Appeal Nos. 23-1257 and 23-1265

In the United States Court of Appeals for the Eighth Circuit

Mille Lacs Band of Ojibwe, *et al.,*

Plaintiffs-Appellees,

v.

Erica Madore, in her official capacity as Mille Lacs County Attorney;
Kyle Burton, in his official capacity as Mille Lacs County Sheriff,

Defendants-Appellants,

County of Mille Lacs, Minnesota,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
CIVIL NO. 17-cv-05155-SRN-LIB

BRIEF OF APPELLANTS ERICA MADORE AND KYLE BURTON

TAFT STETTINIUS & HOLLISTER LLP
Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Attorneys for Appellant Erica Madore, Mille Lacs County Attorney

KELLEY, WOLTER & SCOTT, P.A.
Douglas A. Kelley (#54525)
Steven E. Wolter (#170707)
Brett D. Kelley (#397526)
Perry F. Sekus (#309412)
Stacy L. Bettison (#315886)
Garrett S. Stadler (#402831)
Center Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
(612) 371-9090

Attorneys for Appellant Kyle Burton, Mille Lacs County Sheriff

2023– BACHMAN LEGAL PRINTING – PHONE (612) 339-9518

SUMMARY OF THE CASE

Appellants Erica Madore and Kyle Burton bring this appeal in their official capacities as County Attorney and County Sheriff of Mille Lacs County to reverse two decisions of the district court. The first decision erroneously found on summary judgment that the Mille Lacs Indian reservation created in 1855 exists today even though the reservation was subsequently ceded and disestablished by the plain language of treaties, agreements, and acts of Congress. Two Supreme Court decisions, and the Band's positions in subsequent litigation, confirm the reservation ceases to exist. Appellant Mille Lacs County seeks a determination in this Court that the Band long ago relinquished its rights to the lands originally within the 1855 reservation, which Appellants Madore and Burton adopt by reference. Appellant Madore also contends there is no subject matter jurisdiction.

The second erroneous decision, also decided on summary judgment, declared that Appellees Mille Lacs Band of Ojibwe, its Chief of Tribal Police, and one of its police officers possess inherent law enforcement authority over state and federal law that finds no support in any statutory or common law authority. Appellants respectfully ask this Court to vacate the unlawful aspects of the district court's declaratory judgment.

Appellants request thirty minutes for oral argument.

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JURISDICTIONAL STATEMENT

Appellant Madore, Mille Lacs County Attorney, and Appellant Burton, Mille Lacs County Sheriff, appeal from the final judgment of the United States District Court for the District of Minnesota, the Honorable Susan Richard Nelson presiding, dated January 10, 2023. Appellees asserted jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362, which Appellant Madore contests. Appellants filed timely Notices of Appeal dated February 8, 2023. Fed. R. Civ. App. P. 4(a)(1). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

Appellant Madore, through her counsel, provides the following statement of issue, which Appellant Burton does not join:

1. Whether the district court erred in concluding this case presents a federal question on which subject-matter jurisdiction can be based.

Apposite Authorities:

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)

Inyo Cnty. v. Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, 538 U.S. 701 (2003)

Appellants Madore and Burton, through their counsel, together provide the following statement of issues:

1. Whether the district court issued an advisory opinion as to the extent of Appellees' inherent law enforcement authority.

Apposite Authorities:

Reg'l Home Health Care, Inc. v. Becerra, 19 F.4th 1043 (8th Cir. 2021)

Coffman v. Breeze Corp., 323 U.S. 316 (1945)

2. Whether the district court erred in expanding Appellees' inherent tribal law enforcement authority beyond the bounds of existing Supreme Court precedent.

Apposite Authorities:

United States v. Cooley, 141 S.Ct. 1638 (2021)

Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008)

Strate v. A-1 Contractors, 520 U.S. 438 (1997)

3. Whether the district court's declaration violates federalism principles and supersedes Minnesota's Public-Law 280 authority.

Apposite Authorities:

O'Shea v. Littleton, 414 U.S. 488 (1974)

18 U.S.C. §1162

Oklahoma v. Castro-Huerta, 142 S.Ct. 2486 (2022)

4. Whether the court's declaration violates the Guarantee Clause.

Apposite Authorities:

U.S. Const. art. IV, §4

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STATEMENT OF THE CASE

The Parties.

The Mille Lacs Band of Ojibwe (the "Band") is a constituent member of the Minnesota Chippewa Tribe, a federally recognized Indian tribe. *See* 85 Fed. Reg. 5462, 5464 (Jan. 20, 2020). The other two Appellees are James West, the Band's current Tribal Police Chief, and Derrick Naumann, a tribal police officer. The Band brought suit seeking a ruling that the reservation created for it in 1855 continues to exist despite having ceded it in 1863 and 1864 treaties. (R. Doc. 1); (App. 512-19; R. Doc. 242-5 at 2-8); (App. 521-25; R. Doc. 242-5 at 23-27.) Those two treaties gave the Band a right against compulsory removal, which the Band gave up in 1889 under the Nelson Act. (App. 581-84; R. Doc. 242-6 at 67-70.) In 1902, the Band again agreed to remove to the White Earth reservation in exchange for compensation for their improvements. (App. 120-32; R. Doc. 167-1, Ex. 1.)

This appeal concerns the Band's claims that then-County Attorney Joseph Walsh and then-Sheriff Brent Lindgren interfered with the Band's inherent law enforcement authority and federally-delegated authority under the Tribal Law and Order Act of 2010 ("TLOA"), Title II of Pub. L. No. 111-211, 124 Stat. 2258, 2261-2301. The Band sued the County and its County Attorney and Sheriff, in their official and individual capacities, seeking

declaratory and injunctive relief. (R. Doc. 1.) The final judgment appealed is against the County Attorney and Sheriff solely in their official capacities.[1] (App. 1582-83; R. Doc. 350; Add. 169-70.)

The Cooperative Agreement.

Indian tribes lack inherent criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). To assure more effective policing in places nonmembers may live in what is defined as Indian country in 18 U.S.C. §1151, states and local governments may enter into agreements with tribes to provide tribes with state or local law enforcement authority. *See Hester v. Redwood Cnty.*, 885 F. Supp. 2d 934, 939-40 (D. Minn. 2012).

Minnesota is a mandatory Public Law 280 (PL-280) state. Pub. L. No. 83-280, 67 Stat. 588 (Aug. 15, 1953)(codified as 18 U.S.C. §1162).[2] In 1991, Minnesota enacted a statute specifying how the Band may exercise state law enforcement powers in Mille Lacs County. Minn. Stat. §626.90. That statute grants the Band powers of a state law-enforcement agency if the Band enters

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[1] Appellees' individual capacity claims were dismissed. (App. 1581; R. Doc. 349 at 75; Add. 168.)

[2] PL-280 provided Minnesota criminal jurisdiction over state-law crimes committed by tribal members on their reservations (except Red Lake and Bois Forte reservations).

a cooperative agreement with the Sheriff and agrees to four requirements: (1) to be held liable for its torts and those of persons acting on its behalf; to (2) file an appropriate bond or bond-substitute and (3) an appropriate insurance certificate with the Board of Peace Officer Standards and Training; and (4) agree to be subject to state laws applicable to data practices of law enforcement agencies. *Id*. If the Band enters into a cooperative agreement with the Sheriff defining and regulating law enforcement activities as required by statute, the Band's police department obtains concurrent jurisdiction with the Sheriff in the County. *See* Minn. Stat. §626.90, subds. 2(b) and 2(c).

Since Minnesota enacted §629.90 in 1991, the Sheriff and Band have had several cooperative agreements. (App. 42-43; R. Doc. 165 ¶¶3-4.) In 2008, the Sheriff signed a cooperative agreement with the Band after the Band terminated a cooperative agreement the prior year. (App. 43; R. Doc. 165 ¶¶4-5); (App. 52-61; R. Doc. 165-1, Ex. 1.) The 2008 agreement contained the statutory requirements of §626.90, subd. 2(a), obligated the Sheriff and tribal police to provide mutual aid, and required tribal police to cooperate with the County Attorney. (App. 43; R. Doc. 165 ¶¶4-5); (App. 52-61; R. Doc. 165-1, Ex. 1.) Each party could terminate the agreement on 30 days' notice. (App. 423; R. Doc. 165 ¶¶4-5); (App. 52-61; R. Doc. 165-1, Ex. 1.)

2016 Revocation of the 2008 cooperative agreement.

On June 21, 2016, the County's Board of Commissioners ("Board") voted to revoke the 2008 cooperative agreement between the County and the Band. (App. 44-45; R. Doc. 165 ¶7.) The Board's June 21 resolution cited several reasons for termination, including that the relationship between the County and the Band regarding law enforcement was "no longer cooperative" and no longer served "the interest of public safety for the benefit of all residents in Mille Lacs County." (App. 43-45; R. Doc. 165 ¶¶6-7); (App. 66; R. Doc. 165-1, Ex. 2 at 3.)

Minnesota Attorney General denies County Attorney's request for assistance.

