A25-0527

STATE OF MINNESOTA
IN COURT OF APPEALS

FILED
July 25, 2025
OFFICE OF
APPELLATE COURTS

State of Minnesota,

Respondent,

vs.

Todd Jeremy Thompson,

Appellant.

APPELLANT'S BRIEF

CLAIRE NICOLE GLENN
Staff Attorney
Climate Defense Project
P.O. Box 7040
Minneapolis, MN 55407
651-343-4816
License No. 0402443

Attorney for Appellant

KEITH ELLISON
Minnesota Attorney General

JASON HASTINGS
Mahnomen County Attorney
311 N. Main St.
P.O. Box 439
Mahnomen, MN 56557
218-935-2378
License No. 0294573

Attorneys for Respondent

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LEGAL ISSUES PRESENTED

I. Whether cannabis possession — particularly after expansive legislative reforms legalized adult-use cannabis in Minnesota — is a civil/regulatory matter over which the State lacks enforcement jurisdiction over a tribal member on his own reservation.

Proceedings below: Answering this question in the affirmative, Appellant moved to dismiss the case against him. Add. 9-12, 18-20. The trial court denied this motion, finding that while it was a "close[] case," the statutory offense remained criminal/prohibitory, and thus the State had jurisdiction pursuant to Public Law 280 (P.L. 280). Add. 39-40. Appellant timely petitioned for discretionary review, which this Court granted.

Most apposite authority:

California v. Cabazon Band of Indians, 480 U.S. 202 (1987)
Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310 (5th Cir. 1981)
Twenty-Nine Palms Band of Mission Indians v. Wilson, 925 F. Supp. 1470 (C.D. Cal. 1996)

II. Whether cannabis possession is a right retained by Anishinaabe signatories to the 1855 Treaty with the United States that bars prosecution of Appellant, an enrolled member of the White Earth Band of Ojibwe, by the State.

Proceedings below: Answering this question in the affirmative, Appellant moved to dismiss the case against him. Add. 9-18. The trial court denied this motion, citing three reasons for doing so: first, the trial court claimed that such rights belong to the Tribe as a whole and not to any individual member; second, the trial court asserted Appellant had "not shown that marijuana was envisioned with any of the reserved rights at the time of the Treaty"; and third, the trial court reasoned, "even if the Treaty's

protections somehow encompassed possession of marijuana, they would conflict with Minnesota law prohibiting such possession, and to the extent of the conflict, would be abrogated through P.L. 280." Add. 41. Appellant timely petitioned for discretionary review, which was granted by this Court.

Most apposite authority:

United States v. Brown, 777 F.3d 1025 (8th Cir. 2015)
Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971)
State v. Jackson, 16 N.W.2d 752 (Minn. 1944)
Tulee v. State of Washington, 315 U.S. 681 (1942)

STATEMENT OF THE CASE

On April 17, 2024, the State charged Appellant Todd Jeremy Thompson with one count of felony cannabis possession in the first degree for allegedly possessing more than two pounds of cannabis flower in violation of Minnesota Statute section 152.0263, subdivision 1(1). *See* Add. 1-8.

On December 13, 2024, Mr. Thompson moved to dismiss the case, asserting that cannabis possession is a civil/regulatory matter, and thus, the State lacks jurisdiction to prosecute him as an enrolled member of the White Earth Band of Ojibwe for alleged conduct occurring on the White Earth Reservation. *See* Add. 9-20. Mr. Thompson also argued that cannabis possession is a sovereign right reserved by Anishinaabe[1] signatories to the 1855 Treaty with the United States. *See id.* Following briefing by both parties, the District Court issued an order denying Mr. Thompson's motion on March 3, 2025. *See* Add. 35-41.

Mr. Thompson timely sought this Court's discretionary review of the denial order pursuant to Rule 28.02, subdivision 3, of the Minnesota Rules of Criminal Procedure. This Court found that "a decision on the jurisdiction of the state to enforce Minnesota's cannabis-possession laws and on the extent of the rights reserved under applicable treaties will have an

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[1] *Ojibwe* and *Anishinaabe* are related, but distinct, terms of self-reference used by people indigenous to the Great Lakes region of Turtle Island, also known as North America. Both names have rich histories and deep meanings. *See, e.g.*, ANTON TRUER, THE ASSASSINATION OF HOLE IN THE DAY 217-19 (2011). But stated simply, *Ojibwe* is a tribally-specific term of self-reference, while *Anishinaabe* is a term of self-reference inclusive of Indigenous peoples. Although the name *Chippewa* is "frequently used in reference to the Ojibwe, especially in the United States, [it] is actually a corruption of the word *Ojibwe*" created by European colonizers who did not understand the subtleties of Ojibwe pronunciation. *Id.* at xviii-xix. In recognition of this history, and to reflect Mr. Thompson's preferred terms of cultural self-reference, Anishinaabe and Ojibwe are used here throughout, except where other names appear as formal nouns, in quotes, or as terms of art.

immediate statewide impact on all Tribes in Minnesota subject to Public Law 280 and on their members," and granted Mr. Thompson's petition. *See State v. Thompson*, No. A25-0527, 2025 WL 1419945, *3 (Minn. App. May 13, 2025).

STATEMENT OF FACTS

On August 1, 2023, the Cannabis Finance and Policy Bill became law. H.F. 100, 93rd Leg. (Minn. 2023). With it, sweeping legislative reforms took effect and recreational adult-use cannabis became legal overnight. Now in Minnesota, it is legal to possess up to two ounces of cannabis in public and up to two pounds at home. *See* MINN. STAT. § 342.09. Private individuals may grow and even gift their own cannabis. *Id.* Commercial cannabis sales are governed by regulatory and licensing frameworks managed by the state and tribal governments. *See, e.g.*, MINN. STAT. § 342.02 *et seq.* (establishing the State of Minnesota Office of Cannabis Management created to develop and implement robust operational and regulatory systems to oversee the cannabis industry); *see also infra* Part I.D.

Notably, while the statute included provisions for tribal governments to voluntarily negotiate compacts with the state, it stated in no uncertain terms:

> The state of Minnesota acknowledges the sovereign right of Minnesota Tribal governments to regulate the cannabis industry and address other matters of cannabis regulation related to the internal affairs of Minnesota Tribal governments or otherwise within their jurisdiction, without regard to whether such Tribal government has entered a compact authorized by this section.

MINN. STAT. § 342.09.

Mr. Thompson is an enrolled member of the White Earth Band of Ojibwe. Add. i-ii. He owns Asema Tobacco & Pipe Shop, a limited liability company formed under and authorized by the regulatory laws of the White Earth Band, governed by the White Earth

Limited Liability Code, licensed as a tobacco distributor/wholesaler under the White Earth Reservation Tax Code, and physically located and operating within the exterior boundaries of the White Earth Reservation. *See id.*; *see also* Add. 2-3.

