UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, et al., Plaintiffs, v. County of Mille Lacs, Minnesota, et al., Defendants.	Case No. 17-cv-05155 (SRN/LIB) **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AWARDING DECLARATORY AND INJUNCTIVE RELIEF**

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I. INTRODUCTION

Plaintiffs submit this memorandum in support of their motion for summary judgment awarding Plaintiffs declaratory and injunctive relief. *See* Plaintiffs' Motion for Summary Judgment (June 16, 2022). Plaintiffs' motion is predicated on the Court's prior Memorandum Opinions and Orders dated December 21, 2020 (Doc. 217) and March 4, 2022 (Doc. 313). On the merits, the remaining questions in this case are: (1) whether the Mille Lacs Band of Ojibwe's inherent and federally delegated law enforcement authority extends to all lands within the Mille Lacs Reservation; (2) whether such authority includes the authority to investigate violations of federal and state criminal law; and (3) whether, with respect to non-Indians, the Band has investigatory authority in addition to the authority to detain and turn over violators to jurisdictions with prosecutorial authority. For reasons discussed below, each of these questions should be answered affirmatively and the Court should award the declaratory and injunctive relief requested in Plaintiffs' motion.

II. SUMMARY JUDGMENT STANDARDS

"Summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (quoting Fed. R. Civ. P. 56(c)(2)). "Summary judgment procedure is … not … a disfavored procedural shortcut, but rather … an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*,

477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Here, the facts already found by the Court demonstrate that Plaintiffs are entitled to summary judgment awarding them declaratory and injunctive relief.

III. SUMMARY OF PRIOR ORDERS

In its December 2020 Order, this Court found that, "pursuant to [the 2016] Opinion and Protocol [issued by the Mille Lacs County Attorney], County law enforcement officers repeatedly interfered with law enforcement measures undertaken by Band officers." Doc. 217 at 6. The Court found that Defendants deterred Band officers from: (1) exercising law enforcement authority on non-trust lands within the Reservation; (2) investigating state-law violations, even on trust lands; and (3) exercising law enforcement authority over non-Band members except for detaining (but not investigating) non-members and turning them over to County officers. *See*, *e.g.*, *id.* at 4-5 (discussing provisions of County Attorney's Opinion and Protocol stating that the Band's inherent law enforcement is limited to trust lands, does not include the power to investigate state-law violations—whether through statements, investigative stops, traffic stops or gathering evidence—and does not include the power to investigate non-Indians),[1] 7-12 (describing incidents in which County Sheriff's Deputies actively interfered with Band police officers' investigations), 14

[1] In this memorandum and in Plaintiffs' motion and proposed order, we use the terms "investigate" and "investigation" to include the investigatory activities addressed in the County Attorney's Opinion and Protocol, including such police actions as making traffic and investigative stops; interviewing people and taking statements; conducting searches; and otherwise gathering and retaining evidence. *See* Doc. 150-9 at 8-9 (County Attorney's Opinion); Doc. 150-10 (County Attorney's Protocol).

(quoting County Attorney's letter stating that County Sheriff had "taken on all state law enforcement services" in the County), 21 (discussing County Attorney's view that Band officers holding Special Law Enforcement Commissions (SLECs) could not exercise SLEC authority on non-trust lands).

The Court further found that Defendants' interference with Plaintiffs' law enforcement authority injured Plaintiffs. As the Court noted, Plaintiffs alleged that these injuries included:

> (1) interference and infringement of the Band's sovereign law enforcement authority; (2) resulting injuries to Plaintiffs Rice[2] and Naumann's abilities to practice their chosen professions; (3) harm to morale causing several officers to resign; and (4) a resulting decline in effective law enforcement and public safety.

Id. at 30. The Court set forth substantial, undisputed evidence supporting each claim of injury. *See id*. at 5-12 (interference with the Band's law enforcement authority), 14-16 (decline in morale and officer resignations), 16-21 (impacts on public safety). It concluded that these injuries were "actual, concrete, and particularized." *Id*. at 32.