The impact of revocation on the County Attorney's office was substantial. (App. 45; R. Doc. 165 ¶8.) The County Attorney wrote Minnesota Attorney General Lori Swanson seeking her opinion on whether—post-revocation—the Band's police department remained a state law enforcement agency under Minn. Stat. §626.84, subd. 1(f), and whether its officers remained peace officers under §626.84, subd. 1(c). (*Id.* ¶9.) The County Attorney emphasized the need for clarity on the status of the Band's police department under state law once revocation became effective. (*Id.)* The Attorney General refused, directing the County Attorney "to advise the County as you deem appropriate." (App. 45-46; R. Doc. 165 ¶¶9-10); (App.

72-83; R. Doc. 165-1, Ex. 3.)

County Attorney sought to negotiate a new cooperative agreement.

The same day the Board voted to terminate the cooperative agreement, the County Attorney wrote the Band's then-Chief of Police and Solicitor General:

> Chief Rosati and Solicitor General Matha,
>
> Please accept this e-mail as an attempt to reach out and determine whether you wish to meet in a good faith attempt to negotiate a new cooperative agreement pursuant to Minn. Stat. §626.90.
>
> Notwithstanding my court commitments, I will make every attempt to clear my calendar and meet whenever and wherever with any Mille Lacs Band representatives to try to put together a new cooperative agreement. Please let me know.

(App. 46-47; R. Doc. 165 ¶11); (App. 84-92; R. Doc. 165-1, Ex. 4.)

On June 23, the County Attorney proposed meeting on June 28, and on June 30 urged Rosati and Matha to start the process for a new agreement "without further delay." (App. 46-47; R. Doc. 165 ¶11); (App. 84-92; R. Doc. 165-1, Ex. 4.) The County Attorney continued to press for negotiations in emails dated July 1, July 6 and July 8, but to no avail. (App. 46-47; R. Doc. 165 ¶11); (App. 84-92; R. Doc. 165-1, Ex. 4.)

Opinion and Protocol.

Given the Attorney General's directive, and the need for clarity for the Sheriff and his deputies, the County Attorney drafted a legal opinion (the "Opinion") regarding the Band's law enforcement authority. (App. 47-48; R. Doc. 165 ¶12); (App. 93-109; R. Doc. 165-1, Ex. 5.) Before issuing his Opinion, the County Attorney consulted with other attorneys, including the Executive Director of the Minnesota County Attorneys' Association, and Onamia City Attorney Damien Gove.[3] They uniformly supported and agreed that once revocation became effective, the Band's police department lacked state law enforcement authority outside Pine County, where the Band had a similar cooperative agreement to exercise state law enforcement authority in Pine County. (App. 47-48; R. Doc. 165 ¶12.)[4]

Based on his review of state and federal law in July 2016, the County Attorney concluded[5]:

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[3] Onamia is within the former 1855 reservation.

[4] District Court Judge Hennsey agreed with the County Attorney's position in *State v. Falon Lee Sam*. *See* October 23, 2017 Order and Memorandum at 5, 48-CR-16-1420 (absent a cooperative agreement satisfying the four conditions in §626.90, Subd. 2(a), "the Band does not have the concurrent jurisdictional authority conferred under Minnesota Statute Section 626.90, subdivision 2(c)."). (App. 133-42; R. Doc. 167-1, Ex. 2.)

[5] When the County Attorney issued the Opinion, the law regarding tribal police authority over non-Indians was unsettled. His opinion cited *United*

(1) The Mille Lacs Band of Ojibwe may retain inherent criminal jurisdiction over Mille Lacs Band of Ojibwe members and may also have inherent criminal jurisdiction over members of other Indian tribes and bands on tribal trust lands, but not for "major crimes" or felony offenses;

(2) The Mille Lacs Band of Ojibwe has exclusive jurisdiction over members of the Mille Lacs Band of Ojibwe in civil regulatory cases arising in "Indian country;"

(3) Criminal jurisdiction by tribes does not extend to non-Indians (with one narrow potential exception under the Violence Against Women Act);

(4) Inherent tribal jurisdiction is limited to "Indian country." Indian country includes land held in trust and land within an Indian Reservation. The Mille Lacs Band and the State of Minnesota including Mille Lacs County differ on the extent of "Indian country" in Mille Lacs County. The State and County believe that "Indian country" in Mille Lacs County is limited to tribal trust lands.

(5) The state of Minnesota has criminal jurisdiction over all criminal/prohibitory offenses committed by Indians anywhere in the State of Minnesota;

States v. Terry, 400 F.3d 575 (8th Cir. 2005), which affirmed the admission of evidence seized from a defendant while detained on tribal lands, based on the right to exclude non-Indian law violators. *Id.* at 579-80. But the Ninth Circuit in *United States v. Cooley*, upheld the exclusion of evidence taken from a non-Indian at a traffic stop on the Crow reservation as being outside the tribe's law enforcement authority over non-Indians. 919 F.3d 1135, 1142 (9th Cir. 2019), *rev'd*, 141 S.Ct. 1638 (2021). Two members of that court, when concurring in the denial of en banc review, observed there was "no conflict among the circuits on the question presented." 947 F.3d 1215, 1216 (9th Cir. 2020). It was not until 2021 that the Supreme Court reversed the Ninth Circuit, holding the stop and evidence seizure lawful under the second *Montana* exception. *United States v. Cooley*, 141 S.Ct. 1638 (2021).

> (6) The State of Minnesota has civil/regulatory jurisdiction over Indians who are not on their own reservation or own tribe's trust land.

(App. 47-48; R. Doc. 165 ¶12); (App. 93-109; R. Doc. 165-1, Ex. 5.)

The County Attorney also prepared a one-page "Northern Mille Lacs County Protocol" ("Protocol") to guide law enforcement operating within the northern Mille Lacs County townships of Kathio, South Harbor, and Isle Harbor and parts of the cities of Onamia, Wahkon and Isle. (App. 48; R. Doc. 165 ¶13); (App. 110-12; R. Doc. 165-1, Ex. 6.) The Protocol states the County Attorney's opinion of what Band police officers and state peace officers may or may not do within those areas. The Protocol concludes:

> In the event of any confusion regarding jurisdiction, Mille Lacs Band Police Officers are encouraged to conduct a **joint and cooperative investigation** together with a Mille Lacs County Deputy or other peace officer with state law jurisdiction within Mille Lacs County.

(App. 48; R. Doc. 165 ¶13); (App. 110-12; R. Doc. 165-1, Ex. 6 (emphasis in original).)[6]

[6] The County Attorney explained in correspondence to tribal police in September 2016 that the Protocol did not apply to investigations for tribal-court prosecution. (App. 49-50; R. Doc. 165 ¶16); (App. 113-16; R. Doc. 165-1, Ex. 7.)

Sheriff's Office receives Opinion and Protocol.

The Sheriff distributed the Opinion and Protocol to his office and directed his staff to follow it. The County Attorney explained both documents to Sheriff's deputies shortly before revocation. (App. 194-95; R. Doc. 180 ¶3.)

County Attorney's responsibilities.

State law authorizes the County Attorney to prosecute all state law crimes committed within the County, with exceptions for misdemeanors and some gross misdemeanors that a city attorney may prosecute. *See* Minn. Stat. §388.051, subd. (1)(3) and §626.90, subd. 5. A major purpose of the Opinion and Protocol was to ensure evidence was admissible in court. The County Attorney issued the Opinion and Protocol to eliminate jurisdictional defenses to prosecution caused, for example, by Band police making unlawful stops. (App. 48-49; R. Doc. 165 ¶14.)

The County Attorney's statutory obligation to prosecute crimes is subject to professional responsibility standards, including the responsibility to serve as "a minister of justice and not simply that of an advocate." Comment to Minn. R. Prof. Conduct 3.8; *see also* ABA Standards of Criminal Justice Relating to the Prosecutorial Function 3-1.2(a)-(b). In his Opinion, the County Attorney acknowledged these standards guided his prosecutorial discretion "to determine what crimes are charged in the interest of justice." (App. 49; R. Doc. 165 ¶15.)

New cooperative agreement.

In September 2018, the parties signed a new cooperative agreement granting the Band state law enforcement authority under Minn. Stat. §626.90. (App. 1525-26; R. Doc. 349 at 19-20; Add. 112-13.); (R. Doc. 150-51.) This agreement remains in effect.

Band's deputation agreement and special law enforcement commissions.

Appellee Naumann claimed federal law enforcement authority pursuant to a special law enforcement commission (SLEC) issued under a December 20, 2016 deputation agreement between the Band and Bureau of Indian Affairs (BIA). (R. Doc. 1 ¶¶1, 5K); (App. 143-54; R. Doc. 167-1, Exs. 3-4.) This agreement and Naumann's SLEC are a product of TLOA. For PL-280 states like Minnesota, however, TLOA authorized Indian tribes to request concurrent federal jurisdiction to prosecute crimes listed in 18 U.S.C. §1152 and §1153. *See* TLOA §221, 25 U.S.C. §1321(a)(2), 18 U.S.C. §1162(d). Here, the Band did so, and the U.S. Attorney for the District of Minnesota assumed such authority effective January 1, 2017. (R. Doc. 164 at 12.) TLOA also amended the Indian Law Enforcement Reform Act, 25 U.S.C. §2801, *et seq*., to require the Secretary of the Interior to provide a means for tribal police to obtain SLECs to enforce federal law in Indian Country. SLECs issued under this deputation agreement were to specific individual officers, such as

Naumann, who qualified for a SLEC.