Following Minnesota's legalization of cannabis,[2] Mr. Thompson began openly dispensing cannabis from Asema Tobacco & Pipe Shop.[3] Add. 2. On August 2, 2023, law enforcement applied for and obtained warrants to search for controlled substances at Mr. Thompson's shop, as well as at his home and on his person. *Id.* Later that same day, law enforcement agents with the Paul Bunyan Drug Task Force ("PBDTF") executed the warrants simultaneously. *Id.* Three adults over the age of twenty-one initially were present during the raid at Asema Tobacco & Pipe Shop. *Id.* Mr. Thompson arrived sometime later, and law enforcement searched his person and seized his cell phone. *Id.* At the shop, law enforcement observed mason jars on the counter containing suspected cannabis, as well as digital scales and plastic sandwich bags. *Id.* at 2-3. In total, law enforcement recovered 3,405 grams of suspected cannabis flower, as well as 433 grams of suspected cannabis wax and $2,748 in cash ($1,958

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[2] Although the District Court stated in its memorandum that "[s]ometime in July 2023, White Earth Police Department learned that Thompson was offering cannabis flower and marijuana wax for sale to the general public out of his shop," *see* Add. 36, there is no such evidence in the record. There is no evidence indicating the tip was received by law enforcement in July as opposed to August 2023; there is no evidence that such a report was made to the White Earth Police Department as opposed to state law enforcement agents of the Paul Bunyan Drug Task Force; and there is no evidence indicating or even suggesting that Mr. Thompson possessed cannabis prior to August 2023.

[3] Mr. Thompson acknowledges the facts alleged in the State's complaint for purposes of deciding the preliminary issues raised here on appeal, but does not otherwise waive any defenses or rights to later contest the State's evidence against him should this case proceed.

from a fanny pack and $790 from the business till). *Id.* at 3. No items listed on the search warrant were recovered from Mr. Thompson's home. *Id.*

Arguments

I. Following Expansive Legislative Reforms Legalizing Adult Use in Minnesota, Cannabis Possession Is a Civil/Regulatory Matter Over Which the State Lacks Jurisdiction to Enforce Its Laws Against a Tribal Member on His Reservation.

A. The Jurisdictional Authority Granted to Minnesota by Public Law 280 Does Not Extend to Civil/Regulatory Matters.

Tribal governments "remain separate sovereigns" that predate the founding of the United States and, except where abrogated by Congress, "retain their historic sovereign authority." *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (internal quotations and citations omitted). This sovereignty is neither dependent on nor subordinate to state governments. *See California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987) (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)). Where Congress has so provided, however, state governments may assert jurisdiction and enforce their laws over tribal members on their reservations. *See id.*

Whether Minnesota has jurisdiction to prosecute a tribal member is a question of federal law which is reviewed *de novo*. *See State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997) ("State court jurisdiction over matters involving Indians is governed by federal statute or case law."); *State v. Davis*, 773 N.W.2d 66, 68 (Minn. 2009) ("We review issues of subject-matter jurisdiction de novo.").

In 1953, Congress enacted Public Law 280 to extend the jurisdiction of six states, including Minnesota, over "Indian country"[4] within their respective borders.[5] *See generally* PUB.L. No. 83-280, 67 STAT. 588-89 (1953). But this grant of congressional authority was not without limits. Section 2 authorized states to exercise jurisdiction over criminal matters, *see* 18 U.S.C. § 1162(a) (codifying P.L. 280, Section 2), and Section 4 authorized states to exercise jurisdiction over civil causes of action between private parties, *see* 28 U.S.C. § 1360 (codifying P.L. 280, Section 4). Public Law 280 did not grant to the states any civil regulatory authority. *See Bryan v. Itasca County*, 426 U.S. 373 (1976); *see also Stone*, 572 N.W.2d 725. In reaching this conclusion, the United States Supreme Court recognized the "devastating impact" a contrary interpretation could have on tribal governments, resulting in "the undermining or destruction of such tribal governments as did exist and a conversion of the affect tribes into little more than private, voluntary organizations." *Bryan*, 426 U.S. at. 388 & n.14. "[A] grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values," a perverse result not intended by Congress. *Cabazon Band*, 480 U.S. at 208.

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[4] For purposes of federal criminal law, "Indian country" is generally defined as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . and, including rights-of-way running through the reservation." *See* 18 U.S.C. § 1151; *see also DeCoteau v. District County Court,* 420 U.S. 425, 427 n. 2 (1975).

[5] By its own terms, Public Law 280 excepted Red Lake Reservation from Minnesota's jurisdiction. *See* 18 U.S.C. § 1162(a) (codifying P.L. 280, Section 2, expressly authorizing the State's exercise of criminal jurisdiction over all Indian country in Minnesota except Red Lake Reservation); 28 U.S.C. § 1360 (codifying P.L. 280, Section 4, expressly authorizing the State's limited exercise of jurisdiction over private civil litigation in all Indian country in Minnesota except Red Lake Reservation).

When a State seeks to enforce a law within a reservation under the authority of Public Law 280, therefore, "it must be determined whether the law is criminal nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court [under § 4]." *Cabazon Band*, 480 U.S. at 208. State statutes, however, are not always "so easily categorized." *Id.* Notably, the fact "that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Public Law 280." *Id.* at 211. Otherwise, "the distinction between § 2 and § 4 of [Public Law 280] could easily be avoided and total assimilation permitted," to devastating effect. *See id.* at 211-12.

In *Cabazon Band*, the Supreme Court announced a test for determining whether a purportedly criminal statute falls under Public Law 280's grant of criminal jurisdiction to the states. The distinction, it held, is between "criminal/prohibitory" laws and "civil/regulatory laws." *Id.* at 209-10. The Court explained:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Public Law 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Public Law 280 does not authorize its enforcement on an Indian reservation.

Id. at 209. The Court further noted, "[t]he shorthand test is whether the conduct at issue violates the State's public policy." *Id.*

The Minnesota Supreme Court in *State v. Stone* enunciated a two-step approach for applying the *Cabazon Band* test. *See Stone*, 572 N.W.2d 725. The first step is to determine the proper focus of the *Cabazon Band* analysis. *Id.* at 730. Generally, the broad conduct will be the focus of the reviewing court's analysis unless the narrower conduct presents substantially

different or heightened public policy concerns compared to those underlying the broad conduct. *Id.* If such a difference exists, the narrow conduct becomes the focus for analysis. *Id.* After identifying the conduct on which to focus, the second step is to apply the *Cabazon Band* standard to determine if the law is criminal or civil; "[i]f the conduct is generally permitted, subject to exceptions, the law is civil/regulatory," but "[i]f the conduct is generally prohibited, the law is criminal/prohibitory." *Id.*

In drawing this distinction in close cases, the *Stone* Court explained that the *Cabazon Band* "shorthand public policy test" may provide further guidance. *Id.* Because "all laws implicate some public policy," the Minnesota Supreme Court has interpreted "public policy" as used in the *Cabazon Band* test to mean "public *criminal* policy." *Id.* As the Court has explained, "Public criminal policy goes beyond merely promoting the public welfare. It seeks to protect society from serious breaches in the social fabric which threaten grave harm to persons or property." *Id.* The Court has identified the following non-exhaustive, non-dispositive factors for consideration as part of the public policy inquiry:

> (1) the extent to which the activity directly threatens physical harm to persons or property or invades the rights of others;
> (2) the extent to which the law allows for exceptions and exemptions;
> (3) the blameworthiness of the actor; and
> (4) the nature and severity of the potential penalties for a violation of the law.

