering and exiting their homes in order to live anything close to a normal life. M. Possin Decl. ¶ 15; S. Fermanich Decl. ¶ 19; D. Pollard Decl. ¶¶ 13-16; R. Pearson Decl. ¶¶ 9-10, 22-23; J. Kilger Decl. ¶¶ 7-10; J. Spanton Decl. ¶¶ 8-11; P. Kester Decl. ¶¶ 8-14; M. Hornbostel Decl. ¶¶ 10-12; J. Walsh Decl. ¶¶ 7-11; *Lewis v. Tully*, 99 F.R.D. 632, 636 (N.D. Ill. 1983) ("[T]he existence of past harm is relevant in showing the likelihood of future harm." (citing *Kolender v. Lawson*, 103 S. Ct. 1855, 1857 n. 3 (1983))).[16]

Moreover, Defendants' re-barricading the Roadways will be the cause of the anticipated nuisance. (J. Kilger Decl. ¶¶ 8-9 (barricades causing nuisance and resulting harm); J. Spanton Decl. ¶¶ 8-11 (same); P. Kester Decl. ¶¶ 8-14 (same); M. Hornbostel Decl. ¶¶ 10-12; S.

[16] *See supra* at 14-17; *infra* at 40-50 (describing the widespread and severe irreparable harm Plaintiffs experience when the barricades are chain-locked).

Fermanich Decl. ¶ 19 (same); D. Pollard Decl. ¶¶ 13-16 (same)). Also, Defendants' re-barricading the Roadways will be intentional. ECF No. 12, B. Hubing Decl. ¶ 21, Ex. J (Defendant Johnson admitting that Defendants "have no intention of removing the barriers that [they] installed on [their] lands" until they are paid for over ten years of alleged "trespass"). Further, re-barricading the Roadways will be unreasonable for a plethora of reasons, including but not limited to the widespread and severe harm the barricading causes, especially when balanced against the complete lack of any utilitarian or practical benefit to the Defendants from any use of the land because Defendants' "use" of the land is practically and in terms of utility nothing more (in terms of Defendants' "use") than obstructing public roads in an attempt to get compensation from a municipality for keeping public roads open. They do not use the land for business; they do not use the land for trade; they do not use the land for education. *See Crest Chevrolet-Oldsmobile-Cad. v. Willemsen*, 129 Wis. 2d 129, 384 N.W.2d 692, 695 (adjoining landowner's adding landfill to his property, making his property higher than the property of the adjacent car dealership which caused the accumulation of surface water on the dealership property, was unreasonable). The Defendants' lack of utility in their use of the land as balanced against the widespread and severe harm caused by the conduct or activity on the land instantly distinguishes most nuisance cases from this one, where courts usually need to undertake a balancing test. *See Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 600 (Tex. 2016) (noting that the determination of whether interference with use and enjoyment of land is unreasonable requires balancing each party's land use). Here, there is hardly a competing balancing of utilitarian uses that the Court needs to undertake. J. Spanton Decl. ¶¶ 8-10; P. Kester Decl. ¶ 8; M. Hunt Decl. ¶¶ 13-14; M. Possin Decl. ¶ 7; S. Fermanich Decl. ¶ 19; M. Hornbostel Decl. ¶¶ 10-11. Plus, the barricading occurs on public roads in violation of federal

law, including statute, regulations, and federal Indian common law restricting the extent to which tribal officials can attempt to regulate non-members and attempt to exclude non-members from using public roads. *See supra* at 23-28.

Thus, "it clearly appears that a [private] nuisance will necessarily result from the contemplated act or thing which [Plaintiffs seek] to enjoin," *Wergin*, 179 Wis. at 606, and therefore Plaintiffs are entitled to injunctive relief to prevent Defendants' imminent anticipated conduct.

ii. Plaintiffs are Likely to Succeed on the Merits of Their Anticipated Public Nuisance Claim

A public nuisance is a condition or activity which substantially, unreasonably, or unduly interferes with a public right, or the use and enjoyment of a public place (or space) or with the activities of an entire community. *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶21 & n.15, 254 Wis. 2d 77, 646 N.W.2d 777 (noting that "[t]his definition of public nuisance is consistent with the definition of public nuisance in the Restatement (Second) of Torts § 821B (1979)"); *Milwaukee Metro.*, 2005 WI 8, ¶30. "The number of people affected does not strictly define a public nuisance." *Physicians Plus*, 2002 WI 80, ¶21. Under Wisconsin law, the character of the injury and the right impinged upon are the measures of whether a nuisance is a public one. *Milwaukee Metro.*, 2005 WI 8, ¶29. Factors that courts consider in determining whether a condition or activity constitutes a public nuisance include but are not limited to: "the nature of the activity, the reasonableness of the use of the property, location of the activity, and the degree or character of the injury inflicted or right impinged upon." *Physicians Plus*, 2002 WI 80, ¶21.

An anticipated public nuisance claim must include factual allegations that, if true, would support each of the following: the defendants' anticipated, proposed, or threatened conduct will

necessarily or certainly create a public nuisance; and the resulting public nuisance from the defendants' anticipated, proposed, or threatened conduct will cause the claimant and the public harm that is inevitable and undoubted. *Krueger*, 2018 WI App 60, ¶¶6, 29 & nn.2, 8 (citing *Wergin*, 179 Wis. at 606-07; noting that *Wergin*, which the *Krueger* court relies on, "also contemplates anticipated *public* nuisance claims" (emphasis in original)). Again, the likelihood of the contemplated anticipated conduct occurring is distinguished from the likelihood that, assuming such conduct does occur, nuisance harm will necessarily result. *See Wergin*, 179 Wis. at 606.