Sheriff Burton elected and substituted into lawsuit.

During the relevant period, then-Sheriff Don Lorge was an investigator with the Sheriff's Office assigned to the south end of the County, which does not include Indian country. (R. Doc. 166 ¶3.) Consequently, he had little interaction with tribal police, including then-Plaintiff Sara Rice, former-Tribal Police Chief, and Appellee Naumann. (*Id.*) Then-Chief Rice testified during her deposition that Sheriff Lorge never interfered with Appellees' law enforcement authority. (App. 158-59; R. Doc. 167-1, Ex. 5, Tr. 154:8-10, 192:8-12.) Then-Sheriff Lorge ran for Sheriff in 2018 and decided to retire at the end of his term. (R. Doc. 166 ¶2.) Kyle Burton is now the duly-elected Sheriff of Mille Lacs County.

County Attorney Erica Madore substituted into lawsuit.

In February 2023, Joseph Walsh resigned his position as Mille Lacs County Attorney for new employment. The County Board appointed Erica Madore as his successor. *See* Minn. Stat. §382.02. As Walsh appealed in his official capacity as Mille Lacs County Attorney, Madore is substituted pursuant to Fed. R. App. P. 43(c)(2).

The proceedings below.

On November 17, 2017, the Band and two of its police officers sued the County, County Attorney, and County Sheriff. Appellees sued the then-County Attorney and then-Sheriff in their individual and official capacities. (R. Doc. 1.) Appellees alleged they interfered with the Band's inherent tribal law enforcement authority and federally-delegated authority that TLOA provides individual officers such as Appellee Naumann. (*Id.* ¶¶O-V.) Appellees sought a declaration that interference occurred and an injunction against doing so in the future. (R. Doc. 1.) Appellees also sought a declaration that the Band retained the former reservation provided it in the 1855 treaty. (*Id.*)

Early in the case below, Appellees and the individual Appellants moved for summary judgment. (R. Doc. 146; R. Doc. 162.) In an unusual procedural motion, Appellees moved for a determination that it had standing and that the case was ripe and not moot. (R. Doc. 146.) The individual Appellants sought summary judgment based on the lack of a federal question, Tenth and Eleventh Amendment grounds, absolute and qualified immunity, and individual-capacity defenses. (R. Doc. 164.) On December 21, 2020, the district court granted Appellees' motion, and denied the individual Appellants' motion in part and deferred ruling in part. (R. Doc. 217.)

The County Attorney and Sheriff docketed an interlocutory appeal in this Court over the district court's denial of their immunity defenses. *Mille Lacs Band of Ojibwe et al. v. Walsh et al.*, Appeal No. 21-1138 (Docketed Jan. 20, 2021). After the change in law as articulated in *Cooley*, the County Attorney concluded he would not reissue his 2016 Opinion if the 2018 cooperative agreement terminated. (App. 1412; Walsh Dec. ¶16, filed in Supp. of Mot. to Dismiss in Appeal No. 21-1138 (8th Cir. Aug. 31, 2021).) Accordingly, the County Attorney and Sheriff moved to dismiss their appeal as moot, which this Court granted on September 10, 2021.

Back below, the parties cross-moved for summary judgment on whether the 1855 reservation continued to exist. (R. Doc. 223; R. Doc. 239.) On March 4, 2022, the district court ruled in the Band's favor. (App. 1414-1506; R. Doc. 313; Add. 1-93.) The County is appealing that decision, which the County Attorney and Sheriff adopt by reference under Fed. R. App. P. 28(i).

Later, the Band moved for summary judgment for a declaration that the County Attorney and Sheriff, acting in their official capacities, interfered with the Band's inherent tribal law enforcement authority and the federal law enforcement authority provided individual tribal officers under TLOA. (R. Doc. 317.) The Band also sought to enjoin County law enforcement from

doing so in the future. (*Id.*) The district court ruled the Opinion and Protocol were unlawful, and declared the Band had inherent authority to investigate violations of federal, state and tribal law within the boundaries of the reservation created in the 1855 treaty, even investigating non-Indians on non-Band-owned fee land. (App. 1579; R. Doc. 349 at 73; Add. 166.)

Contrary to what the district court stated, its holding gives the Band more police authority than what the Supreme Court approved in *Cooley*. The district court expressly acknowledged that its final order is based exclusively on the text of the Opinion and Protocol, and the County Attorney and Sheriff's respective declarations and deposition testimony regarding the creation thereof and instructions to follow the same. (App. 1544; R. Doc. 349 at 38; Add. 131.) The district court relied on no facts involving the Band's actual exercise of claimed authority, facts which the court acknowledged "may very well be in dispute." (*Id.*) For that reason, the district court declined to issue an injunction, finding it would be advisory. (App. 1578-79; R. Doc. 349 at 72-73; Add. 165-66.)

SUMMARY OF ARGUMENT

Appellant Madore contends there is no subject matter jurisdiction over the Appellees' law-enforcement interference claim against her office and that of the Sheriff. *See Inyo Cnty. v. Paiute-Shoshone Indians*, 538 U.S. 701, 712

(2008). The district court incorrectly concluded the interference claim rested on federal common law when no federal statute or treaty provision provides federal jurisdiction over the Band's interference claim.

Appellants Madore and Burton contend the district court erred in issuing declaratory relief for four reasons. First, the district court's declaration was an advisory opinion because it broadly pronounced what the Band's inherent law enforcement authority includes without any record support involving the Band's exercise of such authority. The court concedes that its declaration is based not on specific scenarios of alleged interference or deterrence with the Band's exercise of authority. Rather than speculate as to what the Band's authority may be in any particular fact scenario, which the district court admits is advisory, the court simply declared Appellees have amorphous authority tied to no specific circumstances in the case.

Second, the district court abused its discretion by granting declaratory relief unsupported by law. The declaration extends inherent sovereign law enforcement authority beyond any concrete circumstance found in caselaw, extending the Band's law enforcement authority over non-Indians throughout the former Mille Lacs reservation, even on non-member fee lands; provides tribal officers unfettered investigatory authority over state law violations as to Indians; and authorizes, as a matter of common law,

unfettered investigatory authority over federal law violations across the 1855 reservation without congressional authority.

Third, the district court abused its discretion by violating principles of federalism. The declaration will chill Appellants' exercise of PL-280 criminal jurisdiction because the declaration offers no guidance as to what constitutes interference and instead grants the Band what amounts to ongoing federal supervision of County law enforcement. It also interferes with Appellants' criminal law enforcement jurisdiction over Indian-country crimes under PL-280 by giving the Band overly broad and unfettered investigatory authority over state law violations.

Fourth, the district court's declaration violates the Guarantee Clause by granting Band police broad state criminal investigatory powers over nonmembers. The Guarantee Clause requires the United States to guarantee to citizens of the states a republican form of government. But Band police are not accountable to nonmembers as they cannot vote for Band politicians who control Band police.

ARGUMENT

I. Standard of Review

Both of the district court's decisions challenged here were decided on summary judgment. Summary judgment is reviewed de novo. *Lexington Ins.*

Co. v. Integrity Land Title Co., 721 F.3d 958, 974 (8th Cir. 2013). A district court's issuance of declaratory and injunctive relief is reviewed for abuse of discretion. *Straights and Gays for Equal. v. Osseo Area Schools-Dist. No. 279*, 540 F.3d 911, 913 (8th Cir. 2008). A district court abuses its discretion when it misapplies the law or when it makes clearly erroneous factual findings. *Fogie v. Thorn Americas, Inc.,* 95 F.3d 645, 649 (8th Cir. 1996). The County is separately appealing the district court's decision of the 1855 reservation boundaries, filed concomitantly. Appellants Madore and Burton adopt by reference Parts I-VII of the County's brief.

II. This Court Lacks Subject Matter Jurisdiction over Any Claim of Alleged Interference with Appellees' Inherent Tribal or Federally-Delegated Law Enforcement Authority.

Subject matter jurisdiction is a threshold issue. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Jurisdiction is presumptively absent; "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)(internal citations omitted). The basis for federal jurisdiction must appear on the face of a well-pleaded complaint. *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268, 1273 n.8 (11th Cir. 2010).

Appellees' claims arise from alleged interference with two sources of law enforcement authority. One source was its inherent tribal law enforcement authority. (R. Doc. 1 ¶5H.) The second was a deputation agreement with the Bureau of Indian Affairs under which Appellee Naumann received a SLEC. (*Id.* ¶5K.) No source, nor any other federal law or treaties, confers Article III subject matter jurisdiction over Appellees' claims.

A. No federal question jurisdiction exists because Plaintiffs have no cause of action under the Constitution or any federal law or treaty.

Diversity jurisdiction is absent, and thus Appellees had to demonstrate that federal question jurisdiction exists. U.S. Const. art. III, §2. No federal cause of action exists against either the County Attorney or the Sheriff conferring federal jurisdiction over them here.

Appellees cited 28 U.S.C. §1331 and §1362 as providing subject matter jurisdiction. (R. Doc. 1 ¶3.) Sections 1331 and 1362 allow tribes to seek relief in federal court if their claims arise "under the Constitution, laws, or treaties of the United States." But neither section confers subject matter simply because an Indian tribe asserts the claim. *See Ponca Tribe of Indians of Okla. v. Cont'l. Carbon Co.*, 439 F. Supp. 2d 1171, 1174 (W.D. Okla. 2006).