Id.

Whether Minnesota has jurisdiction to prosecute Mr. Thompson, a White Earth Band member, for conduct alleged to have occurred on his reservation, thus turns on whether the statute at issue in this case is criminal/prohibitory or civil/regulatory in nature pursuant to *Cabazon Band* and *Stone*.

B. Sweeping Legislative Reforms Have Legalized Adult-Use Cannabis, Making Cannabis Possession Generally Permitted and Thus Civil/Regulatory in Nature.

Decades ago, this Court concluded that "marijuana"[6] possession was criminal/prohibitory conduct, and thus subject to Public Law 280 jurisdiction. *See State v. Larose*, 673 N.W.2d 157 (Minn. App. 2003) (holding the State had P.L. 280 jurisdiction over tribal member charged with possession on Leech Lake Reservation because marijuana possession was criminal/prohibitory under *Cabazon Band*); *see also State v. St. Clair*, 560 N.W.2d 732 (Minn. App. 1997) (holding that State had P.L. 280 jurisdiction over tribal member charged with possession on White Earth Reservation, but not engaging in *Cabazon Band* analysis). That prior determination, however, was predicated on the then-existing statutory scheme, in which cannabis possession was categorically prohibited with varying penalties. *See Larose*, 673 N.W.2d at 164 ("Minnesota prohibits all marijuana possession. Possession of even a small amount is prohibited and constitutes a petty misdemeanor, punishable by a fine of up to $200 and participation in a drug-education program."). The Minnesota legislature has since recognized, however, that the criminalization of cannabis is not only outdated, but harmful, *see infra* note 9, and accordingly transformed the statutory scheme upon which this Court's prior holdings rested.

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[6] Notably, Mr. Thompson is not charged with "marijuana" possession, he is charged with "cannabis" possession. The name change was an intentional move by the Minnesota legislature away from the Spanish name American politicians had adopted in service of their xenophobic anti-cannabis propaganda around the turn of the 20th century. *See* Nicole Neri, *Marijuana, Cannabis Hemp: Why Minnesota Is Choosing Its Words Carefully*, MPR NEWS (Mar. 18, 2024, 4:00 A.M.), https://www.mprnews.org/story/2024/03/18/marijuana-cannabis-hemp-why-minnesota-is-choosing-its-words-carefully.

Today's legal landscape is unrecognizable to that which existed decades ago. At the federal level, the 2018 Farm Bill removed hemp from the federal schedule, making cannabis with a tetrahydrocannabinol ("THC") level of 0.3% or less on a dry weight basis no longer a controlled substance. *See* AGRICULTURE IMPROVEMENT ACT, PUB. L. 115-334 (2018). The 2018 Farm Bill expressly allowed states and tribal governments to regulate hemp (i.e., low-THC cannabis) and hemp production and included provisions to ensure the "free flow" of hemp in interstate commerce, transforming hemp-based cannabis products from controlled substances to an agricultural commodities whose production is now widely promoted for its economic value.

In 2014, Minnesota passed medical cannabis legislation that paved the way for residents to legally use cannabis as a treatment for qualifying medical conditions as regulated by the state and tribal governments. *See* 2014 MINN. LAWS, ch. 311, S.F. No. 2470. In doing so, the State explicitly recognized the significant medicinal value of cannabis as a treatment for numerous conditions and appropriated millions of dollars for further cannabis-related medical research. *See, e.g.*, *id.* at § 21.

Then in 2023, Minnesota enacted sweeping legislative reforms to decriminalize adult-use cannabis wholescale and promote its commercial and economic value. The Cannabis Finance and Policy Bill, H.F. 100, went into effect August 1, 2023. As part of its enactment, the Office of Cannabis Management was created to develop and implement robust operational and regulatory systems to oversee the cannabis industry in Minnesota. *See* MINN. STAT. § 342.02. Possession of up to two ounces of cannabis in public or up to two pounds at home was decriminalized. *See* MINN. STAT. § 342.09. It also became legal for individuals to grow

up to eight cannabis plants, and gifting cannabis became legal too. *Id.* Cannabis sales now are governed by regulatory and licensing frameworks managed by the state and tribal governments. *See, e.g.*, MINN. STAT. § 342.01 *et seq.*; *see also infra* Part I.D. The statute also provides for voluntary compact negotiations between the state and tribal governments, stating:

> The state of Minnesota acknowledges the sovereign right of Minnesota Tribal governments to regulate the cannabis industry and address other matters of cannabis regulation related to the internal affairs of Minnesota Tribal governments or otherwise within their jurisdiction, without regard to whether such Tribal government has entered a compact authorized by this section.

MINN. STAT. § 342.09.

Given this expansive legislative about-face, the factual predicates on which this Court's prior precedents found "marijuana" possession to be criminal/prohibitory no longer exist. Cannabis possession today is a civil/regulatory matter over which the State lacks Public Law 280 jurisdiction.

C. The Conduct at Issue in This Case — Whether Analyzed Under **Stone** *Broadly as "Cannabis Possession" or Narrowly as "Possession of More Than Two Pounds of Cannabis Flower" — Is Generally Permitted Civil/Regulatory Conduct.*

Following the expansive legalization of adult-use cannabis and development of robust state and tribal regulatory regimes, there can be little doubt that the conduct at issue in this case is civil/regulatory. This is true whether the Court's analysis, under *Cabazon Band* and *Stone*, is of the broader conduct of "cannabis possession" or the narrower conduct of "possession of more than two pounds of cannabis flower."[7] Cannabis possession is generally

[7] The District Court framed the narrow conduct in this case as "possession [sic] non-personal, non-recreational amounts of marijuana in public," Add. 39, but such a definition reliant on multiple negatives does not define what the conduct is. The District Court's

permitted, subject to a complex regulatory framework in which the amounts and forms of cannabis that may be possessed have regulatory limits, for example, based on location, storage, age, medical authorization, and permitting by state or tribal governments. Mr. Thompson maintains that this case does not present the kind of "substantially different or heightened public policy concerns" that, under *Stone*, would necessitate this Court shifting from its default analysis of the broad conduct to the narrow conduct at issue. *See Stone*, 572 N.W.2d at 730. But even assuming *arguendo* that the narrower conduct should be the focus of this Court's analysis, possession of more than two pounds of cannabis flower is not categorically prohibited, but permitted subject to the regulatory regimes established by the State, as well as the White Earth Band.