In addition, the Court found that these injuries were "fairly traceable to the Defendants' challenged conduct," *id*. at 33, and that the declaratory and injunctive relief Plaintiffs sought was "specifically designed" to redress these injuries by "recogniz[ing] and restor[ing] the Band's sovereign law enforcement authority." *Id*. at 34.

[2] The Band's current Chief of Police, James West, has been substituted for Rice under Fed. R. Civ. P. 25(d). *See* Parties' Joint Letter to the Court at 3 (Apr. 4, 2022, Doc. 314).

The Court's December 2020 Order was not a decision on the merits because it did not determine whether Defendants' "'conduct [was] illegal.'" *Id.* at 30 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Specifically, the Court left "for another day" Defendants' challenge to "the extent and scope of the Band's sovereign law enforcement authority." *Id*. at 31-32. At that time, a "core [undecided] issue" was whether the original boundaries of the Mille Lacs Indian Reservation, as established in Article 2 of the 1855 Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855), remained intact. *Id.* at 3. All parties agreed:

> If the Court were to determine that the 1855 Reservation has not been disestablished or diminished, the Band's inherent and federally delegated law enforcement authority [would] extend, at least to some extent, to all lands within the Reservation, including Band-owned and non-Band-owned fee lands, and it [would] be necessary to determine the precise extent of the Band's authority on such lands (as well as trust lands).

Mem. in Support of Joint Motion at 3 (Nov. 11, 2020) (Doc. 208).

Subsequently, the Court's March 2022 Order resolved the boundary issue, holding that "the Mille Lacs Reservation's boundaries remain as they were under Article 2 of the Treaty of 1855." Doc. 313 at 93. Accordingly, it is now "necessary to determine the precise extent of the Band's [law enforcement] authority on" all lands within the Reservation. Doc. 208 at 3. Given the Court's findings regarding Defendants' interference with the Band's law enforcement activities, three questions are presented: (1) whether the Band's inherent and federally delegated law enforcement authority extends to all lands within the Mille Lacs Reservation; (2) whether such authority includes the authority to investigate violations of federal and state criminal law; and (3) whether, with respect to

non-Indians, the Band has investigatory authority in addition to the authority to detain and turn over violators to jurisdictions with prosecutorial authority.

IV. ARGUMENT SUMMARY

The three remaining questions should be answered affirmatively as a matter of federal law. First, the Band has *inherent* law enforcement authority over Indians and non-Indians throughout the Mille Lacs Reservation, including on trust and non-trust lands. Second, the Band's *inherent* authority includes the authority to investigate violations of federal, state and tribal law within the Reservation, including violations by non-Indians. Third, as to non-Indians, the Band has *inherent* authority not merely to temporarily detain offenders and turn them over to jurisdictions with prosecutorial authority, but also to conduct investigations. The exercise of all such inherent sovereign authority is subject to Fourth Amendment standards made applicable to the Band by the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(2). Furthermore, Band police officers holding SLECs have *federally delegated* authority to investigate violations of applicable federal law throughout the Reservation, including on trust and non-trust lands, and to detain or arrest Indian and non-Indian violators, again subject to Fourth Amendment standards.

Given this authority, Defendants' repeated interference with the Band's law enforcement activities, as found in the Court's December 2020 Order, was unlawful. The Court should award declaratory and injunctive relief to "recognize and restore the Band's sovereign law enforcement authority" and to prevent such unlawful interference in the future. Doc. 217 at 34. Declaratory relief is authorized by the Declaratory Judgment Act

because this is "a case of actual controversy within [the Court's] jurisdiction." 28 U.S.C. § 2201(a). Such relief is appropriate to resolve "'concrete and specific'" questions regarding the scope of the Band's law enforcement authority. *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1025 (8th Cir. 2021) (quoting *Caldwell v. Gurley Refining Co.*, 755 F.2d 645, 649-50 (8th Cir. 1985)).