A federal question claim requires resolution of federal law. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983). A

plaintiff's "right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Id.* at 11 (quotations omitted). "In the mine run of cases [a] suit arises under the law that creates the cause of action." *Atlantic Richfield Co. v. Christian*, 140 S.Ct. 1335, 1350 (2020)(quotation omitted). Here, Appellees' case against Appellants fails.

1. There is no constitutional source for Plaintiffs' federal question jurisdiction.

Not all constitutional provisions confer a private right of action. For example, in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015), residential habilitation service providers sued Idaho's Department of Health and Welfare to compel the agency to raise its reimbursement rates. The Court rejected the providers' claim to an implied right of action under the Supremacy Clause, reasoning the clause "instructs courts what to do when state and federal laws clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Id.* at 325; *accord Safe St. Alliance v. Hickenlooper*, 859 F.3d 865, 901-04 (10th Cir. 2017)(rejecting claim that Supremacy Clause provides right to seek preemption of Colorado's marijuana laws under Controlled Substances Act).

Armstrong's analysis of the Supremacy Clause likewise applies to the so-called Indian Commerce Clause, one of Congress's enumerated powers:

"To regulate Commerce with foreign nations, among the several states, and with the Indian tribes." Art. I, §8, cl. 3. Under the Indian Commerce Clause, the Supreme Court has ruled Congress has plenary authority over tribal affairs. *Lone Wolf v. Hitchcock*, 186 U.S. 553, 565 (1903)("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning…."). Unless Congress permits state law to apply, *e.g.*, PL-280, states have little room to regulate tribal activities within Indian country. Hence, the Indian Commerce Clause, like the Supremacy Clause, "instructs courts" in the case of an intrusion of state law into federal-Indian relations, but neither clause is a free-standing source for a cause of action.

2. There is no federal common law conferring Appellees with a private right of action against the County Attorney or Sheriff.

a. Inherent tribal law enforcement authority is not a federal question.

The Band alleges, sans any authority, it has a federal common-law right to exercise "inherent sovereign authority" to create a police force empowered to investigate *state* crimes and to apprehend suspects for prosecution by the appropriate authority. (R. Doc. 1 ¶5(H).) Though federal courts have acknowledged Indian tribes have vestiges of inherent tribal authority independent of federal law, whatever inherent tribal law enforcement power consists of, or whatever its dimensions are today, that authority derives from

no federal law. If inherent, it is not federal; if federal, it cannot be inherent.

A case seeking to enforce a right claimed under tribal law is not a federal question. *See Longie v. Spirit Lake Tribe*, 400 F.3d 586, 590-91 (8th Cir. 2005)(quiet title action against tribe did not present federal question under 28 U.S.C. §1331 because action was "contingent upon tribal law, not federal law"). To assert a claim of inherent tribal law authority raises the question: who says what that tribal authority is?

b. There is no federal common law of Indian affairs conferring Appellees a private right of action.

The Supreme Court advised that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312 (1981). Underpinning *City of Milwaukee* was the appropriate "division of the functions between Congress and the federal judiciary." *Id.* at 313. "Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and public weal when Congress has addressed the problem." *Id.* at 315 (quotation omitted). That admonition applies here. Congress's plenary authority over Indian affairs means that an issue here, if any, is for Congress to address.

While courts have recognized certain tribal claims as a matter of federal common law, the Supreme Court has not recognized a general federal common law of Indian affairs creating a cause of action for tribes to assert inherent authority. In *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003), a state sheriff's office executed a search warrant in a county-initiated welfare fraud investigation. *Id.* at 705. The tribe sued to prevent additional searches, asserting jurisdiction under 28 U.S.C. §§1331, 1337, 1343(i)(3)(4) and the federal common law of Indian affairs. *Id.* at 706. As Justice Ginsberg wrote, the Court unanimously wrote:

> [T]he Tribe asserted as law under which its claims arise the "federal common law of Indian affairs." But the Tribe has not explained, and neither the District Court nor the Court of Appeals appears to have carefully considered, what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state criminal processes.

Id. (citations omitted); *accord Miccosukee*, 607 F.3d at 1274.

There is no occasion here to fashion a judge-made rule for tribes to hale state authorities into federal court over claimed infringements with that federal authority, and even less so for infringing on claimed inherent law enforcement authority. Congress' plenary power over Indian affairs is well-established. And with TLOA, Congress already acted in this area; it could

have fashioned a remedial provision for tribes but did not. Congress could in the future, which is where the solution must come from. Consequently, this Court has no occasion to impute a common-law remedy.

3. TLOA does not confer a right to sue the County Attorney or Sheriff.

Appellee Naumann alleged he possesses federal law enforcement authority pursuant to the SLEC issued him under the deputation agreement. (R. Doc. 1 ¶¶1, 5K).[7] That agreement and Naumann's SLEC are a product of TLOA. Congress enacted TLOA to address the high rate of criminal activity in Indian country, and provided "[n]othing in the Act confers on an Indian tribe criminal jurisdiction over non-Indians." TLOA §206; *see also* §2801(note). For PL-280 states like Minnesota, however, TLOA authorized Indian tribes to request concurrent federal jurisdiction to prosecute crimes listed in 18 U.S.C. §1152 and §1153. *See* TLOA §221, 25 U.S.C. §1321(a)(2), 18 U.S.C. §1162(d).

The Band did so, and the USAO assumed such authority effective January 1, 2017. (App. 160-63; R. Doc. 167-1, Ex. 6.) That office was thereafter accountable under TLOA for handling any cases the Band referred to it. If the Band had a *bona fide* issue with how the County Attorney

[7] Sara Rice, then-Chief of the Band's police department, failed the SLEC exam and could not assert the claim.

executed his discretion to prosecute, the Band could have sought recourse with the USAO,[8] the proper prosecuting authority for persons arrested by Band officers exercising SLEC authority. The County Attorney explained that to then-Chief Sara Rice on December 31, 2016. (App. 185-89; R. Doc. 167-1, Ex. 9; Walsh Dep. Exs. 118-118A).

TLOA did not create a federal cause of action for tribes to sue county attorneys or sheriffs for purported interference. The BIA is the delegating authority; that agency would be the logical entity for Congress to empower to oversee the exercise or interference with that authority. But Congress did no such thing, either for the Band or Naumann.

TLOA's text and structure confirms TLOA created no private cause of action. TLOA is Title II of Pub. Law 111-211. Title I of that statute, the Indian Arts and Crafts Amendments Act of 2010, criminalized counterfeiting of Indian arts and crafts. But Title I of Pub. Law 111-211 expressly permitted tribes or even individual Indians to sue to enforce Title I. *See* Pub. Law 111-

[8] The Band did so. Emails confirm the Band complained with AUSA Karen Schommer, Deputy Criminal Chief at USAO, about certain cases not prosecuted by the County Attorney. Ms. Schommer stated the Band failed to provide "a list of cases that the Police Department has referred to the Sheriff's Department with no resolution, as we discussed" and she was "especially tired of hearing later interpretations of our meetings that are wholly inconsistent with our actual conversations." (App. 190-93; R. Doc. 167-1, Ex. 10.)

211 at §5(d)(codified at 25 U.S.C. §305e). No such language exists in Title II. If Congress intended to permit tribes to sue to enforce Title II, it knew how to do so but chose not to. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979).

In addition to concurrent federal jurisdiction for the USAO to exercise, TLOA amended the Indian Law Enforcement Reform Act, 25 U.S.C. §2801, *et seq*., to require the Secretary of the Interior to provide a means for tribal police to obtain SLECs to enforce federal law in Indian Country.

Here, the BIA issued SLECs under this deputation agreement to specific officers who met the requirements of 25 C.F.R. Part 12. But the BIA included a provision expressly disclaiming any rights to third parties like officer Naumann. (App. 146-47; R. Doc. 167-1, Ex. 4 at 1-2.) This limitation means Naumann has no federal cause of action under the deputation agreement. As the SLEC is personal to him, there is nothing in the deputation agreement empowering the Band to assert any claims against the County Attorney or Sheriff for allegedly interfering with Naumann's BIA-delegated law enforcement authority.[9] Likewise for then-plaintiff Rice, who had no SLEC.

[9] The Department of Justice has concluded TLOA does not confer a private right of action to sue the federal government for allegedly violating TLOA or

4. No Treaty provides federal question jurisdiction.

No Chippewa treaty confers federal question jurisdiction, and neither the district court nor the Band identified such. The 1855 Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, addressed potential disputes in Article 9, with the Chippewa bands agreeing to submit disputes to the President:

> ARTICLE 9. The said bands of Indians, jointly and severally, obligate and bind themselves not to commit any depredations or wrong upon other Indians, or upon citizens of the United States; to conduct themselves at all times in a peaceable and orderly manner; to submit all difficulties between them and other Indians to the President, and to abide by his decision in regard to the same, and to respect and observe the laws of the United States, so far as the same are to them applicable.

Neither this provision, nor anything else in the 1855 treaty, provides the Band with any private right of action against the County Attorney or Sheriff.