In contrast to the conduct alleged here, Minnesota courts applying *Cabazon Band* and *Stone* have found that the State has jurisdiction over matters involving conduct which is categorically prohibited, often involving particularly or even inherently dangerous activities such as driving while intoxicated. *See, e.g.*, *State v. Couture*, 587 N.W.2d 849 (Minn. App. 1999) (Minnesota has P.L. 280 jurisdiction to enforce laws penalizing driving while under the influence, as the purpose is not to regulate driving after consumption, but to "prohibit all driving while under the influence"); *see also State v. Losh*, 755 N.W.2d 736 (Minn. 2008) (Minnesota has P.L. 280 jurisdiction to enforce driving after revocation offense where underlying basis for revocation was driving while impaired); *State v. Busse*, 644 N.W.2d 79 (Minn. 2002) (Minnesota has P.L. 280 jurisdiction to enforce driving after cancellation as

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definition is not only untethered from the statutory framework, and the specific offense with which Mr. Thompson is charged, but so imprecise as to be meaningless and thus unworkable.

inimical to public safety offense arising after three prior incidents of impaired driving); *Bray v. Commissioner of Public Safety*, 555 N.W.2d 757 (Minn. App. 1996) (Minnesota has P.L. 280 jurisdiction to enforce implied consent law because Minnesota does not merely seek to regulate driving while intoxicated, it categorically prohibits such conduct). Likewise, Minnesota courts have found the State has Public Law 280 jurisdiction to enforce predatory offender registration statutes, *State v. Jones*, 729 N.W.2d 1 (Minn. 2007), felon-in-possession of a firearm statutes, *State v. Roy*, 761 N.W.2d 883 (Minn. App. 2009), and statutes criminalizing consumption of alcohol by minors, *State v. Robinson*, 572 N.W.2d 720 (Minn. 1997), all of which involve conduct categorically prohibited by the State due to the particular and significant public safety threats posed.

Where, as here, the conduct at issue is generally permitted and subject to licensure requirements and regulations, however, the State lacks jurisdiction over the on-reservation conduct of tribal members. *See, e.g.*, *Seminole Tribe of Fla. v. Butterworth,* 658 F.2d 310 (5th Cir. 1981) (state lacks jurisdiction to enforce statute criminalizing bingo gaming for non-charitable purposes), *cert. denied* 455 U.S. 1020 (1982); *Twenty-Nine Palms Band of Mission Indians v. Wilson*, 925 F. Supp. 1470 (C.D. Cal. 1996) (state lacks jurisdiction to regulate boxing following its decriminalization), *vacated due to passage of federal legislation preempting state regulations*, 156 F.3d 1239 (9th Cir. July 30, 1998); *State v. Johnson*, 598 N.W.2d 680 (Minn. 1999) (Minnesota lacks jurisdiction to enforce laws requiring proof of insurance and prohibiting driving after revocation for failure to produce insurance); *Stone*, 572 N.W.2d 725 (Minnesota lacks jurisdiction to enforce driving statutes criminalizing the failure to provide motor vehicle insurance, proof of insurance, driving with an expired registration, driving without a license,

driving with an expired driver's license, speeding, driving with no seat belt, and failure to have a child in a child restraint seat); *cf. Bryan*, 426 U.S. 373 (Minnesota lacks jurisdiction to impose taxes on tribal members within the exterior boundaries of the reservation); *Morgan v. 2000 Volkswagen*, 754 N.W.2d 587 (Minn. App. 2008) (Minnesota lacks jurisdiction to effectuate the forfeiture of a vehicle owned by a tribal member for conduct occurring on the owner's reservation).

This is not a close case, and thus Mr. Thompson maintains the inquiry should end there. Cannabis possession, even in quantities more than two pounds, is not a "serious breach[] in the social fabric which threaten[s] grave harm to persons or property." *See Stone*, 572 N.W.2d at 730. It is a generally permitted civil/regulatory matter over which the State lacks jurisdictional authority under Public Law 280. Accordingly, the District Court's decision should be reversed and the State barred from further prosecuting Mr. Thompson.

D. Public Policy Concerns Weigh Heavily in Favor of Finding the State Lacks Jurisdiction to Criminalize Cannabis Possession.

Should this Court inquire further into the public policy considerations outlined in *Stone*,[8] they too militate in favor of finding the statute at issue in this case is civil/regulatory in nature. First, the passage of the Cannabis Finance and Policy Bill reflects the State's clear agreement that possession of cannabis is neither an inherently dangerous activity nor one of particular public policy concern requiring categorical prohibition or criminalization. Nor does

[8] Mr. Thompson recognizes this Court is bound by *Stone*. To the extent *Stone* and its progeny have interpreted the *Cabazon Band* shorthand "public policy" inquiry to function as an additional hurdle for tribal members challenging the imposition of State regulatory authority under *Cabazon Band*, Mr. Thompson preserves here his argument such decisions were wrongly decided.

cannabis possession, even in quantities more than two pounds, "directly threaten[] physical harm to persons or property or invade[] the rights of others." *See Stone*, 572 N.W.2d at 730. Indeed, the District Court found that "Thompson's act did not directly threaten physical harm to other [sic] or property or invade the rights of others." Add. 39.

Second, cannabis possession is generally permitted, subject to regulatory limits on amount, storage, location, age, medical authorization, and permitting by the State and tribal governments. *See supra* Part I.B-C. While possession of larger amounts of cannabis remains criminal under certain circumstances, commercial distribution of large amounts of cannabis is allowed, pursuant to regulatory and licensing schemes. Third, the statutory offense in this case is a crime that carries a maximum penalty of five years, a $10,000 fine, or both. Although this factor may cut against a finding the statute civil/regulatory, it should carry little relative weight in light of the broader context of Minnesota's legislative reforms and the tribal sovereignty interests at stake. The new legislation reflects not only an acknowledgment of the important value of cannabis for medicinal, therapeutic, and recreational purposes, but the significant harms caused by the criminalization of cannabis.[9]