Here, the Defendants' re-barricading of the Roadways will necessarily create a public nuisance. When the barricades are fully constructed (chain-locked), a public nuisance necessarily results. The barricades prevent the Plaintiffs and other residents from freely and reasonably going to and from their homes—located on the land which they possess—and prevent the public from accessing or using the Roadways for any lawful purpose, obviously including vehicular use and access but also apparently any other lawful use of the Roadways, as Defendant Johnson said that the Town lacks "adequate legal interests (proper right-of-way over Tribal lands) to declare the roads as fully public" when the barricades were fully constructed. *See, e.g.*, J. Spanton Decl. ¶¶ 8-10; P. Kester Decl. ¶ 8; M. Hunt Decl. ¶¶ 13-14; M. Possin Decl. ¶ 7; S. Fermanich Decl. ¶ 19; M. Hornbostel Decl. ¶¶ 10-11; ECF No. 12, B. Hubing Decl. ¶¶ 16-19, Exs. E-H (showing the barricades block all vehicular access to and from locations on either sides of the barricades) & ¶ 21, Ex. J at 1 (Defendant Johnson's written statement while the barricades were fully constructed on the Roadways); B. Hubing Suppl. Decl. ¶ 4, Ex. B at 1 (when the barricades are up, entry past the barricades is prohibited). Barricading of the Roadways is a condition or activity which substantially, unreasonably, or unduly interferes with a right common to the

general public, that is, the complete denial to the public of the public's common right to use and access public roads.

The Roadways are "public roads" under federal law as explained above. Thus, the full construction of the barricades wholly prevents the public from the right common to the general public to use the public Roadways. The public's complete prevention in being able to use and access public roads is a substantial, unreasonable, and undue interference with the public right to use public roads. *See* ECF No. 12, B. Hubing Decl. ¶ 21, Ex. J at 1 (Defendant Johnson trying hard to wordsmith his statement that really just tells readers a few main points, one of which is that the Roadways are not public because all the other interested parties are at fault); *Hubbell v. Goodrich*, 37 Wis. 84, 86 (1875) ("**Any obstruction in or encroachment upon a highway, which unnecessarily impedes or incommodes the lawful use of such highway by the public, is a public nuisance**. . . ." (emphasis added)); *Physicians Plus*, 2002 WI 80, ¶21 ("As early as 1875, this court defined a public nuisance with regard to highways."; quoting the above *Hubbell* excerpt).

Looking at the various factors used to determine whether the circumstances sustain a holding that the interference of the public right at issue is unreasonable and thus a public nuisance quickly reveals that barricading the public Roadways constitutes a public nuisance under Wisconsin law. *Physicians Plus*, 2002 WI 80, ¶21; Restatement (Second) of Torts § 821B (1979). First, the nature of barricading the Roadways provides no direct practical or economic benefit to the Defendants, other than to require the Town to pay money for Revocable Temporary Access Permits for Plaintiffs to temporarily use public roads that are required to remain open under federal law. *See* B. Hubing Suppl. Decl. ¶ 3, Ex. A. Second, Defendants wholly or significantly preventing any public use of or access to the Roadways, including all

public vehicular access, when public use of the land does not whatsoever interfere with Defendants' use is unreasonable. Third, the barricading of the Roadways occurs on "public roads" per federal law. *See supra* at 23-28. Fourth, the degree of the injury inflicted by the barricaded Roadways is high, and the character of the injury inflicted by the barricaded Roadways is extensive, because family, friends, associates, non-plaintiff neighbors, delivery services, and passersby are entirely prevented from accessing or using the Roadways that are "public roads" under federal law, *see e.g.*, M. Hunt Decl. ¶¶ 24-27; M. Possin Decl. ¶ 12, in addition to the Plaintiffs' complete denial of access to their land to reenter when excluded therefrom or Plaintiffs' substantial and unreasonable inability to freely leave and return to their respective homes. *See, e.g.*, J. Spanton Decl. ¶¶ 8-10; P. Kester Decl. ¶ 8; M. Hunt Decl. ¶¶ 13-14; M. Possin Decl. ¶ 7; S. Fermanich Decl. ¶ 19; M. Hornbostel Decl. ¶¶ 10-11. Fifth, barricading of the Roadways is a significant interference with the public health, the public safety, the public peace, the public comfort, and the public convenience. S. Fermanich Decl. ¶¶ 20-24; J. Spanton Decl. ¶ 15; R. Pearson Decl. ¶ 21; D. Pollard Decl. ¶ 15. Sixth, barricading the Roadways is proscribed by federal law. *See supra* at 23-28. Seventh, barricading the Roadways has produced, continues to produce, and will further produce long-lasting (if not permanent) detrimental effects. *See, e.g.*, S. Fermanich Decl. ¶ 22; M. Hunt Decl. ¶ 32; J. Hunt Decl. ¶ 31; J. Walsh Decl. ¶¶ 7-11. Eighth, Defendants' know and have reason to know that Defendants' conduct (barricading the Roadways and imminently re-barricading the Roadways) had, has, and will have a significant effect upon the public right, that is, the complete denial of the public's right to use and access the Roadways, which caused, causes, and will further cause severe and extensive effects on the Plaintiffs, and particularly, for the purposes of public nuisance, their families, friends, associates, non-Plaintiff neighbors, delivery drivers, passersby, and the public

in general. *See* B. Hubing Suppl. Decl. ¶ 3, Ex. A at 2-6 (refusing to acknowledge that the Roadways are public roads despite knowing their status because the Roadways are listed by the Tribe on the NTTFI).

