A25-0527

STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Todd Jeremy Thompson,

Appellant.

APPELLANT'S REPLY

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ARGUMENTS IN REPLY

The State in this case seeks to exercise its jurisdiction over a tribal member charged with possessing more than two pounds of cannabis flower on his own reservation. *See* MINN. STAT. 152.0263, subd. 1(1). White Earth Band member Todd Jeremy Thompson maintains that because cannabis possession is generally permitted in Minnesota, subject to various regulations and licensure requirements, the State lacks jurisdiction to criminalize his on-reservation conduct. *See California v. Cabazon Band of Indians*, 480 U.S. 202 (1987) (state lacks jurisdiction to enforce statute criminalizing on-reservation gambling); *Seminole Tribe of Fla. v. Butterworth,* 658 F.2d 310 (5th Cir. 1981) (state lacks jurisdiction to enforce statute criminalizing on-reservation bingo gaming), *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 enforce civil or criminal penalties pertaining to on-reservation boxing), *vacated due to passage of federal legislation preempting state regulations*, 156 F.3d 1239 (9th Cir. July 30, 1998); *see also State v. Stone*, 572 N.W.2d 725 (Minn. 1997). Cannabis possession (including possession of cannabis flower in amounts greater than two pounds) is a matter explicitly regulated by the White Earth Band. 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 Adult-Use Cannabis Code (and if so what consequences he should face) are all regulatory matters for the White Earth Band to address.

To justify its claim of Public Law 280 jurisdiction, the State in its brief advances what boils down to two arguments:[1] (1) the cannabis possession statute at issue is criminal/prohibitory because it is a criminal statute, *ipso facto*; and (2) the conduct at issue is "inherently dangerous." *See generally* Resp. Br. at 5-11.[2] Neither argument is meritorious.

First, Mr. Thompson does not dispute that the statute at issue is enforced with criminal penalties; that fact is the *starting premise* which occasions this Court's analysis under *Cabazon Band* and *Stone*. It is hardly the end of this Court's inquiry. *See, e.g.*, App. Br. at 11-25 (analyzing the statutory framework to assess whether the conduct at issue is generally prohibited or generally permitted pursuant to *Cabazon Band* and then applying the "public policy factors" identified in *Stone*).

Indeed, the State's assertion that the cannabis possession statute with which Mr. Thompson is charged is criminal/prohibitory because it is a criminal statute is the precise kind of *ipso facto* argument rejected by the United States Supreme Court in *Cabazon Band*:

> California argues, however, that high stakes, *unregulated* bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations. But 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. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted.

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[1] The State's brief fails to address Mr. Thompson's assertion that cannabis possession is a right retained by Ojibwe signatories to the 1855 Treaty with the United States, the second of two issues raised on appeal. On that issue, therefore, Mr. Thompson rests on the strength of his opening brief.

[2] The State's brief does not include page numbers. Accordingly, Mr. Thompson's pin citations refer to the page order of the State's electronically filed .pdf document.

480 U.S. at 211. The fact that possession of more than two pounds of cannabis flower is an offense enforced with criminal penalties does not undermine the factually inescapable—and legally controlling—conclusion that cannabis possession, including flower in amounts greater than two pounds,[3] is permitted rather than prohibited conduct subject to a variety of regulatory and permitting conditions.

Second, the State's conclusory assertions of inherent dangerousness are baseless, and the State offers no explanation to justify its claim. In fact, the sweeping reforms recently enacted by the Minnesota legislature reflect just the opposite: that cannabis possession is *not* the kind of inherently dangerous activity that requires categorical criminal prohibition. *See also Stone*, 572 N.W.2d at 730 (explaining that "[p]ublic criminal policy goes beyond merely promoting the public welfare . . . "to protect society from serious breaches in the social fabric which threaten grave harm to persons or property"). Nor does anything in the record suggest that possession of cannabis flower, even in amounts greater than two pounds, is inherently

[3] In its brief, the State attempts to make much of the allegation that cannabis concentrate, or "wax," was also recovered in the raid of Mr. Thompson's shop. *See* Resp. Br. at 4, 5, 9, 10. But Mr. Thompson was not charged with possession of cannabis concentrate; the issue presented here is whether the State has jurisdiction to enforce the statute with which Mr. Thompson was charged. *See, e.g.*, *State v. Reese*, No. CX-97-984, 1998 WL 88502, *2 (Minn. App. Mar. 3, 1998) (noting that Public Law 280 analysis is based on the charging statute, not whether the State "wisely or prudently" charged the conduct at issue). And in any event, the State's description of cannabis wax as "a known illegal product" is misleading at best—possession of cannabis concentrate, like cannabis flower, is generally permitted subject to regulations regarding amounts, with civil penalties for unlicensed sale and criminal penalties for unlicensed possession in amounts greater than the statutory limits. *See, e.g.*, MINN. STAT. § 342.09, subd. 1(a)(4); MINN. STAT. § 342.09, subd. 1(a)(6)(ii); MINN. STAT. § 342.09, subd. 6(c); MINN. STAT. § 152.0263, subd. 1(2).

dangerous.[4] To the contrary, the District Court expressly found that "Thompson's act did not directly threaten physical harm to other [sic] or property or invade the rights of others." Add. 39. The State's claim—that possession of cannabis flower suddenly goes from lawful to "inherently dangerous" when the scale tips from two pounds to more—is absurd.