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[9] Cannabis legalization in Minnesota was prompted as a response to "staggering statewide racial disparities in marijuana enforcement." *See, e.g.*, *Racial Disparities Persist in Marijuana Enforcement, Even After Legalization*, MINN. ACLU (Feb. 5, 2020, 12:45 P.M.), *available at* https://www.aclu-mn.org/en/news/racial-disparities-persist-marijuana-enforcement-even-after-legalization; Tim Walker, *Recreational Cannabis Bill Passes House in Historic Vote*, MINN. H.R. SESS. DAILY (May 13, 2021, 11:11 P.M.), https://www.house.mn.gov/sessiondaily/Story/15961 (quoting statements of bill sponsor, then-House Majority Leader Ryan Winkler, urging his colleagues to view cannabis legalization "through the lens of racial equality," noting that "Cannabis prohibition in Minnesota has been a failure. The criminal penalties associated with cannabis prohibition have been unfairly applied to communities of color, especially Black Minnesotans"). In recognition of the harms caused by the State's legacy of grossly disparate enforcement, the Office of Cannabis Management—created as part of Minnesota's sweeping statutory reforms legalizing

This Court should set aside the Distrct Court's other clearly erroneous findings in assessing the *Stone* public policy considerations. *See* MINN. R. CIV. P. 52.01. The District Court claimed that Mr. Thompson had a "high degree of blameworthiness" for possessing cannabis "in a tobacco shop where those over 18 but under the required age of 21 would have had access." *See* Add. 40. This conclusion is not only factually speculative, but legally erroneous. The federal minimum age for tobacco purchase was increased from eighteen to twenty-one in 2019,[10] and Minnesota followed suit a year later. *See, e.g.*, 21 U.S.C. § 387f(d)(5) (2019); MINN. STAT. § 609.685 (2020). Thus, persons younger than twenty-one cannot enter tobacco products shops in Minnesota. MINN. STAT. § 144.4167, subd. 4. The District Court also found that "[t]he sheer quantity possessed, the cash confiscated, the baggies, scales, and the arrangement of the marijuana in the shop are suggestive of additional blameworthiness," Add. 40, although nothing in the record or in the District Court's analysis explains how these alleged facts are "suggestive of additional blameworthiness" or otherwise inconsistent with the operation of a commercial business. Similarly, the District Court concluded that "these facts along with the tip received by law enforcement in July 2023 show that Thompson's conduct predated the August 1, 2023, effective date of the Act thereby increasing his blameworthiness." Add. 40. But there was no July 2023 tip — it simply does not exist in the record. *See also supra*

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cannabis—has a Division of Social Equity "charged with . . . administering grants to communities that experienced a disproportionate, negative impact from cannabis prohibition . . . ." *Division of Social Equity Overview*, MINN. OFFICE OF CANNABIS MANAGEMENT (last visited Jan. 8, 2024), https://mn.gov/ocm/socialequity/social-equity-overview.jsp.

[10] It is worth noting that unlike in the cases of alcohol and tobacco, which do not have recognized medicinal benefits, minors may legally consume cannabis if they are medically authorized and registered in a medical cannabis program regulated by the State or a tribal government. *See* MINN. STAT. §§ 152.22 *et seq.*

note 2. Mr. Thompson's conduct did not predate August 1, 2023, nothing in the record suggests that he did, nor has the State ever made any such allegation.

Finally, while not an explicit public policy factor identified in *Stone*, "concern for protecting Indian sovereignty from state interference" should lead this Court "to resolve any doubts about the statute's purpose in favor of [Mr. Thompson]." *See Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992). The White Earth Band unequivocally has exercised its authority — by virtue of its inherent sovereignty, the treaties between Ojibwe peoples and the United States, and the Minnesota Chippewa Tribe (MCT) Constitution — to regulate cannabis. *See also* MINN. STAT. § 342.09 ("The state of Minnesota acknowledges the sovereign right of Minnesota Tribal governments to regulate the cannabis industry and address other matters of cannabis regulation related to the internal affairs of Minnesota Tribal governments or otherwise within their jurisdiction, without regard to whether such Tribal government has entered a compact authorized by this section."). Cannabis possession, including possession in amounts greater than two pounds, is a matter explicitly regulated by the White Earth Band. *See generally* WHITE EARTH BAND OF THE MINNESOTA CHIPPEWA TRIBE ADULT-USE CANNABIS CODE, *available at* https://www.whiteearth.com/divisions/judicial-services/codes-ordinances; *see also id.* at §1.01, subd. 4 ("After serious deliberation, the White Earth Band has determined that Adult-use Cannabis is an appropriate subject to exercise the Band's sovereignty."); *id.* at §1.01, subd. 2 ("The White Earth Band of the Minnesota Chippewa Tribe . . . regulates cannabis within the exterior boundaries of the White Earth Reservation.").

Chapter Four of the White Earth Band Adult-Use Cannabis Code, in particular, establishes a regulatory framework for licensing of facilities and persons under the Adult-Use Cannabis Program. *Id.* at § 4.01-4.04. And Chapter Three provides for enforcement of the Adult-Use Cannabis Code by the White Earth Band's Medicinal Cannabis Control Commission, with enforcement decisions appealable to the White Earth Tribal Court. *Id.* at §§ 3.01-3.03. Similarly, the White Earth Band regulates the conduct of limited liability companies, with enforcement actions heard by the White Earth Tribal Court. WHITE EARTH BAND OF THE MINNESOTA CHIPPEWA TRIBE LIMITED LIABILITY COMPANY CODE § 702, *available at* https://www.whiteearth.com/divisions/judicial-services/codes-ordinances.

In fact, the State acknowledged in its brief to the District Court that it views Mr. Thompson's alleged conduct as criminal only because he failed to obtain the appropriate permit from the White Earth Band. *See* Add. at 22 (arguing that Mr. Thompson "did not have a license, or even an application filed with the White Earth Indian Reservation to sell marijuana products as required by Minnesota's newly enacted Statute"); *id.* at 27 (stating that Mr. Thompson "is . . . educated enough to understand that the newly enacted Minnesota marijuana laws require licensure and regulations"); *id.* at 28 (arguing that Mr. Thompson's alleged possession of cannabis was not "in compliance with the regulations set forth by the law").

Whether Mr. Thompson was properly permitted by White Earth, in compliance with the Band's licensure requirements, or otherwise in violation of the Band's Cannabis Code (and

if so what consequences he should face) are all regulatory matters for the White Earth Band to address.[11]

This Court granted discretionary review of Mr. Thompson's petition, in part, because "a decision on the jurisdiction of the state to enforce Minnesota's cannabis-possession laws and on the extent of the rights reserved under applicable treaties will have an immediate statewide impact on all Tribes in Minnesota subject to Public Law 280 and on their members." *See Thompson*, 2025 WL 1419945 at *3.

> As Thompson describes, since the effective date of Minnesota's legislation regarding adult-use cannabis, Minnesota's Tribes and Tribal members have become involved in the cannabis trade: Across northern Minnesota . . . White Earth, and Leech Lake were first to enter the adult-use cannabis markets. The Prairie Island Indian Community, a Mdewakanton Reservation north of Red Wing, opened a store in June 2024, as well as a cultivation facility and their own flower brand. The Fond du Lac Band is building an 18,000-square-foot manufacturing facility in Brookston, and the tribally-owned Mille Lacs Corporate Ventures is set to open a 50,000-square-foot cultivation facility later this year.