Injunctive relief is authorized by Fed. R. Civ. P. 65 and is appropriate because plaintiffs have suffered irreparable injuries, remedies at law are not available to compensate for those injuries, the balance of hardships strongly favors injunctive relief, and such relief is in the public interest. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). The injunctive relief sought by Plaintiffs will not harm Defendants because it will not prevent them from exercising their own law enforcement and prosecutorial authority. Rather, by recognizing and restoring the authority of Band officers, the relief sought will serve the public interest by strengthening law enforcement on the Reservation for Indians and non-Indians alike. *See* Doc. 217 at 16-21 (describing adverse impacts on law enforcement and public safety arising from Defendants' interference with the Band's law enforcement authority).

V. ARGUMENT

A. THE BAND'S INHERENT LAW ENFORCEMENT AUTHORITY

1. General Principles of Tribal Sovereignty

The Band is a federally recognized Indian tribe. *See* Doc. 217 at 2. Federally recognized Indian tribes are "'distinct, independent political communities' exercising

sovereign authority." *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (quoting *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 519 (1832)). Due to their incorporation into the United States, "the 'sovereignty that the Indian tribes retain is of a unique and limited character.'" *Id*. (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). Tribes retain powers of self-government with respect to "relations among members of a tribe[,]" but there has been an implicit divestiture of sovereignty in some areas involving "the relations between an Indian tribe and nonmembers of the tribe." *Wheeler*, 435 U.S. at 326.

For example, tribes retain the power to "determine tribal membership, regulate domestic affairs among tribal members, and exclude others from entering tribal lands." *Cooley*, 141 S. Ct. at 1642 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327-28 (2008)). However, "owing to their 'dependent status,' tribes lack any 'freedom independently to determine their external relations' and cannot … 'enter into direct commercial or governmental relations with foreign nations[,]'" *id*. at 1642-43 (quoting *Wheeler*, 435 U.S. at 326), nor "exercise criminal jurisdiction over non-Indians." *Id*. at 1643 (citing *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978)). "In all cases, tribal authority remains subject to the plenary authority of Congress." *Id*. (citing *Michigan v. Bay Milles Indian Community*, 572 U.S. 782, 788 (2014)).

Given the distinctions the Court has drawn between inherent tribal authority over Indians and non-Indians, we address the questions regarding the scope of the Band's

inherent law enforcement authority in this case with respect to Indians first and then with respect to non-Indians.

2. Tribal Law Enforcement Authority Over Indians

Among the inherent sovereign powers that tribes *retain* is the authority to prescribe *and enforce* criminal laws applicable to member and non-member Indians. *See* 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193 (2004); *Wheeler*, 435 U.S. at 324-25; *Kelsey v. Pope*, 809 F.3d 849, 855 (6th Cir. 2016); *Walker v. Rushing*, 898 F.2d 672, 674 (8th Cir. 1990).[3] This authority includes the authority to establish a police force with jurisdiction to investigate and apprehend Indians suspected of violating such laws. *E.g., Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975) ("the power to regulate is only meaningful when combined with the power to enforce"); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1199-1200 (C.D. Cal. 1998); *State v. Schmuck*, 850 P.2d 1332, 1335-37 (Wash. 1993), *cert. denied*, 510 U.S. 931 (1993).

"An Indian tribe's power to punish members who commit crimes *within Indian country* is a fundamental attribute of the tribe's sovereignty." *Walker*, 898 F.2d at 674 (emphasis added). Because all lands within a reservation comprise Indian country, *see* 18

[3] In 25 U.S.C. § 1301(2), Congress expressly defined a tribe's "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." It defined "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." *Id*., § 1301(4). In this memorandum and in Plaintiffs' motion and proposed order, we use the term Indians as it is defined § 1301(4) and the term non-Indians to refer to persons who are not Indians within the meaning of § 1301(4).

U.S.C. § 1151, this authority and the concomitant authority to establish a police force with jurisdiction to investigate and apprehend Indians suspected of violating tribal laws extends throughout a reservation's boundaries. *See Kelsey*, 809 F.3d at 857 ("tribal power is *at its zenith* where territory and membership intersect") (emphasis in original).