The 1863 and 1864 treaties likewise lack language that can be interpreted to provide any Appellee with a right of action against Appellants. No language in either treaty provides Appellees a private right of action. These treaties were treaties of cession and removal, first to a reservation at

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its implementing regulations. *See* Federal Def's Memo. in Support of Motion to Dismiss at 16 17, in *Confederated Tribes and Bands of the Yakama Nation v. Holder*, No. 11-3028 (E.D. Wash., filed June 22, 2011).

Leech Lake, then to White Earth in an 1867 treaty.[10] While the Band was provisionally exempted from removal in Article XII of both treaties, there is no basis in either text to imply a present right to sue for alleged interference with inherent law enforcement authority.[11] And neither treaty addresses tribal law enforcement.

Some contemporaneous Indian treaties addressed tribal criminal jurisdiction. For instance, the July 19, 1866 Treaty with the Cherokees protected that tribe's inherent criminal jurisdiction to prosecute only tribal members. 14 Stat. 799, 803. While the General Crimes Act, 18 U.S.C. §1152,

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[10] Article VIII of the 1867 treaty specifically addressed prosecutorial jurisdiction:

> For the purpose of protecting and encouraging the Indians, parties to this treaty, in their efforts to become self-sustaining by means of agriculture, and the adoption of the habits of civilized life, it is hereby agreed that, in case of the commission by any of the said Indians of crimes against life or property, the person charged with such crimes may be arrested, upon the demand of the agent, by the sheriff of the county of Minnesota in which said reservation may be located, and when so arrested may be tried, and if convicted, punished in the same manner as if he were not a member of an Indian tribe.

Treaty with the Chippewa of Mississippi, 1867, March 12, 1867, 16 Stat. 719. This provision provides no cause of action to Appellees to sue the County Attorney or Sheriff.

[11] Naumann's federal law enforcement authority was not inherent, it depended upon BIA delegation and was terminable at will, subject only to Naumann's APA rights. (App. 147-49, 153; R. Doc. 167-1, Ex. 4, ¶¶2(F), 9.)

may refer to treaties as providing criminal jurisdiction to tribes, by 1970 the Department of the Interior's opinion was that no existing treaty provided criminal jurisdiction over non-Indians. *See* 77 I.D. 113 (M-36810)(Aug. 10, 1970).

III. The District Court's Declaration is Advisory as to the Band's Inherent Law Enforcement Authority.

Declaratory judgment "may not be made the medium for securing an advisory opinion in a controversy which has not arisen." *Coffman v. Breeze Corp.*, 323 U.S. 316, 324 (1945)(citations omitted); *Barnes v. Kansas City Off. of Fed. Bureau of Investigation*, 185 F.2d 409, 411 (8th Cir. 1950). A proper declaratory judgment must resolve a real dispute arising from a specific set of circumstances of actual or threatened harmed in a "real and immediate" way that is neither "'conjectural' or 'hypothetical'"; an "[a]bstract injury is not enough." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). The controversy must be "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Reg'l Home Health Care, Inc. v. Becerra*, 19 F.4th 1043, 1044 (8th Cir. 2021)(quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The declaration must provide something "more than a judicial pronouncement that [the plaintiffs'] rights were violated." *Id.*

Here, the district court's declaration as to what is included in the Band's inherent law enforcement authority is advisory because it does nothing more than broadly pronounce the Band's rights despite the record lacking "specific facts involving the [Band's] actual exercise of such" rights. (App. 1574; R. Doc. 349 at 68; Add. 161.) The only facts on which the court relied are the text of the Opinion and Protocol and former-Sheriff Lindgren's declaration that he instructed his office to follow the Protocol. (App. 1543-44; R. Doc. 349 at 37-38; Add. 130-31.) Though these facts may present a sufficiently concrete, sharp controversy as to whether the Band may exercise its inherent law enforcement authority over the entire 61,000 acres versus 3,660 trust acres, these facts are insufficient to justify declaratory relief as to the question of "what" actions that law enforcement authority permits.

The district court did not base its declaration on any actual, concrete, specific instances of law-enforcement interference or deterrence—facts the court acknowledged "may very well be in dispute." (*Id.* at 38.) Such facts are needed here to "'sharpen[] the presentation of issues' necessary for the proper resolution" of any disagreement about what the Band's authority permits it to do. *Lyons*, 461 U.S. at 101 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Indeed, the district court declared that Band police officers possess broad investigative authority as purportedly recognized in three cases. The court admitted, however, it could not "grant declaratory relief that itemizes various forms of investigative authority" because it would have had to "speculate and identify which specific acts may be 'investigative.'" (App. 1574; R. Doc. 349 at 68; Add. 161.) The court could not do so because the record lacks concrete facts that the Band was prevented from exercising any such investigative authority. (*Id.*) In this regard, the court did not settle a "dispute *which affects the behavior of the defendant towards the plaintiff*." *Becerra*, 19 F.4th at 1045 (emphasis in original)(quoting *Hewitt v. Helms*, 482 U.S. 755 (1987)). Instead, it tells Appellants that Appellees have authority over chimerical circumstances not present here and over which the parties will have to postulate based on extrapolations of caselaw holdings. Such is advisory for the same reason Appellees' requested injunction was denied as advisory. (App. 1579; R. Doc. 349 at 73 ("on this record, any specific terms [of an injunction] would be advisory as to the specifics of any given scenario, not present in this record."); Add. 166.)

In sum, the record lacks an actual, concrete, specific factual scenario sufficient to satisfy Article III's case-and-controversy requirement as to "what" the Band's authority includes here as opposed to "where" Indian

country is. This Court should therefore vacate the district court's declaration to the extent it declared "what" kinds of law enforcement actions the Band's inherent authority may permit. That leaves open where such authority can be exercised, which is inextricably intertwined with the boundary question.

IV. The District Court Erred in Expanding the Band's Inherent Tribal Law Enforcement Authority Beyond the Bounds of Existing Supreme Court Precedent.

The district court erred by expanding the Band's inherent tribal law enforcement authority beyond the circumstances of *United States v. Cooley*, 141 S.Ct. 1638 (2021), and far beyond any recognizable legal boundaries. The district court erred by expanding existing law to conclude that the Band's inherent sovereign law enforcement powers include the authority of Band police officers to investigate violations of federal, state, and tribal law across the 1855 reservation—authority extending even into the homes of non-Indians on non-Indian owned fee lands. (App. 1580; R. Doc. 349 at 74; Add. 167.)[12]

The district court also erred in declaring that Band police officers have unfettered investigatory authority over state law violations by Indians as a

[12] The vast majority of lands within the original boundaries of the 1855 reservation are nonmember fee lands. The majority of residents within the original 1855 boundaries are nonmembers and specifically non-Indians. (App. 976; R. Doc. 242-10 at 17); (App. 1320; R. Doc. 242-12 at 78.)

matter of federal common law. (*Id*. at 74, Section 2(a)("As a matter of federal law, … inherent sovereign law enforcement authority includes the authority of Band police officers to investigate violations of federal, state and tribal law.").) While tribal officers have the right to investigate violations of tribal law by Indians within Indian country, nothing in the law supports affording them the same authority with respect to investigation of state-law violations by Indians, let alone unlimited investigatory authority over everyone. In *Cooley*, the Court limited a tribe's inherent law enforcement authority to investigate and detain non-Indians to a "reasonable period of time." *Cooley*, 141 S.Ct. at 1643. The district court's declaration sets no limits on tribal officers' investigatory authority of state-law violations with respect to Indians, but simply reads: "As a matter of federal [common] law … inherent sovereign law enforcement authority includes the authority of Band police officers to investigate violations of federal, state, and tribal law." (App. 1580; R. Doc. 349 at 74; Add. 167.) Period. This allows tribal officers unfettered state-law investigatory authority over Indians. No law supports this broad power.

Finally, the district court erred in finding that Band officers have the newly-fashioned authority to investigate federal-law violations as a matter of federal common law in the absence of a Deputation Agreement between the

Band and the Bureau of Indian Affairs ("BIA") and SLECs issued to Band police officers by the BIA. (App. 1577-78; R. Doc. 349 at 71-72; Add. 164-65.) While tribal officers with SLECs possess certain rights to investigate federal law violations as specified in the Deputation Agreement, the district court's declaration would, as written, afford non-deputized tribal officers the *federal common law* right to investigate violations of federal law across the reservation. More stunning, the district court placed no limits on this new-fangled common law authority to investigate federal violations. Just like the district court's declaration regarding the Band's enforcement of state law violations against Indians, the district court sets no limitations on this novel federal common law authority.

A. Tribal sovereignty is limited.

The Supreme Court has described tribes as "distinct, independent political communities." *Worcester v. Georgia*, 6 Pet. 515, 559 (1832). However, due to their incorporation into the United States, that sovereignty "is of a unique and limited character." *Cooley*, 141 S.Ct. at 1642 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). Owning to their "dependent status," tribes "lack inherent sovereign power to exercise criminal jurisdiction over non-Indians." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978). In other words, a tribe's inherent sovereign authority

does not generally permit it to try and punish non-Indian offenders. *Id.* at 210.