Id.

If affirmed, the District Court's opinion in this case will undermine the sovereignty of tribal governments and the rights of their members and sow uncertainty in the cannabis

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[11] The MCT Constitution provides that "[a]ll members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and *equal opportunities to participate in the economic resources and activities of the Tribe*, and no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law." *See* MINN. CHIPPEWA TRIBE CONST., art. XIII (emphasis added). Whether or not the conduct at issue in this case is protected under article XIII of the MCT Constitution, for example, is a matter the White Earth Tribal Court can and should decide.

regulatory landscape. While state interference with tribal sovereignty is harmful in its own right, specific examples highlight particularly perverse results. For example, if a tribal member is licensed and permitted by White Earth to purchase, cultivate, distribute, and/or sell cannabis, or finance such activities, and inadvertently fails to renew their license,[12] are they suddenly subject to an exercise of criminal jurisdiction by the State? If White Earth were to grant Mr. Thompson such a license, retroactive to August 1, 2023, would the State lose criminal jurisdiction over this case? Does the State have criminal jurisdiction over a tribal member on their own reservation who possesses two pounds and one joint of cannabis, and then lose jurisdiction entirely once the joint is smoked?

Such results reflect the absurdity of the State's position that the conduct at issue in this case is anything other than civil/regulatory and thus left to the jurisdiction of tribal governments under Public Law 280. Recognizing sovereignty and repairing past harms are explicit goals of the Cannabis Finance and Policy Bill, and it is the task of this Court to correct the District Court's errors and ensure the legislative intents of both the Minnesota Cannabis Finance and Policy Bill and Congress' Public Law 280 are not now impeded. Cannabis possession is civil/regulatory and the State lacks jurisdiction under Public Law 280 to prosecute Mr. Thompson, an enrolled White Earth Band member, for allegedly possessing cannabis on his own reservation in a manner out of compliance with the White Earth Band's regulatory scheme.

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[12] Under the White Earth Adult-Use Cannabis Code, "[a]ll temporary Licenses expire after one year, and all final Licenses expire after two years, and must be renewed every two years thereafter." WHITE EARTH BAND OF THE MINNESOTA CHIPPEWA TRIBE ADULT-USE CANNABIS CODE, *supra*, at § 4.01, subd. 5.

II. Prosecution of Mr. Thompson Violates the Treaty-Reserved Rights of Ojibwe Peoples to Harvest, Possess, and Use Culturally, Spiritually, and Medicinally Significant Plants as Asemaa.

A. Treaties Must Be Interpreted As Indigenous Signatories Would Have Understood Them and Construed Liberally with All Ambiguities Resolved in Favor of Indigenous Signatories.

As part of the genocidal[13] invasion of what is now called the United States, European colonizers entered into treaties with the Indigenous peoples they encountered. Later, the United States followed suit. Treaty-making served as a way to legitimize the taking of Indigenous land and resources, and the treaties themselves were typified by coercion, misrepresentation, and false promises. The numerous treaty negotiations between the United States and various configurations of Ojibwe governments,[14] for example, involved the use of

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[13] Use of the word "genocidal" to reflect the relationship between settler-colonizers and Indigenous peoples is intentional and not hyperbolic. The Holocaust Museum in Houston gives a cursory overview of this genocide as follows:

> When European settlers arrived in the Americas, historians estimate there were over 10 million Native Americans living there. By 1900, their estimated population was under 300,000. Native Americans were subjected to many different forms of violence, all with the intention of destroying the community. In the late 1800s, blankets from smallpox patients were distributed to Native Americans in order to spread disease. There were several wars, and violence was encouraged; for example, European settlers were paid for each Penobscot person they killed. In the 19th century, 4,000 Cherokee people died on the Trail of Tears, a forced march from the southern U.S. to Oklahoma. In the 20th century, civil rights violations were common, and discrimination continues to this day.

Genocide of Indigenous Peoples, HOLOCAUST MUSEUM OF HOUSTON, https://hmh.org/library/research/genocide-of-indigenous-peoples-guide/ (last visited Apr. 24, 2022)

[14] Colonizers did not understand the nonhierarchical structures of government they encountered, including regional networks of autonomous villages with collaborative decision-making structures involving multiple chiefs making local and regional decisions as a counsel. As a result, United States officials decided that various geographically proximate but distinct communities could be negotiated with as a "band," with any one representative from that

translators who intentionally mistranslated the terms of agreements; negotiators who did not represent all of the people from whom the treaties purported to take land and rights; promises of annuity payments that went undelivered, underdelivered, or paid to settler trading posts to settle fabricated debts; and coercive circumstances resulting from physical violence, land intrusions, disruption of traditional economies and food sources, starvation, and disease. *See* TRUER, *supra* note 1, at 41-55, 99-102, 111, 118, 127.

Yet the very existence of these treaties also belies the fact that European nations, and later the United States, recognized the inherent sovereignty of Ojibwe peoples and their rights to the land, water, and natural resources settlers sought to commandeer. *See Herrera v. Wyoming*, 587 U.S. 329, 345 (2019). Indigenous peoples would not have needed treaties, nor any other formal acknowledgement of their sovereignty, but for the attempts of settler-colonizers to erase it. Thus, grants of rights and authorities flowed from the sovereign Indigenous peoples to the United States government. *See, e.g.*, *United States v. Winans*, 198 U.S. 371, 381 (1905) (Treaties are "not a grant of rights *to* [Indigenous peoples], but a grant of rights *from* them, [as well as] a *reservation of those rights not granted*." (emphasis added)). Due to the nature of these treaties, they listed only those rights that a sovereign tribe relinquished to the United States, not those they retained. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968); *see also Herrera*, 587 U.S. 329; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd sub nom. Washington v. United States*, 138 S.Ct. 1832 (2018); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

"band" having unilateral authority to enter treaties on behalf of everyone within the region. *See, e.g.*, PETER ERLINDER, THE ANISHINAABE NATION'S 'RIGHT TO A MODEST LIVING' FROM THE EXERCISE OF OFF-RESERVATION USUFRUCTUARY TREATY RIGHTS 14-15 (2010).