When the defendants' anticipated, proposed, or threatened conduct happens (re-barricading the Roadways), Plaintiffs and the public will undoubtedly be harmed by the resulting public nuisance caused by such activity or condition. *See Indiana, B. & W.R. Co. v. Eberle*, 110 Ind. 542 (1887) ("The owner of a town lot . . . suffers a peculiar damage by the obstruction of a public street immediately in front of his lot . . . . He may, therefore, maintain an action to remove or prevent such obstruction, although the same may be a public nuisance." (citing Minnesota case); "The occupation of a public street in a city for a market, thereby obstructing the street . . ., [] is a public nuisance." (citing New Jersey case)). When the barricades are chain-locked on the Roadways, Plaintiffs and the public are harmed by the resulting public nuisance. The public is necessarily harmed by the denial of the public's common right to access and use public roads, and Plaintiffs are necessarily harmed and suffer harm of a kind different from that suffered by the public in the form of Plaintiffs' inability to freely and reasonably return to or exit and reenter their personal dwellings and thus their inability to maintain normal livelihoods that are integrally connected to their homes, as well as extreme stress and anxiety and other mental conditions from such inabilities. *See Parker v. People*, 111 Ill. 581, 602 (1884) ("All [people] have, as members of the public, a right to have the public highways free from obstruction to travel, and have the right to travel thereon. This is a public right. Every [person] who owns property abutting upon a highway has a right of access to and egress from [their] property from and to the highway. This is a private right.").

Thus, "it clearly appears that a [public] nuisance will necessarily result from the contemplated act or thing which [plaintiffs seek] to enjoin." *Wergin*, 179 Wis. at 606; *Krueger*, 2018 WI App 60, ¶¶6, 29 & nn.2, 8 (citing *Wergin*; noting that *Wergin* "also contemplates anticipated *public* nuisance claims" (emphasis in original)). Therefore, Plaintiffs are entitled to injunctive relief to prevent Defendants' imminent anticipated conduct.

Because Plaintiffs have shown a high likelihood of success on each of their claims, the entry of a preliminary injunction is appropriate here.

II. Plaintiffs Have Demonstrated the Likelihood of Suffering Irreparable Harm and the Lack of an Adequate Remedy at Law in the Absence of Preliminary Relief.

To satisfy the "irreparable harm" prong, plaintiffs "must establish that irreparable harm is likely without an injunction…. That is, there must be more than a mere possibility that the harm will come to pass, but the alleged harm need not be occurring or be certain to occur before a court may grant relief." *Michigan v. U.S. Army Corps of Engrs.*, 667 F.3d 765, 787–88 (7th Cir. 2011) (citing *Winter*, 555 U.S. at 21–23) ("A presently existing actual threat must be shown.").

Here, there is more than a "mere possibility" that the Defendants will replace the barricades on the Roadways. Rather, it is very likely, if not certain, that the Defendants will do so. To start, saying that the Defendants "removed" the barricades is misleading. The Defendants only unlocked the chains that connect the cement blocks at each of the barricades; the cement blocks themselves remain in place at each of the barricade sites, signaling that this is only a temporary measure and Defendants will likely relock the chains at any time. (Am. SOF ¶ 111.)

Further, the circumstances surrounding the reopening of the barricades indicate that Defendants will likely re-lock them in the future, reflecting the high likelihood that Defendants will suffer irreparable harm in the absence of an injunction. The Defendants only agreed to unlock the chains upon payment for newly created and unprecedented Revocable Temporary Access

Permits over the Roadways. (Am. SOF ¶¶ 113-130.) These "permits" are valid for only 30 days each, and can be renewed a maximum of two times, for a total of 90 days. (B. Hubing Suppl. Decl. ¶ 3, Ex. A.) The Revocable Temporary Access Permits are set to expire on April 12, 2023—assuming the Tribe does not renege on the permits' terms, which Plaintiffs fear is certainly a possibility). (Am. SOF ¶ 122; B. Hubing Suppl. Decl. ¶ 3, Ex. A at 3–6 ("Date of Expiration[:] 4/12/2023"); M. Hornbostel Decl. ¶ 9.) Assuming temporary access via the "permits" does not lapse between today and the possible two renewals of the "permits," the barricades will be fully reconstructed on or immediately after June 13, 2023. (Am. SOF ¶¶ 123-124.)

Moreover, the Tribe's purpose in issuing the revocable temporary access permits is to "facilitate negotiations between the Tribe and the Town of Lac du Flambeau concerning remedies for past trespass violations, and possible future access solutions[.]" (B. Hubing Suppl. Decl. ¶ 3, Ex. A at 1.) Thus, the Tribe clearly has no intention of keeping the Roadways open past the 90-day period unless the Tribe's exorbitant $20,000,000 settlement demand is negotiated and accepted. (Am. SOF ¶¶ 13, 149; B. Hubing Suppl. Decl. ¶ 3, Exs. A-C.) Unless they can resolve their issues in the next 90 days—keeping in mind that the parties have gone a decade without resolving the dispute—Plaintiffs will again be reduced to helpless pawns and further irreparably harmed. Defendants' recent actions only point to the conclusion that Defendants will soon fully reconstruct the barricades on the Roadways. "[T]he existence of past harm is relevant in showing the likelihood of future harm." *Lewis v. Tully*, 99 F.R.D. 632, 636 (N.D. Ill. 1983) (citing *Kolender v. Lawson*, 103 S. Ct. 1855, 1857 n. 3 (1983)). Thus, while the barricades are not currently fully constructed on the Roadways, Plaintiffs have demonstrated a high likelihood of imminent irreparable harm and a lack of an adequate remedy at law.

As established by the record, and discussed in further detail below, the illegal barricades which blocked the Roadways have already caused irreparable harm to the Plaintiffs. The looming threat of the barricades being relocked at any time means the likelihood of this irreparable harm reoccurring remains high. *Lewis*, 99 F.R.D. at 636 ("[T]he existence of past harm is relevant in showing the likelihood of future harm.").