A tribe's authority to investigate on-reservation violations of tribal law by Indians includes the authority to investigate violations of applicable federal and state criminal laws as well. *See*, *e.g.*, *Ortiz-Barraza*, 512 F.2d at 1180 (tribal officer has authority "to investigate any on-reservation violations of state and federal law, where the exclusion of the trespassing offender from the reservation may be contemplated"). Because Congress has limited the punishments tribes may impose for violations of tribal law, *see* 25 U.S.C. § 1302(a)(7), tribes have a strong interest in investigating Indian violations of applicable state and federal criminal laws within their reservations.

As discussed below, tribes have inherent authority to investigate violations of state or federal criminal law by *non-Indians* within their reservations. The tribes' retained authority over Indians within their reservations is at least as extensive as it is over non-Indians. *See*, *e.g.*, *Wheeler*, 435 U.S. at 326 (areas of implicit divestiture of tribal sovereignty involve relations between a tribe and nonmembers). Accordingly, the existence of tribal authority to investigate violations of state or federal criminal law by non-Indians within a reservation necessarily means that tribes have the same authority with respect to Indians.

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3. Tribal Law Enforcement Authority Over Non-Indians

Because tribes lack inherent authority to criminally prosecute non-Indians, a tribe's retained law enforcement authority does not include the authority to investigate violations of *tribal* criminal law by non-Indians or to arrest non-Indians for criminal prosecution in *tribal* court. However, tribes retain inherent authority to investigate non-Indians for violations of applicable *state or federal* criminal law within their reservations and to temporarily detain non-Indians suspected of such violations and to turn them over to jurisdictions with prosecutorial authority. This authority extends throughout a tribe's reservation and is not limited to trust lands. It is subject to Fourth Amendment standards made applicable to tribes by the Indian Civil Rights Act, not more restrictive standards applicable only to tribal police officers.

We provide support for these propositions below. We first summarize the Supreme Court's recent *Cooley* decision and then discuss tribal law enforcement authority over non-Indians based on *Cooley* and other applicable case law, including *United States v. Terry*, 400 F.3d 575 (8th Cir. 2005).

a. *Cooley*

In *Cooley*, the issue was whether "a tribal police officer has authority to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law." *Cooley*, 141 S. Ct. at 1642. The Ninth Circuit held that, because tribes lack the power to exclude non-Indians from public rights-of-way within a reservation, tribes have no authority to detain and search a

non-Indian on a public right-of-way unless it is "obvious" or "apparent" that the non-Indian has violated state or federal law. *United States v. Cooley*, 919 F.3d 1135, 1141-42 (9th Cir. 2019).

The Supreme Court unanimously reversed. *Cooley*, 141 S. Ct. at 1641. Noting that "no treaty or statute has explicitly divested Indian tribes of the policing authority at issue[,]" the Court "turn[ed] to precedent to determine whether a tribe has retained inherent sovereign authority to exercise that power." *Id.* at 1643. It found *Montana v. United States*, 450 U.S. 544 (1981), "highly relevant." *Cooley*, 141 S. Ct. at 1643. In *Montana*, the Court held "that the 'principles on which *Oliphant* relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" *Id*. (quoting *Montana*, 450 U.S. at 565) (modification normalized). However, *Montana* made clear that this "'general proposition' was not an absolute rule." *Id*. (quoting *Montana*, 450 U.S. at 565).

As the Court explained in *Cooley*, *Montana* set forth two important exceptions; under the second, "a 'tribe may … retain inherent power to exercise civil authority over the conduct of 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*.'" *Id*. (quoting *Montana*, 450 U.S. at 566) (emphasis added in *Cooley*). According to *Cooley*, this exception, which "speaks of the protection of the 'health or welfare of the tribe[,]'" "fits the present case, almost like a glove." *Id.* (quoting *Montana*, 450 U.S. at 566). *Cooley* explained:

> To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation. … "[A]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe."

Id. (quoting *Schmuck*, 850 P.2d at 1341).