In recognition of the context in which most treaties between the United States and Indigenous peoples were signed, the United States Supreme Court has made clear that reviewing courts must take particular care when seeking to determine the meaning and effect of those treaties. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES, 4th Ed. (2012) (cataloguing the Supreme Court's "canons of treaty construction"); *see also State v. Keezer*, 292 N.W.2d 714 (Minn. 1980) (recognizing the canons of treaty construction).[15] A reviewing court must "look beyond the written words to the larger context that frames the treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *See Mille Lacs Band*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). Treaties must be interpreted "liberally, resolving uncertainties in favor of the Indians." *United States v. Brown*, 777 F.3d 1025, 1031 (8th Cir. 2015); *see also Mille Lacs Band*, 526 U.S. at 200 (citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908), and *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979)); *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 199 (W.D. Wis. 1996) (noting "the important lesson that ambiguities in treaties are often subtle and not obvious to modern readers"). A reviewing court must "give effect to the terms as the Indians themselves would have understood them." *See Mille Lacs Band*, 526 U.S. at 196; *see also Jones v. Meehan*, 175 U.S. 1, 10 (1899); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Herrera*, 587 U.S. at 349.

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[15] Mr. Thompson recognizes that the Minnesota Supreme Court in *Keezer* limited the application of the canons of construction to land cession treaties. Because the treaties at issue in this case are land cession treaties, the canons apply regardless. But to the extent this Court may find otherwise, Mr. Thompson preserves here his assertion that *Keezer* was wrongly decided and should be overturned.

Treaty interpretation is a matter of law reviewed *de novo*. *See Richard v. United States*, 677 F.3d 1141, 1144-45 (Fed. Cir. 2012); *see also State v. Northrup*, No. A19-0130, 2019 WL 6838485, *4 (Minn. App. Dec. 16, 2019).

B. Ojibwe Signatories Would Have Understood the 1855 Treaty as Retaining the Right to Continue Harvesting, Possessing, and Using Plants as Asemaa.

In 1825, the United States signed a treaty with the "Sioux and Chippewa, Sacs and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, [and] Potawattomie[] Tribes" who controlled territory not held, bought, or otherwise owned by the United States. *See* TREATY WITH THE SIOUX, ET AL., Aug. 19, 1825, 7 Stat. 272 ("1825 TREATY"). The 1825 Treaty created boundaries which both the United States and tribal signatories agreed to recognize. *See id.* In particular, the 1825 Treaty established the Prairie du Chien boundary line, north of which was recognized as Ojibwe territory. *See id.*

In the years that followed, Ojibwe peoples entered treaties incrementally ceding this land to the United States, eventually ceding all but the small tracts of land expressly set aside as reservations. *See, e.g.*, TREATY WITH THE CHIPPEWA, July 29, 1837, 7 Stat. 536 ("1837 TREATY"); TREATY WITH THE CHIPPEWA, Oct. 4, 1842, 7 Stat. 591 ("1842 TREATY"); TREATY OF WASHINGTON, Feb. 22, 1855, 10 Stat. 1165 ("1855 TREATY").

Notably, the treaties between the United States and Ojibwe reaffirmed the former's recognition of the latter's sovereignty beyond what was implicit in the act of treaty-making itself. For example, in granting mineral rights from Ojibwe peoples to the United States, the 1826 Treaty stated that this grant did "not . . . affect the title of the land, nor the existing jurisdiction over it," which remained that of the Ojibwe. *See* TREATY WITH THE CHIPPEWA, Aug. 5, 1826, 7 Stat. 290 ("1826 TREATY"). Similarly, the 1842 Treaty affirmed that "the whole

country between Lake Superior and the Mississippi" had "always been understood as belonging in common to the Chippewas" and that all unceded lands continued to be held in common by the Ojibwe Bands. *See* 1842 TREATY.

The land that would later become the White Earth Reservation was first ceded by Ojibwe peoples to the United States in the 1855 Treaty. *See* 1855 TREATY. In exchange for millions of acres of land in what is now northern Minnesota,[16] the United States offered token annuities to the Ojibwe signatories. *See id.* The 1855 Treaty by its own terms conveyed "right, title, and interest" in the ceded territory. *See id.* But this general language would not have been understood to relinquish the usufructuary rights of Ojibwe signatories, including the right to continue the culturally, spiritually, and medicinally significant uses of plants as asemaa. *Accord. Brown*, 777 F.3d at 1028-29; *cf. Mille Lacs Band*, 526 U.S. at 194 (The 1855 Treaty is "devoid of any language expressly mentioning — much less abrogating — usufructuary rights").

According to the 1855 treaty journal, Ojibwe negotiators expressed their understanding of the limited terms they were negotiating as follows:

> [T]he Chippewa chiefs understood the United States to have a straightforward goal. In the words of Flatmouth, chief of the Pillager band residing near Leech Lake, "It appears to me that I understand what you want, and know your views from the few words I have heard you speak. You want land."

Brown, 777 F.3d at 1028. Also of note, and in contrast to other treaty negotiations between the United States and Ojibwe, the 1855 treaty journal includes "no record of a discussion of

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[16] The territory ceded in the 1855 Treaty encompasses the region between the Snake, Mississippi, East Savannah, St. Louis, East Swan, Vermillion, Big Fork, Rainy Lake, Black, Wild Rice, Red, Buffalo, Leaf, and Crow Wing Rivers, as further enclosed by a few straight lines, the 1837 Treaty border, and the shorelines of several lakes. *See* 1855 TREATY.

usufructuary rights, and the treaty is silent on that subject." *Id.* As the Eighth Circuit found in concluding the rights to net and sell fish were reserved on the Leech Lake Reservation in the 1855 Treaty, "the silence regarding usufructuary rights in the 1855 treaty and the negotiations leading up to it suggest that the Chippewa Indians did not believe they were relinquishing such rights." *Id.* at 1031; *see also Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971) ("We start with the undisputed premise that at the time of the passage of the Nelson Act in 1889, the Indians possessed unrestricted hunting and fishing rights on the reservation. These rights, while perhaps in fact dating back many years to an aboriginal right were established in law by treaty with the United States in 1855, 1864, and 1867."); *State v. Jackson*, 16 N.W.2d 752 (Minn. 1944) ("So far as treaty provisions are concerned, it is conceded that the [1855 Treaty] contains no express reservation by the Indians of the right to hunt and fish upon their reservation. But such saving clause would have been superfluous, as the treaty was not a grant of rights to the Indians, but a grant of rights from them-a reservation of those not granted. The ancient and immemorial right to hunt and fish, which was not much less necessary to the existence of the Indians than the atmosphere they breathed, remained in them unless granted away." (internal quotations and citations omitted)).