The cases cited by the State in support of its claims are inapposite and reflect a misunderstanding of the basic legal principles at issue in this case. The State cites multiple cases, for example, which address prudential considerations of separations of power between different branches of state government and have nothing to do with exercises of state jurisdiction that may invade or infringe upon tribal sovereignty. *See, e.g.*, *Neighborhood Sch. Coal. v. Indep. Sch. Dist. No. 279*, 484 N.W.2d 440 (Minn. App. 1992), *rev. denied* (Minn. June 30, 1992); *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169 (Minn. App. 2009), *rev. denied* (Minn. Oct. 20, 2009); *see also* Resp. Br. at 6 (erroneously asserting that "Minnesota established and enacted Public Law 280").

Likewise, the State's reliance on *In re Beaulieu* is misplaced. First, that case involved a member of the Red Lake Band, to whom Public Law 280 does not apply. 737 N.W.2d 231 (Minn. App. 2007). Second, the *In re Beaulieu* decision was predicated on several key findings, none of which exist here:[5] (1) Red Lake did not have any laws or regulations allowing for the

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[4] Even if the State had identified some reason for its dangerousness concern, on this record it would be speculative at most. Furthermore, it is worth noting that the United States Supreme Court found in *Cabazon Band* that "the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime" did not justify an exercise of Public Law 280 jurisdiction. *Cabazon Band*, 480 U.S. at 221-222. Nor is there any reason to suspect the involvement of organized crime in this case. *Id.* at 221.

[5] Mr. Thompson questions whether *In re Beaulieu* was rightly decided. In that case, the Court concluded that a civil-regulatory law may be enforced by the State against a Red Lake

commitment of sexually dangerous persons and did not operate an inpatient sex-offender treatment facility to house and rehabilitate such individuals; (2) state jurisdiction over civil commitment of sexually dangerous persons would not interfere with the goals of encouraging tribal self-sufficiency and economic development; and (3) the state had a uniquely compelling interest in protecting the public from persons who have an uncontrollable impulse to sexually assault. *Id.* at 240. Similarly, *Bray v. Commissioner of Public Safety* is readily distinguishable.[6] 555 N.W.2d 757 (Minn. App. 1996). The *Bray* court found the State's exercise of jurisdiction justified because (1) Minnesota categorically prohibits driving while intoxicated, (2) there was no other forum than the state to address the issue, and (3) there was no particular tribal sovereignty interest at issue. *Id.* The other cases cited by the State are similarly unavailing, as they all involve inherently dangerous and categorically prohibited criminal conduct. *See State v. Jones*, 729 N.W.2d 1 (Minn. 2007) (predatory offender registration); *State v. Busse*, 644 N.W.2d 79 (Minn. 2002) (driving after cancellation as inimical to public safety after three prior incidents of impaired driving); *State v. Couture*, 587 N.W.2d 849 (Minn. App. 1999) (driving while under the influence).

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member because doing so was not preempted by federal law. This logic seems to create an exception that would swallow the rule of *Cabazon Band* and effectively nullify the distinctions drawn by Congress in Public Law 280, undermining "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency." *See Cabazon Band,* 480 U.S. at 216. In any event, for the reasons described above, the case is entirely inapposite.

[6] Mr. Thompson also notes that *Bray* was decided prior to *Stone* and thus the Court of Appeals in that case did not apply the complete analytical framework adopted by the Minnesota Supreme Court in *Stone*.

This case stands in stark contrast to those cited by the State in its brief. Cannabis possession is not only generally permitted in the State of Minnesota, subject to regulations and licensing, but it is expressly permitted, regulated, and licensed by the White Earth Band as an exercise of its sovereignty. *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. The Band has adopted extensive regulations governing, for example, licensure of facilities and persons under the Band's Adult-Use Cannabis Program as well as administrative enforcement and judicial review of enforcement decisions. *Id.* at §§ 3.01-3.03, 4.01-4.04. The State has made no claim that the Band, in its years of experience regulating medical cannabis, cannot also capably regulate adult-use cannabis. Nor has the State offered any explanation for why it believes it can and should wrest enforcement jurisdiction from the Band. The Minnesota legislature itself has recognized the sovereignty of Minnesota Tribal governments to regulate the cannabis industry, *see, e.g.* MINN. STAT. § 3.9228, subd. 2(a), and the significant tribal interests at stake are beyond dispute, *see State v. Thompson*, No. A25-0527, 2025 WL 1419945, *3 (Minn. App. May 13, 2025).

In fact, the State appears to agree that it views Mr. Thompson's alleged conduct as criminal only because he failed to obtain the proper license or permit from the White Earth Band. *See* Resp. Br. at 5-6 ("Appellant was educated to the laws and regulations necessary to operate his 'shop' on the Reservation and within the State of Minnesota as established by his maintenance of those license requirements."); *id.* at 10 ("The Appellant has a valid and regulated Tribal license to sell tobacco. The Appellant is educated enough to understand the

laws and regulations to open and operate an L.L.C. and to sell tobacco to the general public. The Appellant has a sufficient practical education to understand the newly enacted Minnesota marijuana laws require licensure and regulations as he didn't make his cannabis product available to the general public until after the cannabis legislation was enacted."); *id.* at 9 ("Minnesota's Public [sic] policy mandates strict and broad regulations pertaining to possession, including type and quantity of cannabis . . . . Both the criminal code and the newly enacted cannabis laws strictly regulate the use, possession and sale of cannabis . . . ."); *see also* 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").

Finally, the State incorrectly asserts, "[t]he Appellant's factual argument is that he was compliant with his business and tobacco licenses, but argues that he would have no such obligation for his possession and sale of cannabis." Resp. Br. at 10. This is false. Mr. Thompson merely asserts that it is not for the State to decide, regulate, or criminalize whether he has obtained the appropriate licensure or permits from the White Earth Band to possess more than two pounds of cannabis flower.

For the foregoing reasons and the reasons stated in Mr. Thompson's opening brief, this Court should reverse the District Court's decision and bar further prosecution of this case.

Respectfully Submitted,

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