The Court noted that it had "repeated *Montana*'s proposition and exceptions in several cases involving a tribe's jurisdiction over the activities of non-Indians within the reservation." *Id*. at 1643 (citing *Plains Commerce Bank*, 554 U.S. at 328-30; *Nevada v. Hicks*, 533 U.S. 353, 358-60 & n.3 (2001); *South Dakota v. Bourland*, 508 U.S. 679, 694-96 (1993); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 426-30 (1989) (plurality opinion)). According to the Court, "in so doing [it had] reserved a tribe's inherent sovereign authority to engage in policing of the kind before us." *Id*. at 1644.

For example, in *Strate v. A-1 Contractors*, 520 U.S. 438, 456-59 (1997), the Court "relied on *Montana*'s general jurisdiction-limiting principle to hold that tribal courts did not retain inherent authority to adjudicate personal-injury actions against nonmembers of the tribe based upon automobile accidents that took place on public rights-of-way running through a reservation." *Cooley*, 141 S. Ct. at 1644. However, the *Strate* Court also said that it did "'not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn

over to state officers nonmembers stopped on the highway for conduct violating state law.'" *Id*. (quoting *Strate*, 520 U.S. at 456 n.11).

The Court "reiterated this point" in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), "there confirming that *Strate* 'did not question the ability of tribal police to patrol the highway.'" *Cooley*, 141 S. Ct. at 1644 (quoting *Atkinson*, 532 U.S. at 651). Similarly, in *Duro*, which did *not* involve a public right-of-way, the Court recognized "that 'where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.'" *Cooley*, 141 S. Ct. at 1644 (quoting *Duro*, 495 U.S. at 697) (modification normalized).

Cooley explained that "[t]he authority to search a non-Indian prior to transport is ancillary to this authority that we have already recognized." *Id*. (citing *Ortiz-Barraza*, 512 F.2d at 1180-81). "Indeed," the Court pointed out, "several state courts and other federal courts have held that tribal officers possess the authority at issue here." *Id*. (citing *Schmuck*, 850 P.2d at 1341; *State v. Pamperien*, 967 P.2d 503, 504-06 (Or. Ct. App. 1998); *State v. Ryder*, 649 P.2d 756, 759 (N.M. 1982); *Terry*, 400 F.3d at 579-80; *Ortiz-Barraza*¸ 512 F.2d at 1180-81; F. Cohen, Handbook of Federal Indian Law § 9.07 at 773 (2012)). Notably, these cases did not all arise on public rights-of-way; *Terry*, for example, involved tribal law enforcement activity at a private residence within a reservation. *See Terry*, 400 F.3d at 578-79.

The *Cooley* Court next addressed the distinction the Ninth Circuit had drawn between tribal police authority on tribal lands—that is, lands on which tribes have the

power to exclude—and on a public right-of-way on which tribes lack such power. The Court acknowledged that "in *Duro* we traced the relevant tribal authority to a tribe's right to exclude non-Indians from reservation land." *Cooley*, 141 S. Ct. at 1644 (citing *Duro*, 495 U.S. at 696-97). However, the Court pointed out that "tribes 'have inherent sovereignty independent of the authority arising from the power to exclude,' … and here *Montana's second exception recognized that inherent authority*." *Id*. (emphasis added) (quoting *Brendale*, 492 U.S. at 425) (modification normalized).

The Court then distinguished its own prior cases denying tribal jurisdiction over the activities of non-Indians on a reservation, noting that those cases "rested in part upon the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them." *Id*. (citing *Duro*, 495 U.S. at 693; *Plains Commerce Bank*, 554 U.S. at 337). In contrast, in *Cooley*, the tribal officer's search and detention did "not subsequently subject [the suspect] to tribal law, but rather only to state and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it." *Id*. at 1644-45. "[A]n initial investigation of non-Indians' violations of federal and state laws to which those non-Indians are indisputably subject protects the public without raising similar concerns of the sort raised in our cases limiting tribal authority." *Id*. at 1645 (internal quotation omitted).