While the Supreme Court has remained firm that inherent tribal sovereignty remains limited, *Montana v. United States*, 450 U.S. 544 (1981) created two narrow exceptions to *Oliphant*. *Id.* at 565. The second exception holds that a tribe may retain inherent power to exercise *civil* authority over non-Indians on fee lands within its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Montana's second exception was recently applied, for the first time in any law-enforcement context, in *Cooley*. *See* 141 S.Ct. at 1641-46. *Cooley* offers a narrow exception to the general proposition that a tribe cannot "exercise criminal jurisdiction over non-Indians." *Montana*, 450 U.S. at 565.

Before turning to the district court's misreading of *Cooley*, it is important to keep in mind the Court's holding in *Montana*. There, the Court held a tribe could not regulate hunting and fishing by non-Indians on land that non-Indians owned in fee simple on a reservation. The Court's decision was supported by its conclusion in *Oliphant* that a tribe's inherent sovereign powers do not extend to the activities of nonmembers. *Cooley*, 141 S. Ct at 1643 (*citing Montana*, 450 U.S. at 565).

B. The district court's declaration grants the Band authority beyond what *Cooley* contemplates.

The district court's declaration grants the Band authority well beyond what the Supreme Court permitted in *Cooley*. The issue in *Cooley* was "whether an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation." *Id.* at 1641. In contrast, the district court's declaration extends a tribe's inherent law enforcement authority over non-Indians throughout the former reservation. It also provides tribal officers full investigatory authority of state-law violations over Indians. (App. 1580; R. Doc. 349 at 74; Add. 167.) And, it authorizes tribal officers, in the absence of congressional authority, to investigate federal law violations across the reservation "as a matter of federal law." The district court's declaration of inherent tribal law enforcement authority is unsupported by *Cooley* or other precedent.

1. *Cooley* affirmed inherent tribal authority in specific circumstances distinguishable here.

Cooley narrowly fits *Montana*'s "health or welfare" exception. That exception grants tribal police limited authority, under fact-specific circumstances, to initially investigate and temporarily detain non-Indians who threaten or have some direct effect on the health or welfare of people on an Indian reservation. 450 U.S. at 566.

In *Cooley*, a tribal officer noticed a vehicle stopped on the side of a public highway, engaged with the driver, and noticed the driver appeared to be under the influence. 141 S.Ct. at 1642. The officer also saw two rifles lying on the front seat. *Id*. For safety, the officer ordered the defendant out of the vehicle and conducted a pat-down. *Id*. He called tribal and county officers for assistance, returned to the vehicle and found drugs and paraphernalia. *Id*. The officer took the defendant to the tribal police department for questioning by federal and local officers. *Id*.

In affirming the search, the Court reasoned that the second *Montana* exception fit the circumstances "almost like a glove." *Id*. at 1643. That is, the tribal officer possessed the authority to conduct an initial investigation on a public road running through a reservation and to temporarily detain a non-Indian suspect to address "conduct that threatens or has some direct effect on the health or welfare of the tribe." *Id*. at 1642 (cleaned up).

Cooley occurred on the Crow Reservation in Montana, spanning over two million acres. Montana, unlike Minnesota, is not a PL-280 state.[13] The tribal officer in *Cooley* was not cross-deputized with federal or state law enforcement authority. The road at issue was not regularly patrolled by state

[13] *See infra* Part V.B.

and county officers. These particularized facts were essential to the Court's holding.[14]

The district court takes the premise of *Cooley* and expands it beyond recognition, extending inherent criminal investigatory authority over everyone, everywhere within the former 61,000-acre reservation. As to Indians, the investigatory authority of tribal officers over state law violations is limitless. The district court limits that authority with respect to non-Indians but none on tribal officers investigating state law violations by Indians across the reservation. For federal law violations, the district court finds that non-deputized tribal officers have a *common law* right to investigate federal law violations across the reservation. Not only that, but this novel common-law right is also unlimited, just like the Band's new authority to investigate all state law violations by Indians.

What the district court failed to recognize is that the "close fit" between the second *Montana* exception and the facts in *Cooley* is simply inapplicable to broad investigatory power over nonmember activities on fee lands, particularly in a PL-280 state in which local officers can be called in to investigate suspicious activities by nonmembers on fee lands. Moreover,

[14] Justice Alito made clear in his concurrence that *Cooley* was limited to the facts presented in that case. 141 S.Ct. at 1646 (Alito, J. concurring).

neither *Cooley* nor its progenitors afford tribes unlimited investigatory authority over state law violations by Indians, nor a federal common law right for non-deputized tribal officers to investigate federal law violations without limitation.

2. The district court's relief swallows the second *Montana* exception.

Cooley warned that the "*Montana* exceptions are 'limited' and 'cannot be construed in a manner that would swallow the rule.'" 141 S.Ct. at 1645 (quoting *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008)). *Cooley*'s holding is based on an *exception* to the general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 1643 (quoting *Montana*, 450 U.S. at 565). In other words, *Montana*'s exceptions to tribal jurisdiction over nonmembers must be read narrowly. *See id.* at 1645.

The district court, however, reads the narrow exception too broadly. First, nothing in *Cooley* or relevant precedent affords tribal officers unlimited investigatory authority over state law violations committed by *Indians*. *Cooley* does not even speak to the issue. *Cooley* addresses the limited rights of tribal officers over *non-Indians*. The district court's declaration, however, finds "as a matter of federal law" (*i.e.,* federal *common* law) that the Band's inherent sovereign law enforcement authority includes

unfettered authority to investigate Indians for all state-law violations. (App. 1580; R. Doc. 349 at 74; Add. 167.) Neither *Cooley* nor any other Supreme Court case allows that conclusion.

The Band's tribal officers are authorized to investigate state law violations by virtue of state statute and agreement with the Sheriff. Minn. Stat. §626.90. Nowhere does the district court cite any authority for the unsupported proposition that such authority stems from federal common law. But that's precisely what the district court declares: "*As a matter of federal law*, … inherent sovereign law enforcement authority includes the authority of Band police officers to investigate violations of federal, state and tribal law." (App. 1580; R. Doc. 349 at 74 (emphasis added); Add. 167.) Such judicial legislation interferes with the state's statutory law enforcement authority.

Similarly, nothing in *Cooley* or relevant precedent affords tribal officers a common law right to investigate federal law in the absence of a Deputation Agreement and a SLEC. Section 2(a) of the district court's declaration states that "[a]s a matter of federal law," tribal officers possess the inherent sovereign law enforcement authority "to investigate violations of *federal*, state and tribal law." (*Id.*) That right, however, is authorized by Congress, as made clear in Section 2(b) of the district court's declaration. Yet

nowhere does the district court provide any basis for affording such a right "[a]s a matter of federal [common] law." (App. 1560; R. Doc. 349 at 54; Add. 147.)

And finally, the district court's reading of *Cooley* is overly broad because it authorizes criminal investigatory authority across the entire former reservation, even on nonmember and non-Indian owned fee lands and in homes regardless of the availability of local law enforcement. The district court offers three reasons for its overly-expansive holding: (1) the *Montana* exception, on which *Cooley* relies, contains no geographic limitation; (2) criminal activity on non-Indian owned fee lands within a reservation threatens the health and welfare of a tribe in the same way criminal activity on public rights-of-way does; and (3) any limitation based on a land's status as a public right-of way or fee land is "impractical." (*Id.* at 54.)

3. The district court's application of *Cooley* across the reservation is overly expansive.

The ownership status of the land has consistently been relevant to the question of inherent tribal law enforcement authority. The district court acknowledges that "the Supreme Court has generally conditioned tribes' law enforcement authority based on issues of "who, what, and where", including "the status of the land where the offense occurred (*e.g.* Indian Country,

portions of the reservation, or non-reservation land.)." (App. 1546; R. Doc. 349 at 40; Add. 133.)

Montana's extension of tribal authority has rarely been extended over nonmembers on non-Indian land. *See, e.g., Plains Com. Bank*, 554 U.S. at 330; *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001); *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The district court offers no compelling support for the extraordinary geographic expansion of the Band's authority under an *exception* to the general rule that tribes lack authority over non-Indians on fee lands.[15] This is particularly true under the squishy facts of this case.

Nothing about *Montana's* silence on the geographic reach of a tribe's inherent law enforcement authority warrants the district court's ruling expanding it across an entire reservation. Indeed, *Cooley* made clear that the applicability of *Montana's* second exception to other fact patterns is limited. 141 S.Ct. at 1643; *Montana*, 450 U.S. at 565. It observed that the

[15] The district court's declaration theoretically could extend the Band's inherent authority over non-Indian drug possessions, domestic disputes in non-Indian households, child neglect between nonmember parents and nonmember children, theft by and against non-Indians, or non-Indian welfare fraud—criminal activity that does not rise to the level of the second *Montana* exception and far exceeds *Cooley*. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

circumstances of that case were a "close fit" with the second exception, 141 S.Ct. at 1645, implying that it was not widening the exception.

The Supreme Court has repeatedly reaffirmed that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Plains Com. Bank,* 554 U.S. at 330 (*citing Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001)). Indeed, the Court stated: "Tellingly, with only 'one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*.'" *Id.* at 333 (citing *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)). The Court added that the exception—*Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989)—fits the general rule. *Plains Com. Bank*, 554 U.S. at 333-34. The Court permitted a tribe to restrain particular *uses* of non-Indian fee land through zoning regulations, and *Montana* did *not* authorize the Yakima Nation to impose regulations on non-Indian fee land located in an area of the reservation where nearly half the acreage was owned by nonmembers. *Plains Com. Bank*, 554 U.S. at 333-34.