The barricades—and now the likely prospect of the barricades being fully reconstructed soon—have taken a major toll on the mental health of Plaintiffs and the other residents on these Roadways regardless of whether they were barricaded in or out. Plaintiffs and other residents on the Roadways have experienced and are experiencing mental health conditions, such as severe anxiety, stress, and insomnia, due to a variety of things like worsening insomnia, the mere knowledge of losing reasonable (vehicular) access to their homes and soon pedestrian access to their homes due to melting ice on the lakes, fear of retaliation, and significant concerns about delayed response times for emergency vehicles to pass through the barricades. (J. Walsh Decl. ¶¶ 1-11; M. Hornbostel Decl. ¶¶ 9-11; D. Pollard Decl. ¶¶ 12-13, 15-16; J. Spanton Decl. ¶¶ 12-16; J. Kilger Decl. ¶¶ 9-10, 17; R. Pearson Decl. ¶¶ 18-24; B. Hubing Decl. ¶ 10; J. Hunt Decl. ¶¶ 15-19 (describing Mr. Hunt's medical emergency in October 2022 and how, if the incident had occurred while the barricades were up, Mr. Hunt would not have survived, and Mr. and Ms. Hunt's fear that if the barricade is reconstructed, Mr. Hunt will not survive another medical emergency); M. Hunt Decl. ¶¶ 18-19 (same); M. Possin Decl. ¶¶ 9-11 (diagnosed with anxiety disorder as a direct consequence of the Defendants' barricades, and describing ongoing insomnia); S. Fermanich Decl. ¶¶ 11-18, 24 (describing underlying atrial fibrillation condition and episodes that have worsened in frequency and length due to the barricades construction and fear that Defendants will chain back up the barricades at any time); M. Hunt Decl. ¶¶ 33-34 (tripling usual dose of insomnia

medication to sleep through the night).) Still others are falling into deep depression to the point of needing mental health services. (R. Pearson Decl. ¶¶ 22-23; P. Kester Decl. ¶¶ 17, 29-30; J. Walsh Decl. ¶¶ 7-11.)

Plaintiffs were irreparably harmed and continue to be irreparably harmed by the anxiety and emotional stress from knowing that they may soon be once again barricaded from their home. (M. Hornbostel Decl. ¶¶ 9, 11; J. Hunt Decl. ¶¶ 11, 29; M. Hunt Decl. ¶¶ 12, 30; M. Possin Decl. ¶ 15; S. Fermanich Decl. ¶ 24; J. Walsh Decl. ¶¶ 7-11.) The mere likely prospect of the imminent reconstruction of the barricades irreparably harms Plaintiffs, as Plaintiffs fear the barricades will be chained back up at any time, especially because the concrete blocks remain visible on the Roadways, which causes extreme anxiety and emotional distress knowing Plaintiffs may soon once again be barricaded in or out. (M. Hornbostel Decl. ¶¶ 9, 11; J. Hunt Decl. ¶¶ 11, 29; M. Hunt Decl. ¶¶ 12, 30; M. Possin Decl. ¶ 15; S. Fermanich Decl. ¶ 24; J. Walsh Decl. ¶¶ 7-11.)

As discussed above, Plaintiffs have suffered from severe depression, anxiety, and stress, and are worried about losing their homes. This anxiety, fear, and depression remains for the Plaintiffs now, even with the chains on the barricades unlocked, because Plaintiffs fear the Defendants will relock the barricades at any time. Courts have held that harm affecting physical and mental health, safety, and wellbeing (or acts or omissions that threaten health, safety, and wellbeing) constitutes irreparable harm for which there is no adequate remedy at law. *E.g.*, *Am. Med. Ass'n v. Weinberger*, 522 F.2d 921, 925 (7th Cir. 1975) (noting that the implementation of a Medicare and Medicaid program that "directly interfere[es]" with the ability to receive proper medical care threatens the health of the programs' members such that plaintiffs showed a likelihood of irreparable harm to plaintiffs if an injunction does not issue); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 946 (W.D. Wis. 2018) (finding that plaintiffs established that

they are at risk of irreparable harm because of "serious, ongoing impact[s] on plaintiffs' [mental and physical] health," which strongly weighs in favor of injunctive relief).[17]

As U.S. Representative Thomas Tiffany stated in a February 23, 2023 letter to Defendant John Johnson, the barricades put at risk the health and safety of the Plaintiffs and other residents who rely solely on the Roadways. (B. Hubing Decl. ¶ 26, Ex. O.) Representative Tiffany notes that the "decision to take this unprecedented action is putting the health, safety, and well-being of dozens of town residents at risk" and the barricades have "cut[] off access to … vital roads in the dead of winter [in Northern Wisconsin]." (*Id*.)

When the barricades are fully constructed (chain-locked), emergency services, such as EMTs, fire departments, etc., need to carry the key (that they have not been provided to them by the Defendants) to a specific barricade lock (and a heating device if a lock is frozen) and stop to unlock the barricade before providing emergency services to potentially save lives. Snowbanks, trees and natural terrain in some areas prevent vehicles from driving around the barricades when they are in place, even in an emergency. (Am. SOF ¶ 219.)

When the barricades are fully constructed (chain-locked), Plaintiffs are threatened by Defendants that, if they leave for any reason other than medical appointments or receiving prescription medications, they are not be allowed back through the barricades to return to their

[17] *Jones v. Wolf*, 467 F. Supp. 3d 74, 93 (E.D.N.Y. 2020) (finding that 22 civil immigration detainees held in ICE custody, during the height of the COVID-19 pandemic, who are either over the age of 50 or have serious underlying medical conditions demonstrated that, due in part to the conditions of the facility at which they are held, "face a grave, irreparable risk to their health and safety" in the absence of injunctive relief; stating that "irreparable harm exists where, as here, the moving individuals face imminent risk to their health, safety, and lives" (internal quotation marks omitted)); *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 214 (E.D.N.Y. 2000) (citation omitted), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003) (plaintiffs who "face imminent risk to their health, safety, and lives" "have suffered and continue to suffer grave and irreparable harm"); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 613–14 (D.D.C. 1980) (finding that regulations that would expose children farmworkers to toxic or potentially toxic pesticides create hazards that constitute irreparable harm necessitating interlocutory relief in the form of reversing denial of injunctive relief and remanding to district court for immediate entry of an injunction); *NAACP v. Town of East Haven*, 70 F.3d 219, 224 (2d Cir. 1995) (noting that public safety is an aspect of irreparable harm).