So too, the Ojibwe signatories to the 1855 Treaty would not have understood its provisions to relinquish their rights to the medicinal, cultural, and spiritual uses of asemaa, particularly on their own reservation territories. *Brown,* 777 F.3d at 1031 (describing the "general rule" that Indigenous signatories enjoy exclusive treaty rights "on lands reserved to them and these rights need not be expressly mentioned in the treaty" (quoting *United States v. Dion*, 476 U.S. 734, 738 (1986))). Asemaa is a sacred medicine given to Ojibwe peoples by the

Creator that is used in everyday life, as well as during ceremonies, as an offering or prayer. *See* Add. 15-17. Asemaa is commonly referred to as "tobacco" or "traditional tobacco," and may contain dried tobacco plant itself and/or a mixture of different plants. *Id.* An older form of asemaa made with the inner, light green layer of inner bark of the red willow predates the transfer of tobacco plant to the Ojibwe, and is still used today instead of or in addition to tobacco. *Id.*

The ceremonial use of asemaa is "foundational to Anishinaabe history and culture." Add. 15 (citing *The Importance of Tobacco (Asemaa)*, SEVEN GENERATIONS EDUCATION INSTITUTE (Jan. 30, 2024), *available at* https://www.7generations.org/the-importance-of-tobacco/). It is a way to "communicate with the spirit world, strengthen relationships, show respect, and provide an offering." *Id.* For example, "the act of passing a ceremonial pipe, or 'peace pipe,' symbolizes unity, respect, and the sharing of knowledge and experiences." *Id.* (citing *Our Story*, WAABIGWAN MASHKIKI, https://waabigwan.com/our-story/).

Anishinaabe signatories would not have understood the treaties to involve relinquishing such culturally and spiritually significant practices. In fact, tobacco provisions were frequent terms of the treaties themselves. The 1837 Treaty, for example, promised to the Ojibwe signatories provision of $500 in tobacco, while the 1855 Treaty promised $100 worth of tobacco per year for five years. Ceremonial asemaa also was likely involved in the making of the treaties themselves. *See* Add. 16 (citing *Ceremonial Use of Tobacco*, Milwaukee Public Museum, https://www.mpm.edu/content/wirp/ICW-166).

C. The Reserved Right to Harvest, Possess, and Use Plants as Asemaa Today Extends to Cannabis Plants.

The method of exercising a treaty-reserved right is not static, but evolves in modern times. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1430 (W.D. Wis. 1987); *see also Washington*, 384 F. Supp. at 402 (recognizing that the exercise of reserved rights evolves in modern times); Peter Erlinder, *State of Minnesota v. Mille Lacs Band of Chippewa Indians, Ten Years On*, 41 ENV. L. R. 10921 (Oct. 2011). Just as asemaa practices had evolved to include use of the tobacco plant by the time of treaty signing, asemaa practices today have evolved to include the use of the cannabis plant.

> In Anishnaabe culture, smoking tobacco is often accompanied by ceremonial rituals and prayers, symbolizing a connection to the natural world and the spirit realm. The smoke from burning tobacco is believed to carry prayers and intentions to the heavens, fostering a sense of community and collective healing. At Waabigwan Mashkiki, we honor the traditional act of smoking as a sacred ritual that brings people together in harmony with nature and the universe. Whether shared among friends or enjoyed in solitude, the act of smoking cannabis is a celebration of community, connection, and the timeless wisdom of indigenous cultures.

See, e.g., Add. 16-17 (quoting *Our Story*, *supra*).

The legal recognition of cannabis as both a valuable agricultural commodity and significant medicinal treatment only further strengthens Mr. Thompson's argument that cannabis possession is part of his treaty-reserved right to asemaa practices. *See supra* Part I.B. A review of the subsequent Treaty of 1867 further makes clear that in creating the White Earth reservation within the 1855 Treaty territory, agricultural improvements and pursuits were not only explicitly contemplated, but a central component of the agreement. *See* TREATY WITH THE CHIPPEWA, Mar. 19, 1867, 16 STAT. 719. And both traditional tobacco and cannabis are

now recognized as important ways to address the poor health outcomes in American Indian communities stemming from the ongoing violence of colonization. *See* Add. 17.

Treaty rights are not static, and as the role of cannabis as an agricultural commodity, medical treatment, and recreational substance has evolved in Minnesota more broadly, so too has it evolved to become a part of the reserved rights of Ojibwe peoples to engage in asemaa practices. *See, e.g.*, *Lac Courte Oreilles Band*, 653 F. Supp. at 1430 ("Plaintiffs are not confined to the hunting and fishing methods their ancestors relied upon at treaty time. The method of exercise of the right is not static."); *United States v. Bresette*, 761 F. Supp. 658 (D. Minn. 1991) (treaty-reserved rights included participation in modern commerce).

D. The Rights Reserved by Ojibwe Signatories to the 1855 Treaty Belong to Mr. Thompson as a White Earth Band Member.

In holding that cannabis possession is not a treaty-reserved right retained by Mr. Thompson, the District Court claimed that such rights "belong to the Tribe as a whole and not to any individual member." Add. 41. This assertion is wrong. It is well-settled that an individual tribal member may assert a treaty-reserved right as a bar to criminal prosecution. *See, e.g.*, *Brown*, 777 F.3d at 1032; *see also Dion*, 476 U.S. at 738 n.4 (Hunting and fishing "treaty rights can be asserted by Dion as an individual member of the Tribe."); *Winans*, 198 U.S. at 381 (While "the negotiations were with the tribe," treaties "reserved rights, however, to every individual Indian, as though named therein."); *Jackson*, 16 N.W.2d at 757 ("[T]he fact that defendant had no allotment of his own did not defeat his right to claim immunity from prosecution under the state laws for shooting game upon the trust allotment of another Indian within the limits of his reservation.").

Particularly instructive is the case of *Tulee v. State of Washington*, 315 U.S. 681 (1942). In that case, Tulee had been convicted in the Washington state court system on a charge of catching salmon without a license. *Id.* at 682. The State claimed that because Tulee was off-reservation, but within the treaty-ceded territory, Tulee did not have the right to exercise reserved usufructuary rights in violation of state law. *Id.* at 683-84. The United States Supreme Court, however, held otherwise, finding that a properly broad construction of the relevant treaties prohibited the state from criminalizing Tulee in that case even for off-reservation conduct. *Id.* at 684-85.

Like Tulee, the State alleges Mr. Thompson did not have the proper permit to possess more than two pounds of cannabis. And like Tulee, Mr. Thompson's treaty-reserved rights preclude his prosecution in state court. The rights reserved by the Ojibwe signatories to the 1855 Treaty to culturally, spiritually, and medicinal significant uses of plants as asemaa, the modern exercise of which includes possession of the cannabis plant, extend to Mr. Thompson. As a White Earth Band member, Mr. Thompson enjoys the treaty-reserved right to possess cannabis which precludes his prosecution in this case.

CONCLUSION

For the foregoing reasons, Appellant Todd Jeremy Thompson asks this Court to reverse the District Court's decision and bar further prosecution of this case.

Respectfully Submitted,

Claire Nicole Glenn (she/her)
Staff Attorney
Climate Defense Project
P.O. Box 7040
Minneapolis, MN 55407
651-343-4816
claire@climatedefenseproject.org
License No. 0402443

ATTORNEY FOR APPELLANT

Date: July 25, 2025