Though these cases involve the first exception under *Montana*, the same principle applies to *Montana's* second exception. Whether in the regulatory or law-enforcement context, expanding inherent tribal sovereignty remains dependent on the status of the land where the offense

occurred. *Cooley* itself acknowledges that its holding is limited to the officers' conduct on a right-of-way crossing a reservation. *Cooley*, 141 S.Ct. at 1646 (Alito, concurring). *Cooley* does not support the district court's wholesale elimination of all territorial boundaries. The district court takes *Cooley* too far.

C. The district court's declaration confuses the power to exclude with the health-and-safety exception.

The district court misapplied existing law in concluding that criminal activity on non-Indian owned fee lands within a reservation threatens the health and welfare of a tribe just as criminal activity on public rights-of-way does. (App. 1561-63; R. Doc. 349 at 55-57; Add. 148-50.) That conclusion is fact-dependent and cannot be made on a disputed summary judgment record, as the district court does here. *See supra* Part III, *infra* Part V.A. Nothing about the facts of this case—the issuance of the Opinion and Protocol, on which the court rested its entire analysis—warrants the sweeping conclusion that criminal activity threatens the health and welfare of a tribe regardless of where it occurs.

The district court correctly notes that "[c]ourts have not identified all aspects of investigative authority that tribal police possess when exercising their inherent law enforcement authority." (App. 1574; R. Doc. 349 at 68; Add. 161.) In fact, the district court even acknowledges that "typically, courts

have only addressed a tribe's inherent investigative authority in response to specific facts involving the actual exercise of such authority." (*Id.*) The district court, therefore, declines to grant the Band injunctive relief and purportedly limits its investigatory authority to the confines of *Cooley*, *Terry*, and *Thompson*. (*Id.*)

However, the district court's order extends tribal investigatory authority under *Terry* to nonmembers' activities on fee lands and public highways, among other areas, even though *Terry* is based upon the tribal power to exclude on tribal-owned land, which is inapplicable to fee lands or public highways. *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997).

The district court likewise extends *State v. Thompson*, 937 N.W.2d 418, 421-22 (Minn. 2020), for the same proposition, declaring that the Band has open-ended authority to "detain, investigate, and remove a non-Indian who violates state law" anywhere on the reservation based on the power to exclude. (App. 1549-50, 1576; R. Doc. 349 at 43-44, 70; Add. 136-37, 163.) Yet the court makes no mention that *Thompson* was based on the power to exclude, which, again, is inapplicable to fee lands or public highways. Additionally, *Thompson* was based on the Red Lake Reservation—a closed reservation over which Minnesota lacks PL-280 authority—and thus is

inapposite here. 937 N.W.2d at 418.[16] And yet the district court offers no explanation (nor can it) as to why a tribe's *investigatory authority* should be limited to legal precedent but the *geographic* reach of that authority within Indian country is boundless. Nothing in the relevant authority warrants such an overly-expansive result.

D. The district court's policy justifications fall within the purview of Congress, not the judiciary.

Finally, the district court's policy rationale lacks legal foundation. The district court opines that "finding that the Band's inherent tribal authority encompasses the entire reservation … would reduce unnecessary complications involved in a parcel-by-parcel approach to tribal law enforcement authority." (App. 1564; R. Doc. 349 at 58; Add. 151.) Not only does the record lack factual support for this proposition, the district court offers no explanation for rejecting the longstanding proposition that *where* tribal law enforcement authority is exercised matters. *E.g., Montana,* 450 U.S. 544.

Regardless of how easy it might (or might not) be to extend tribal law enforcement authority across 61,000 acres, such policy determinations are

[16] The vast majority of the 61,000 acres in the former reservation are owned by non-Indians, and the majority of residents are not Band members. (App. 976; R. Doc. 242-10 at 17); (App. 1320; R. Doc. 242-12 at 78.)

best left to Congress, not courts. Indeed, it is just such policy determinations that fall squarely within the plenary power of Congress. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)(tribal authority remains subject to the plenary authority of Congress).[17]

V. The District Court's Open-Ended Declaration of the Band's Inherent Authority Will Unduly Burden County Law Enforcement and Violate Principles of Federalism.

Principles of federalism counsel against declaring that the Band possesses open-ended inherent law enforcement authority—untethered to any specific factual scenario—while expressly inviting the Band to haul Appellants into court for injunctive relief whenever it claims such authority in any given scenario. The court's rejection of these principles was an abuse of discretion.

[17] This authority is, of course, subject to a constitutional analysis as articulated in *United States v. Lara*, 541 U.S. 193, 211-214 (2004) and as cited by the majority in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). "Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' The Bill of Rights does not apply to Indian tribes.... And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Com. Bank*, 554 U.S. at 337 (citations omitted).

A. The district court invites what is analogous to an ongoing federal audit of County law enforcement, in violation of federalism principles.

The Supreme Court recognizes "the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws." *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *accord Samuels v. Mackell*, 401 U.S. 66, 72 (1971)("[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid."). These federalism principles apply not only against state judicial officers, but also against executive officials of state or local governments, like Appellants here. *Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

The district court rejected Appellants' federalism arguments, concluding that "the federalism concerns articulated in *O'Shea* do not exist here. Unlike the plaintiffs in *O'Shea*, Plaintiffs do not seek an 'ongoing federal audit' of any state proceedings." (App. 1570; R. Doc. 349 at 64 (incorporating by reference R. Doc. 217 at 39-41 (citing *O'Shea*, 414 U.S. at 500)); Add. 157.) However, the federalism principles implicated by ongoing federal audits of state proceedings are similarly implicated by ongoing

federal audits of the state executive's administration of its own law, particularly when that administration is expressly authorized under PL-280. That was error.

Though the district court correctly denied the requested injunction as "advisory as to the specifics of any given scenario, not present in this record," (App. 1579; R. Doc. 349 at 73; Add. 166), the court erred by not denying it with prejudice and for arranging an ongoing federal audit of the County's actions. After the court made open-ended pronouncements about the Band's investigative authority without tethering them to any specific scenarios reflected in the record, the court's order expressly permits the Band to haul Appellants into court for a permanent injunction anytime the Band believes it should have authority over a given law enforcement scenario. (App. 1579; R. Doc. 349 at 73 ("in the future, if the Band's law enforcement authority is disputed in a situation in which Band officers believe there is a threat to the health or welfare of the tribe, the Band may certainly seek relief, if appropriate, from the Court."); Add. 166.)

The vagueness of the district court's declaration and the court's complete lack of guidance as to what could or could not constitute interference counsels restraint. The district court's declaration will chill the

County's exercise of PL-280 criminal jurisdiction. The court's rejection of these principles was an abuse of discretion.

B. The declaration is improvident given Minnesota's status as a Public Law 280 state.

The district court broadly concludes that the Band's "inherent sovereign law enforcement authority includes the authority of Band police officers to investigate violations of federal, state, and tribal law," (App. 1577; R. Doc. 349 at 71; Add. 164), and that PL-280 does not impact or limit that authority, (App. 1572-73; R. Doc. 349 at 66-67; Add. 159-60). That was error. The historical enactment of PL-280, coupled with the federal government's delegation to PL-280 states of "exclusive" criminal jurisdiction should have informed the court's analysis and demonstrated to it that Congress did not intend nor assume for tribes to be quasi-state peace officers with general investigatory authority over state-law crimes. To the extent the district court declared the Band possessed authority to generally investigate state-law crimes irrespective of the state's control, the court abused its discretion.

In 1953, Congress extended to Minnesota criminal jurisdiction on Indian reservations under PL-280.[18] Pub. L. No. 83-280, 67 Stat. 588, 588-

[18] Exceptions are the Red Lake Reservation under the terms of PL-280 and Nett Lake/Bois Forte from retrocession. The entire County is under state criminal jurisdiction.

89 (codified as 18 U.S.C. §1162). PL-280 made those reservations subject to Minnesota's criminal laws and made Minnesota's county sheriffs, rather than federal marshals, responsible for policing Minnesota reservations. *See Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1032 (9th Cir. 2013)(through P.L. 280 "the federal government abdicated its role in policing Indian Country and transferred that obligation to the states…."); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 490 (1979)(The purpose of PL-280 was to facilitate "the transfer of jurisdictional responsibility to the States."); *United States v. Finn*, 919 F. Supp. 1305, 1334 (D. Minn. 1995)("in enacting Public Law 280, Congress was attempting to assimilate the Indians in Indian country within the criminal justice system of the respective, designated States."), *aff'd sub nom. United States v. Pemberton*, 121 F.3d 1157 (8th Cir. 1997). In so doing, Congress expressly granted to Minnesota authority over criminal law enforcement jurisdiction throughout Indian country in Minnesota. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

In 2010, Congress amended PL-280 to permit tribes within PL-280 states to request from the Attorney General that federal criminal jurisdiction be made concurrent with state and, where applicable, tribal governments. TLOA, Pub. L. No. 111-211, 124 Stat. 2258 (amended as 18 U.S.C. §1162(d)).