The *Cooley* Court also expressed doubts about the standards adopted by the Ninth Circuit to govern investigations by tribal police officers. *See id*. As the Court explained,

"[t]hose standards require tribal officers first to determine whether a suspect is non-Indian and, if so, allow temporary detention only if the violation of law is 'apparent.'" *Id*. (quoting *Cooley*, 919 F.3d at 1142). "The first requirement, even if limited to asking a single question, would produce an incentive to lie." *Id*. "The second requirement—that the violation of law be 'apparent'—introduces a new standard into search and seizure law" and it was "not obvious" "whether, or how, that standard would be met." *Id*.

The Supreme Court acknowledged that it had "previously warned that the *Montana* exceptions are 'limited' and 'cannot be construed in a manner that would swallow the rule.'" *Id.* at 1645 (quoting *Plains Commerce Bank*, 554 U.S. at 330). However, the Court explained that it had "also repeatedly acknowledged the existence of the exceptions and preserved the possibility that 'certain forms of nonmember behavior' may 'sufficiently affect the tribe as to justify tribal oversight.'" *Id*. (quoting *Plains Commerce Bank*, 554 U.S. at 335). The Court stated that, "[g]iven the close fit between the second exception and the circumstances here, we do not believe the warnings can control the outcome." *Id*.

In a concurring opinion (in which no other Justice joined), Justice Alito joined the *Cooley* Court's opinion

> on the understanding that it holds no more than the following: On a public right-of-way that traverses an Indian reservation and is primarily patrolled by tribal police, a tribal police officer has the authority to (a) stop a non-Indian motorist if the officer has reasonable suspicion that the motorist may violate or has violated federal or state law, (b) conduct a search to the extent necessary to protect himself or others, and (c) if the tribal officer has probable cause, detain the motorist for the period of time reasonably necessary for a non-tribal officer to arrive on the scene.

Id. at 1646 (Alito, J., concurring).

Notwithstanding the limitations stated by Justice Alito, *Cooley* and other applicable law strongly support the proposition that a tribe's inherent law enforcement authority over non-Indians extends throughout its reservation and includes the power to investigate possible violations of state or federal criminal law, including the power to conduct searches subject to Fourth Amendment standards (not just for the immediate safety of a tribal officer or others). And, while tribal law enforcement officers cannot arrest non-Indians for prosecution in tribal court, they can temporarily detain non-Indians and turn them over to jurisdictions with prosecutorial authority if the basis for and duration of such detentions is reasonable under Fourth Amendment standards. We address each of these points below.

b. Tribal Inherent Enforcement Authority Over Non-Indians Extends to All Lands Within a Reservation

We first address the geographic scope of tribal law enforcement authority over non-Indians. As noted above, Justice Alito stated that *Cooley*'s holding was limited to public rights-of-way primarily patrolled by tribal police. However, for several reasons, the *full Court's* opinion in *Cooley* supports the proposition that tribal law enforcement authority over non-Indians extends throughout a tribe's reservation.

First, in *Cooley*, the Court clearly and repeatedly based tribal law enforcement authority over non-Indians within a reservation on the second *Montana* exception. *See Cooley*, 141 S. Ct. at 1643-45. The *Montana* exceptions address the "inherent sovereign power" that "Indian tribes retain … over non-Indians on their reservations, *even on non-*

Indian fee lands." *Montana*, 450 U.S. at 565 (emphasis added).[4] The second exception specifically addresses a tribe's authority "over the conduct of non-Indians *on fee lands within its reservation*[.]" *Id.* at 566 (emphasis added). Because the exception is not limited to public rights-of-way, the Court's reliance on *Montana*'s second exception in *Cooley* demonstrates that the tribal authority the Court recognized in *Cooley* extends throughout a tribe's reservation.