homes. (B. Hubing Suppl. Decl. ¶¶ 4-5, Exs. B & C; R. Pearson Decl. ¶ 19.) Plaintiffs are not only unable to drive vehicles past the barricades, but also they could not go around the barricades on foot or by any other means because the Defendants would erroneously consider them "trespass[ers]." (Am. SOF ¶¶ 145; B. Hubing Decl. ¶ 21, Ex. J.) Although some Plaintiffs have some limited ability to access basic necessities when the barricades are fully constructed, such as food and pet supplies, by walking or snowmobiling across frozen lakes in the area, those Plaintiffs' ability to do so is quite literally disappearing; as the weather continues to warm up and the ice on top of the lakes melts, it will be or is already too dangerous for Plaintiffs to attempt to walk or snowmobile across them. J. Spanton Decl. ¶¶ 9-10; R. Pearson Decl. ¶ 16. And if the chains on the barricades are relocked and, as a matter of necessity, the Plaintiffs who cross melting lakes adjacent to their homes continue to cross melting lakes in order to try to maintain their livelihoods, the risk of tragedies and threat to their health, safety and well-being increases manyfold.

Courts have held that, under certain circumstances, loss of employment opportunities can also constitute irreparable harm. *See, e.g.*, *Brewer*, 757 F.3d at 1068 (plaintiffs demonstrated irreparable harm by a policy that prohibits a class of people from getting a driver's license on the basis of citizenship status that, in turn, prevents a class of people from being able to drive to work and ultimately to maintain their chosen professions). Here, it is not as though the Plaintiffs have been wrongfully terminated and could find a job elsewhere. Rather, many Plaintiffs were barricaded into their homes and could be re-barricaded into their homes at any given moment; this wholly prevents *all* employment opportunities if the very real threat of losing their current jobs comes to fruition because of the Defendants' unlawful acts.

Further, even if all the above-mentioned forms of irreparable harm do not suffice (which, we posit, they do), surely the inability to maintain normal and complete interpersonal relationships

and intertwined livelihoods with family and spouses, *see, e.g.*, R. Pearson Decl. ¶¶ 10-13, and engage in other everyday activities—like normally attending to needed medical procedures, *see* D. Pollard Decl. ¶ 14—because of being blocked into (and out of) one's home constitutes irreparable harm for which there is no calculable damages. *See Brewer*, 757 F.3d at 1068 ("Defendants' policy hinders Plaintiffs' ability to drive, and … this (in turn) hinders Plaintiffs' ability to work and engage in other everyday activities. No award of damages can compensate Plaintiffs for the myriad personal and professional harms caused by their inability to obtain driver's licenses. Thus, Plaintiffs are likely to suffer irreparable harm in the absence of an injunction."). This is especially clear where courts have held that even the *deprivation of business relationships*, which is an undoubtedly monetary-driven affair unlike family, marriage, and friendship, constitutes irreparable harm for which there is no adequate remedy at law. *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003); *Stuller*, 695 F.3d at 678–79 (agreeing with the district court's conclusion that "because [the franchisee-plaintiff's] franchises would be terminated by Steak N Shake if [franchisee-plaintiff] did not implement Steak N Shake's pricing policy, [franchisee-plaintiff] had demonstrated that it had no adequate legal remedy and would suffer irreparable harm in the absence of an injunction" enjoining Steak N Shake "from taking any adverse action against [franchisee-plaintiff] for its refusal to implement the policy during the pendency of the case.").

Compare the deprivation of business or franchisee-franchisor relationships that courts have held constitutes irreparable harm with the severe consequences of not being able to go about one's normal day, like attending to needed medical procedures without disruption (*see* D. Pollard Decl. ¶ 14) *or* the severe consequences of forcibly depriving natural persons of normal and complete companionship-driven relationships and intertwined livelihoods like spouses and family (e.g., the Pearsons, who had to wake up 1.5 hours earlier than usual every morning to make it to work in

time and who were getting home 2 hours after they otherwise normally would while the barricades were in place, *see* R. Pearson Decl. ¶¶ 10-13) and it immediately becomes clear that the harm Plaintiffs face is precisely the unique type of harm for which injunctive relief has long been intended. *See Gause v. Perkins*, 56 N.C. 177 (1857) (irreparable harm is harm "which cannot be repaired, retrieved, put back again, atoned for … the injury must be of a peculiar nature, so that compensation in money cannot atone for it" (emphasis omitted)).

Furthermore, the Defendants gave Plaintiffs 24 hours, or less, notice before putting up the barricades that immediately hurt Plaintiffs' livelihoods and physical and mental wellbeing. M. Hornbostel Decl. ¶ 7; J. Hunt Decl. ¶ 9; M. Hunt Decl. ¶ 10; M. Possin Decl. ¶ 6; S. Fermanich Decl. ¶ 6; J. Kilger Decl. ¶ 6; J. Spanton Decl. ¶ 7; R. Pearson Decl. ¶ 7; P. Kester Decl. ¶ 7; J. Walsh Decl. ¶¶ 7-11. The notice did not provide Plaintiffs with time to respond despite the drastic consequences of Defendants' actions. *Cf. Banks. v. Trainor*, 525 F.2d 837, 839–40 (7th Cir. 1975) (affirming issuance of preliminary injunction where a change to the food stamp program that increased the price of food stamps and therefore lessened the value for the same coupon allotment was accompanied by inadequate notice to food stamp recipients that violated federal regulations and due process). As a matter of equity and fairness, once the Defendants decided to barricade the Roadways, they did not give Plaintiffs and other impacted residents any practical notice other than barely enough time for some Plaintiffs and other impacted residents to escape physical entrapment and blockades, leaving behind the rest of their property, before the Defendants acted on their decision and blockaded the Roadways. *See* D. Pollard Decl. ¶ 10; P. Kester Decl. ¶ 8. It is conceivable, if not highly likely, that the Defendants would do the exact same thing when they decide to relock the barricades.