Though the federal government agreed in 2016 to assume concurrent criminal jurisdiction over the former reservation, the deputation agreement between the federal government and the Band submits that tribal officers holding SLECs may only respond to violations of exclusively state law "in accordance with policies and practices set forth under State and local law." (R. Doc. 150-39 at 6.) In other words, the Band and federal government agree the Band lacks general criminal investigative authority over state-law crimes and instead must conduct such investigations in accordance with state law.

Though tribes can punish their own members for tribal-law violations, *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990), nothing in PL-280 vests tribes with state-criminal investigatory authority concurrent with states, *id.* The Band can only possess general investigatory authority over state law crimes if granted it by the state by agreement, much the same way as the Band receives the same authority with respect to federal law only if granted by the federal government under SLECs agreements.

Recently, the Supreme Court held that all states retain preexisting sovereign criminal authority within their borders over non-Indians. *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2495 (2022). The Court noted "[n]othing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed

jurisdiction." *Id.* at 2499-2500 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P. C.*, 467 U.S. 138, 150 (1984)). Importantly, the Court held a PL-280 state's exercise of criminal jurisdiction over crimes committed even by Indians in Indian country could not be preempted for infringing tribal self-government, "[a]bsent Public Law 280, state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government." *Id.* at 2499-2500. Against the backdrop of PL-280's enactment described above, the Court's conclusion strongly suggests PL-280 granted states primary jurisdictional authority over criminal matters in Indian country—one that overrides the Band's interests in self-government.

The district court attempts to distinguish *Castro-Huerta* by stating that the case involved the state's exercise of prosecutorial jurisdiction rather than criminal law enforcement jurisdiction. (App. 1572; R. Doc. 349 at 66; Add. 159.) This distinction is unwarranted. The Court itself in *Casto-Huerta* notes that "concurrent state jurisdiction" on a reservation implicates state "law enforcement on the Reservation." *Castro-Huerta*, 142 S.Ct. at 2501. And nothing in the text of PL-280 suggests the broad criminal jurisdiction granted to Minnesota applies any differently to its exercise of prosecutorial

authority versus law enforcement authority. Rather, the granting of jurisdiction assumes both.

The district court's declaration that the Band inherently possesses general authority to investigate state-law violations circumvents state control and state laws.[19] That declaration cannot be squared with the foregoing authority regarding Minnesota's authority over criminal matters in Indian country. For example, the district court's declaration fails to provide that the Band will not engage in street immunity in the course of exercising its supposed investigatory authority of state-law crimes, despite the fact that any decision to grant immunity must be made by the County Attorney, not a police officer.

The district court erred and abused its discretion in declaring the Band possessed inherent authority to generally investigate state-law crimes without regard for the laws and authority of Minnesota, a PL-280 state.

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[19] Under Minn. Stat. §626.90, the Mille Lacs Band may obtain concurrent jurisdiction over (a) all persons on trust lands; (b) all Minnesota Chippewa Tribe members (not all Indians) within the original 1855 boundaries; and (c) over any person who commits or attempts to commit a crime in the presence of a tribal officer. *See*, Minn. Stat. §626.90, subd. 2(c)(1)-(3). To do so, the Band must enter into a cooperative agreement with the Sheriff. §626.90, subd. 2(b).

VI. The District Court's Declaration Violates the Guarantee Clause.

The district court empowered the Band's police department with broad state criminal investigatory powers over nonmembers. This violates the Guarantee Clause, which provides "the United States shall guarantee to every state in this union a Republican Form of Government." U.S. Const. art. IV, §4.

Republicanism requires that those who impose the legislative and executive will on the electorate be answerable to it. Appellants have the right to ensure their constituents, including nonmembers, can participate in the political process that oversees law enforcement and holds it accountable. *Cf. New York v. United States*, 505 U.S. 144, 169 (1992)(emphasizing importance of holding local officials accountable to "the views of the local electorate"). County voters—including many Band members—elect the Sheriff, County Attorney, and Board of Commissioners. Not so with the Band. Only enrolled members of the Band can vote for Band executive officers. Furthermore, constitutional rights guaranteed to citizens are directly implicated here, as tribes are not subject to the Fourth Amendment. *Plains Com. Bank*, 554 U.S. at 337.

The district court rejected these arguments because the Supreme Court stated that the limited search and detention in *Cooley* subsequently

subjected Cooley to state or federal law rather than tribal law. (App. 1570; R. Doc. 349 at 64 (quoting *Cooley*, 141 S.Ct. at 1644-45); Add. 157.) However, regardless of what laws are subsequently applied against the nonmember, the district court's reasoning is misplaced here.

First, *Cooley* did not address a Guarantee Clause challenge. Second, the investigative authority the district court's declaration authorizes is categorically different than the "initial investigation" permitted by the Supreme Court in *Cooley*. Indeed, the Court in *Cooley* explained the "initial investigation" under the limited circumstances in that case came far from subjecting Cooley to "full tribal jurisdiction." 141 S.Ct. at 1644-45. The district court's declaration, by contrast, expressly permits the Band to exercise virtually unlimited state criminal investigatory authority over nonmembers—which more aptly resembles "full tribal jurisdiction" than the very limited authority exercised in *Cooley*. The district court's declaration extends the Band's investigatory authority beyond the precedential limits in *Cooley* and violates the Guarantee Clause. And to the extent the district court concludes the rights guaranteed to non-Indian citizens under the Bill of Rights are satisfied by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-04 (App. 1571-72; R. Doc. 349 at 65-66; Add. 158-59), the court erred. *See supra* n.17.

The California Supreme Court addressed a Guarantee Clause claim in *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126 (Cal. 2006). There, the Fair Political Practices Commission, a state agency, sued the Agua Caliente Band to enforce campaign contribution reporting requirements of the state's Political Reform Act ("PRA"). The court held the agency had authority under the Tenth Amendment and the Guarantee Clause to enforce PRA notwithstanding claims of tribal sovereign immunity:

> Allowing the Tribe immunity from suit in this context would allow tribal members to participate in elections and make campaign contributions (using the tribal organization) unfettered by regulations designed to ensure the system's integrity. Allowing tribal members to participate in our state electoral process while leaving the state powerless to effectively guard against political corruption puts the state in an untenable and indefensible position without recourse. Given the unique facts here, we agree with the Court of Appeal and conclude that the guarantee clause, together with the rights reserved under the Tenth Amendment, provide the FPPC authority under the Federal Constitution to bring suit against the Tribe in its enforcement of the PRA.

Id. at 1138-39. The court added that "[t]he inability to enforce the PRA against the Tribe, a major donor to political campaigns, has the effect of substantially weakening the PRA. The State of California has determined that the PRA is vitally important to its republican form of government. *Id.* 1139.

Though recent judicial precedent interpreting the Guarantee Clause is mixed, *compare State ex rel. Huddleston v. Sawyer*, 932 P.2d 1145, 1158 (Ore. 1997)(holding the Clause presents a non-justiciable political question) *with Kerpen v. Met. Washington Airports Auth.*, 907 F.3d 152, 163-64 (4th Cir. 2018)(assuming justiciability of Guarantee Clause claim), "the Guarantee Clause should be regarded as a protector of basic individual rights and should not be treated as being solely about the structure of government," Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994). County citizens residing within the former reservation are constitutionally entitled to vote for representatives who oversee law enforcement in the County. This Court should hold the declaration unlawful to the extent it grants the Band broad state-criminal investigatory authority over County citizens lacking representation.

CONCLUSION

Appellant Madore requests the Court to dismiss this action for lack of subject matter jurisdiction. Appellants Madore and Burton request that this Court reverse the district court's summary judgment ruling on the status of the reservation and vacate the court's declaration as to the scope of Appellees' inherent sovereign law enforcement authority.

Dated: May 1, 2023

Respectfully submitted,

TAFT STETTINIUS & HOLLISTER LLP

By: *s/ Scott G. Knudson*

Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400
Email: sknudson@taftlaw.com
sflaherty@taftlaw.com

Attorneys for Appellant Erica Madore

KELLEY, WOLTER & SCOTT, P.A.

By: *s/ Douglas A. Kelley*
Douglas A. Kelley (#54525)
Brett D. Kelley (#397526)
Stacy L. Bettison (#315886)
Perry F. Sekus (#309412)
Garrett S. Stadler (#402831)
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
Tel: (612) 371-9090
Fax: (612) 371-0574
Email: dkelley@kelleywolter.com
bkelley@kelleywolter.com
sbettison@kelleywolter.com
psekus@kelleywolter.com
gstadler@kelleywolter.com

Attorneys for Appellant
Kyle Burton

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants Madore and Burton certifies that this brief complies with the requirements of Fed. R. App. P. 32(a) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 12,779 words, including headings, footnotes and quotations and that the brief has been scanned for viruses and is virus-free.

Dated: May 1, 2023

TAFT STETTINIUS & HOLLISTER LLP

By: *s/ Scott G. Knudson*
Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400
Email: sknudson@taftlaw.com
sflaherty@taftlaw.com

Attorneys for Appellant Erica Madore

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 1, 2023

Respectfully submitted,

TAFT STETTINIUS & HOLLISTER LLP

By: *s/ Scott G. Knudson*
Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400
Email: sknudson@taftlaw.com
sflaherty@taftlaw.com

Attorneys for Appellant Erica Madore