Second, criminal activity on non-Indian fee lands within a reservation threatens the health and welfare of a tribe just as criminal activity on public rights-of-way does. The Court's statement that "[t]o deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats[,]" *Cooley*, 141 S. Ct. 1643, is fully applicable to crimes committed on fee lands. Indeed, as this and other cases illustrate, grave concerns about protecting a tribe's health and welfare can arise from violations of federal and state criminal law on non-Indian fee lands within a reservation. *See*, *e.g.*, Doc. 217 at 18 (discussing drug houses on the Mille Lacs Reservation), 20 (discussing open-air drug dealing on the Reservation); Doc. 150-33 at 39 (former Police Chief Rice's testimony regarding drug houses on the Reservation) (internal page 219); Doc.

[4] Tribal authority on trust lands and tribally owned fee lands is generally more extensive than on non-Indian fee lands because tribes retain the power to exclude non-Indians from trust lands and tribally owned fee lands. *See Duro*, 495 U.S. at 696 (discussing the tribes' "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands"); *Strate*, 520 U.S. at 454 (under *Montana*, "tribes retain considerable control over nonmember conduct on tribal land").

156 at 3-4 (Cash Decl. regarding the sale of "drugs from houses on fee land within the Reservation"); *see also Terry*, 400 F.3d at 578 (tribal officers' investigation of a domestic violence call at a private residence on a reservation); *United States v. Peters*, No. 3:16-CR-30150-RAL, 2017 U.S. Dist. LEXIS 56754 at *1 (D.S.D. Apr. 13, 2017) (tribal officers' investigation of a fight behind a motel on a reservation); *State v. Haskins*, 269 Mont. 202, 887 P.2d 1189, 1191 (1994) (tribal officers' undercover investigation and controlled drug buys on a reservation).

Third, the Court's rationale for distinguishing its prior cases limiting tribal authority over non-Indians applies to tribal law enforcement authority on non-Indian fee lands. *See Cooley*, 141 S. Ct. at 1644. The Court explained that tribal law enforcement authority to investigate and detain non-Indians for violations of *federal or state* law does not raise the same concerns as subjecting non-Indians to *tribal* law, and that is just as true on non-Indian fee lands as it is on public rights-of-way. *See Bergeson v. McNeece*, No. 1:21-CV-01026-CBK, 2021 U.S. Dist. LEXIS 235864 at *5 (D.S.D Dec. 9, 2021) (*Cooley* "rejected the claim that tribal police officers cannot search and detain a non-member who is suspected of violating federal or state laws 'to which those non-Indians are indisputably subject'") (quoting *Cooley*, 141 S. Ct. at 1644-45).

Fourth, the Court's holding was not limited to public rights-of-way that are "primarily patrolled by tribal police." *Cooley*, 141 S. Ct. at 1646 (Alito, J., concurring). That limitation is not referenced in the question presented, which asked only "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. Nor does the Court's statement of the case indicate that the right-of-way in issue was primarily patrolled by tribal police. *See id.* at 1641-42. More generally, by grounding its holding in *Montana*'s second exception, which addresses tribal authority over non-Indians *within reservation boundaries*, the Court's opinion supports the proposition that the authority it recognized extends throughout a reservation and is not limited to public rights-of-way, let alone to public rights-of-way primarily patrolled by tribal police. *See* Brief for the United States at 37, *United States v. Cooley*, https://www.supremecourt.gov/DocketPDF/ 19/19-1414/165737/20210108153036386_19-1414tsUnitedStates.pdf (U.S. June 1, 2021) (No. 19-1414) (noting that the "Court has treated 'alienated, non-Indian land'—that is, land within reservation boundaries owned in fee by non-Indians—as jurisdictionally equivalent to public rights-of-way") (quoting *Strate*, 520 U.S. at 454).