The illegal barricades prevented Plaintiffs from freely going to and from their properties. (Am. SOF ¶¶ 65-87, 110, 136, 144, 220, 244-245, 261; D. Pollard Decl. ¶¶ 6-7; R. Pearson Decl. ¶¶ 4-5; J. Kilger Decl. ¶¶ 3-4; J. Spanton Decl. ¶¶ 4-5; M. Hornbostel ¶ 11; J. Hunt Decl. ¶¶ 12-13; M. Hunt Decl. ¶ 13; M. Possin Decl. ¶ 7; S. Fermanich Decl. ¶ 19; J. Walsh Decl. ¶ 7.) The Defendants' actions therefore restrained the Plaintiffs' physical liberty. Certain plaintiffs were prevented from leaving their properties in any reasonable manner (M. Hornbostel Decl. ¶ 10; J. Hunt Decl. ¶¶ 12-13; M. Hunt Decl. ¶ 13), while others fled their homes and were prevented from returning to their properties, because of the barricades and Defendants designating non-tribe members on the Roadways as "trespass[ers]" and advising Plaintiffs that they would not be allowed back into their properties if they fled (B. Hubing Suppl. Decl. ¶ 4, Ex. B at 1; B. Hubing Decl. ¶ 21, Ex. J; Am. SOF ¶¶ 110; J. Spanton Decl. ¶ 14; J. Kilger Decl. ¶ 9; D. Pollard Decl. ¶ 10; P. Kester Decl. ¶ 8.)

Because of the Defendants' *ultra vires* actions, many Plaintiffs could not leave their residential neighborhoods, even to obtain basic necessities such as food, pet supplies and home repair materials. (*See, e.g.*, R. Pearson Decl. ¶¶ 14-16; J. Kilger Decl. ¶ 8; J. Spanton Decl. ¶ 9.) Other Plaintiffs, like the Pollards, were forced to flee and take with them only what they could fit in their car. (D. Pollard Decl. ¶ 10.) Thus, by placing the barricades the Defendants wholly restricted the Plaintiffs' fundamental freedom of movement. *See Kent v. Dulles*, 357 U.S. 116, 126 (1958) ("Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. **Freedom of movement is basic in our scheme of values**…. [E]very American is left to

shape his own life as he thinks best, do what he pleases, go where he pleases." (emphasis added) (internal citations omitted)).[18]

Moreover, by imposing the barricades the Defendants completely denied Plaintiffs the long-recognized right to access and enjoy property free from unlawful interference. Courts, including the Seventh Circuit, have consistently recognized that denying property owners the right to access and enjoy their property—even segments that do not contain the dwelling itself—gives rise to irreparable harm and, in turn, injunctive relief. *United Church of the Med. Ctr. V. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) ("**It is settled beyond the need for citation … that a given piece of property is considered to be unique, and its loss is always an irreparable injury**." (emphasis added)); *Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 789 (11th Cir. 1984) ("[I]rreparable injury is suffered when one is wrongfully ejected from his home. Real property and especially a home is unique.").[19]

There is an absolutely immediate need to issue an injunction requiring that the Roadways remain open during the pendency of this lawsuit. Without this guarantee from the Court, it is highly likely, if not certain, that the Defendants will replace the barricades—maybe tomorrow, maybe next week, likely no later than June 14, 2023. When that happens, Plaintiffs and other impacted

[18] *Schleifer v. City of Charlottesville*, 963 F. Supp. 534, 542 (W.D. Va. 1997) (similar; citing *Kent v. Dulles*); *Aziz v. Trump*, 234 F. Supp. 3d 724, 737 (E.D. Va. 2017) (a travel ban irreparably harms hundreds of university students and faculty by "significantly straining freedom of movement").

[19] *E.g.*, *Classic Country Land, LLC v. Eversole*, No. 6:17-cv-00113-GFVT-HAI, 2018 WL 4219195, at *4 (E.D. Ky. Sept. 5, 2018) (after finding in favor of the plaintiff on the merits of the dispute, that is, that the land at issue was plaintiff's as established by a land survey, inviting plaintiff "to file additional motions for injunctive relief to protect their property rights" if the defendant "further interferes" with the plaintiff's land); *Stickler v. Halevy*, 794 F. Supp. 2d 385, 405 (E.D.N.Y. 2011) (inviting plaintiffs to move for a preliminary injunction that would require the fence installed by defendants on a disputed area of property between the parties' properties "to be removed forthwith, with free access restored to occupants of both homes to the entire space," and noting that "[t]he Disputed Area can be restored during the litigation with access to all parties without appreciably harming any of them"); *Koepp v. Holland*, 688 F. Supp. 2d 65, 94 (N.D.N.Y. 2010) (issuing preliminary injunction that enjoins defendant from "erecting, installing or constructing any fencing along the property line separating plaintiffs' property and the 40-foot strip [of disputed land] which would interfere with plaintiffs' [property right] during the pendency of this action").

residents will immediately once again be stripped of their right to freely travel to and from their respective properties. These innocent landowners should not be forced to live in limbo.[20]

Further, the Plaintiffs do not have an adequate remedy at law. Damages here are simply incalculable. Even if the Plaintiffs' claims could somehow be remedied through an award of damages, which they cannot, damages are "an inadequate remedy" when the defendant is unable to pay the damages or because of the difficulty of quantifying the injury to the victim. *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 230 (7th Cir. 1996). Due to the number of Plaintiffs involved, well over thirty (with potentially more to join if they can overcome their fear of retaliation from the Defendants and their associates), as well as the type of harm involved, there is a real risk that the Defendants will not be able to pay an award of damages given the level of harm at issue here, leaving the Plaintiffs without any remedy at all. In addition, it is impossible to put a value on the loss of freedom and fundamental liberties that have been suffered by the Plaintiffs and will continue to be suffered by them in the absence of immediate court relief pending the outcome of the litigation. *See Alvarez*, 679 F.3d at 589; *Flack*, 328 F. Supp. 3d at 946. There is an immeasurable difficulty in quantifying the injuries to the Plaintiffs. *Cf. Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865, 872–73 (7th Cir. 2009) (affirming the district court's grant of preliminary injunction and conclusion that harm to plaintiff was irreparable because it was difficult to ascertain the specific amount of money damages and because money damages might come too late to adequately compensate plaintiff). The Court should therefore find that the Plaintiffs have suffered and will continue to suffer irreparable harm in the absence of injunctive relief and have no adequate remedy at law.

[20] Plaintiffs hereby incorporate by reference Plaintiffs' Supplemental Jurisdictional Statement (ECF No. 25), which explains the basis for this Court's authority to issue an injunction in this case.

III. The Balancing of Equities Weighs Heavily in Plaintiffs' Favor

If the moving party makes the preliminary showing of likelihood of success on the merits and the threshold showing of likelihood of suffering irreparable harm in the absence of injunctive relief, the court then turns to balancing the harms and assessing the public's and non-parties' interest, if any, in granting or denying the requested relief. *DM Trans, LLC v. Scott,* 38 F.4th 608, 622 (7th Cir. 2022).

The balancing of equities needing to tip in plaintiffs' favor is another way of saying that plaintiffs must show the harm they would suffer without the injunction is greater than the harm that preliminary relief would inflict on the defendants. *See Michigan*, 667 F.3d at 769–70; *DM Trans*, 38 F.4th at 622 ("[T]he court weighs the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted."). Also, "[t]he more likely [the plaintiff] is to win, the less the balance of harms must weigh in his favor…." *DM Trans*, 38 F.4th at 622.

Balancing of harms is often referred to as a "sliding scale analysis." *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012). It is not mathematical in nature, but rather is intuitive, allows the court to craft appropriate relief, and accounts for competing considerations. *Id.* In other words, "the district court sits as would a chancellor in equity and weighs all the factors…." *Id.*

Here, the balance of harms strongly favors granting Plaintiffs' request for injunctive relief pending the outcome of this case. *DM Trans,* 38 F.4th at 622. In this case, the harm that Plaintiffs will suffer if Defendants are permitted to re-barricade the Roadways substantially outweighs the harm Defendants will incur if they are prohibited from replacing the barricades across the

Roadways.[21] The Roadways have been public roads for many decades. *See* Am. SOF ¶ 105. Their character and use will not change. Keeping the Roadways open to the public, at least during the pendency of this suit, will not harm the Defendants. On the other hand, if Defendants remain free to unlawfully barricade the Roadways again, the Plaintiffs will suffer tremendous harm, as discussed above. Therefore, the balance of harms analysis overwhelmingly favors Plaintiffs and heavily weighs in favor of granting injunctive relief requiring the barricades be removed.

IV. The Public and Non-Parties' Interest will be Served by Entering a Preliminary Injunction Requiring Defendants to keep the Roadways Open During the Pendency of this Lawsuit.

Entry of a preliminary injunction requiring Defendants to keep the Roadways open in compliance with clear and express federal law will serve the public interest in many ways, including protecting the public's right to use the Roadways and ensuring that emergency vehicles, police and other first responders can access homes, persons, and properties that are currently

[21] The Defendants might invoke the "tribal exhaustion requirement" in response to Plaintiff's Amended Motion for Preliminary Injunction, if not in their motion to dismiss, and frame Plaintiffs opting not to first go to tribal court for relief as a circumstance that weighs in Defendants' favor in the balance of harms or public interest analyses for injunctive relief. Tribal court exhaustion is a deferential court-created principle that at its most basic level normally requires civil disputes between Indians and non-Indians arising on a reservation to first be heard in tribal court before federal court, even on the threshold issue of whether the tribal court has jurisdiction over the dispute.

However, as an initial matter, the "tribal exhaustion requirement" is a misnomer because it is not a requirement but rather is a prudential concept. It is a rule of comity; it is not a jurisdictional rule. *Valenzuela v. Silversmith*, 699 F.3d 1199, 1206 (10th Cir. 2012); *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013). Thus, lack of tribal court exhaustion does not prohibit the Court from hearing this case in general and, more specifically, ruling on Plaintiffs' Amended Motion for Preliminary Injunction.

Here, any potential assertion of tribal court exhaustion need not be entertained, because two Plaintiffs have been "banned" from setting foot in any tribal buildings. (M. Hornbostel Decl. ¶¶ 19-21.) Tribal exhaustion is not needed for a federal court to proceed with a case that has not first been entertained by a tribal court "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985). It is hard to conceive of a more apposite application of this principle than here, where two Plaintiffs, Mr. Hornbostel and Ms. Panfil, have quite literally been banned by the Tribe from entering tribal buildings, ostensibly including the tribal courthouse. A person obviously lacks any opportunity (let alone an adequate opportunity) to challenge a tribal court's jurisdiction or exhaust potential remedies in that court when that person cannot access the tribal courthouse without being jailed for "trespass[ing]" by entering the tribal courthouse because the person is banned from tribal buildings. M. Hornbostel Decl. ¶¶ 19-21, Ex. B. *Cf. Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997) (exhaustion not required where there was no functioning tribal court).

blocked by the barricades. *See* R. Pearson Decl. ¶ 21. This factor unquestionably weighs in favor of the entry of injunctive relief.

In fact, there is no public interest served at all by allowing the Roadways to be closed. To the contrary, nonparties have a strong interest in the Court entering an order requiring the Roadways remain open to allow access for: Plaintiffs' families who wish or need to visit Plaintiffs for any number of reasons; Plaintiffs' friends who wish or need to visit Plaintiffs for any number of reasons; delivery drivers; construction workers and contractors; other residents of Vilas County, and Northwoods passersby who want to see the number of lakes adjoining the Roadways, especially as the spring and summer seasons approach. Plus, the public and nonparties, including Plaintiffs' families and friends, are harmed by the deteriorating wellbeing and health of the Plaintiffs directly caused by Defendants' conduct. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) ("The general public has an interest in the health of state residents." (internal quotation marks omitted)).

Additionally, non-party residents who are unable to freely travel to and from their home when the Defendants' barricades are in place on the Roadways have been and will be severely, irreparably harmed in the form of being unable to go (and send their child with special needs) to the necessary school and consequently the child dropping out of all classes except one. Specifically, a mother and her child with special needs were forced to flee their home by Defendants' actions of barricading the Roadways and Defendants' refusal to remove the barricades, which forced the child with special needs to not be able to attend the school in which she was thriving, resulting in the child dropping out of all of her classes except one and having a severe panic attack from the stress of not being able to return to her rightful school and therapy. (P. Kester Decl. ¶¶ 4-30.)

Courts have consistently held that depriving a child of access to school and education is clear-cut harm for which injunctive relief is necessary—not to mention the emotional, social, developmental, and psychological harmful consequences of educational deprivation, especially for children with special education needs.[22] Thus, this additional demonstrated severe harm to yet another impacted family further tips the *Winter* analysis heavily in Plaintiffs' favor such that their motion for preliminary injunctive relief should be granted.

REQUEST FOR WAIVER OF BOND

Once a court has determined that injunctive relief is warranted, Federal Rule of Civil Procedure 65(c) requires consideration of an appropriate bond. Under appropriate circumstances, such a bond may be excused, notwithstanding the literal language of Rule 65(c). *Allen v. Bartholomew Cty. Court Servs. Dep't*, 185 F. Supp. 3d 1075, 1087 (S.D. Ind. 2016) (citing *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010)); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16–CV–943–PP, 2016 WL 5239829, at * 7 (E.D. Wis. Sept. 22, 2016).

In the instant case, Plaintiffs have demonstrated a high likelihood of success on their Motion. The facts here, including the complete lack of harm to the Defendants if the Court orders

[22] *See Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist.*, 175 F. Supp. 2d 375, 392-93 (N.D.N.Y. 2001) ("It is almost beyond dispute that wrongful discontinuation of a special education program to which a student is entitled subjects that student to actual irreparable harm." (citing six on-point cases across six different district courts)); *Ray v. Sch. Dist. of DeSoto Cty.*, 666 F. Supp 1524, 1535 (M.D. Fla. 1987) ("[E]xcluding [children] unnecessarily from a normal, integrated classroom setting[] constitutes irreparable injury to their mental well-being and educational potential."); *Stuart v. Nappi*, 443 F. Supp. 1235, 1240 (D. Conn. 1978) (imminent irreparable injury demonstrated where child with special educational needs will be without any education for at least a period of time, and noting that depriving child of a special education program "can only serve to hinder [the child's] social development"); *see also Helms v. Cody*, No. 85-cv-5533, 1994 WL 424367, at *5 (E.D. La. Aug. 9, 1994) ("The Court agrees with intervenors that the special education students … would have suffered irreparable harm if this Court had not granted the stay pending appeal to the Fifth Circuit Court of Appeals. The Court is most concerned about the welfare of the special education students involved. These students should not have to be subjected to major changes in their education until and unless this Court's ruling is affirmed by the Fifth Circuit Court of Appeals. The Court will maintain the *status quo* at the present time.").

the Roadways remain open, all weigh against a substantial bond or any bond at all. Accordingly, Plaintiffs respectfully request that the Court waive the requirement for a bond or, in the alternative, that it impose a bond of not more than $1,000.00.

CONCLUSION

As set forth above, Plaintiffs have demonstrated a need for the immediate issuance of a preliminary injunction prohibiting Defendants from barricading the Roadways and enjoining them from putting up future barricades of the Roadways. Accordingly, Plaintiffs respectfully request that this Court enter an Order:

1. Requiring the Defendants to remove, within 8 hours of notice of entry of an order, the cement block portions of the barricades and other impediments to ingress and egress over Annie Sunn Lane, Center Sugarbush Lane, East Ross Allen Lake Lane, and Elsie Lake Lane (the "Roadways") in the Town of Lac du Flambeau, Wisconsin, so that the Roadways are immediately open, and kept open, for public use, and requiring the Defendants to remove, within 8 hours of notice of entry of an order, any and all recording devices, such as cameras, monitoring Plaintiffs' use of the Roadways;

2. Enjoining the Defendants, their employees, agents and representatives, and all persons acting in concert or in participation with them, from maintaining or erecting, or causing to be maintained or erected, or allow any other person to maintain or erect, any barricade or other means of blocking Plaintiffs' access over the Roadways so that Plaintiffs and the other property owners or possessors with homes served by the Roadways, as well as their respective families, guests and invitees, may freely travel to and from their properties, and enjoining the Defendants, their employees, agents and representatives, and all persons acting in concert or in participation

with them, from installing recording devices, such as cameras, monitoring the use of the Roadways;

3. Enjoining the Defendants, their employees, agents and representatives, and all persons acting in concert or in participation with them, from restricting or limiting the use of or access to the Roadways, including (but not limited to) by blocking or closing the Roadways and/or by requiring permits of any sort to access, use, or travel over, the Roadways; and

4. Directing Defendants to preserve all documents and evidence related to this matter.

Dated this 27th day of March, 2023.

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