Finally, limiting a tribe's inherent law enforcement authority over non-Indians within a reservation based on the land's status as a public right-of-way or fee land, or on whether the land is primarily patrolled by tribal officers, is impractical and contrary to Congress's intent in defining Indian country to include *all* land within a reservation in 18 U.S.C. § 1151. As the Supreme Court explained in the context of federal law enforcement,

> law enforcement officers operating in the area [would] find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962) (footnote omitted). Given the complexity of law enforcement on Indian reservations, these concerns counsel against further complicating such authority by distinguishing the scope of tribal authority based on the particular characteristics of each parcel on which such authority is exercised.

c. Tribal Inherent Law Enforcement Authority Over Non-Indians Includes the Power to Investigate Possible Violations of State or Federal Law

A tribe's inherent authority to investigate possible on-reservation violations of applicable state or federal criminal law by non-Indians was recognized by multiple courts long before *Cooley*. As noted above, in 1975 the Ninth Circuit held that tribal police have inherent power "to investigate any on-reservation violations of state and federal law, where the exclusion of the trespassing offender from the reservation may be contemplated." *Ortiz-Barraza*, 512 F.2d at 1180. In 1994, the Montana Supreme Court affirmed the use of evidence obtained by tribal officers during an undercover investigation and controlled drug buys on a reservation in a state-court prosecution. *Haskins*, 887 P.2d at 1194-96. The court held that the authority of tribal police to investigate violations of state and federal criminal law on a reservation was not limited to simply detaining and ejecting an individual observed to be violating such law, but included the "authority *to conduct a proper and thorough investigation, to gather the evidence necessary for a successful prosecution, and then, in due course, to turn that evidence over to the proper jurisdiction* with authority to

prosecute any non-Indians involved." *Id*. at 1195-96 (emphasis added). In 1998, the Oregon Court of Appeals held that the "power to maintain public order by investigating violations of state law on [a] reservation … is clearly an incident of general tribal authority." *Pamperien*, 967 P.2d at 505. It added that tribal officers "have the authority to investigate on-reservation violations of state and federal law as part of the tribe's inherent power as sovereign and may detain violators and turn them over to proper officials if jurisdiction to prosecute the offense rests outside the tribe." *Id*. at 506 (footnote omitted).

In 2005, the Eighth Circuit likewise held that tribes have inherent authority to investigate on-reservation violations of state and federal criminal law by non-Indians. *Terry*, 400 F.3d 575. In *Terry*, tribal officers responded to a domestic violence call at a residence within the Pine Ridge Reservation. *Id*. at 578.[5] After identifying the suspect, the officers asked him to exit his vehicle, smelled alcohol on his breath, handcuffed him and placed him in the back of a patrol car. *Id*. Having observed ammunition on the suspect's dashboard, the officers then searched the vehicle and found a rifle. *Id.* The officers held the suspect until the County Sheriff was able to take custody of him the following day, during which period the suspect was questioned briefly by a BIA special agent. *Id*. at 579. When the suspect was charged in federal court with possessing a firearm after previously being convicted of a misdemeanor crime of domestic violence, he moved

[5] The court did not specify whether the residence was on trust or fee lands, *id.*, indicating that the status of the land was not relevant to its decision.

to suppress the ammunition and firearm seized from his vehicle and the statements he made to the BIA officer. *Id*. at 577-78.

In affirming the denial of the suppression motion, the Eighth Circuit explained that "tribal police officers do not lack authority to detain non-Indians whose conduct disturbs the public order on their reservation." *Terry*, 400 F.3d at 579. It quoted *Duro* for the proposition that, "'[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.'" *Id*. (quoting *Duro*, 495 U.S. at 697, and citing *Strate*, 520 U.S. at 456 n.11).

The *Terry* court then held that this authority necessarily entailed the authority to investigate non-Indian suspects, subject to Fourth Amendment standards made appliable to tribes by the Indian Civil Rights Act. Specifically, the court held that, "[b]ecause the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations, tribal police must have such power." *Id*. at 579-80 (citing *Ortiz-Barraza*, 512 F.2d at 1180). "When exercising this power, however, tribal officers must avoid effecting a constitutionally unreasonable search or seizure." *Id*. at 580 (citing 25 U.S.C. § 1302(2)). The court did not limit tribal authority to conduct such searches to searches necessary to protect the immediate safety of the officer or others, but expressly recognized that tribal police had authority to conduct searches to investigate violations of law.

Later in 2005, the Tenth Circuit cited *Duro* and *Terry* in support of the proposition that "tribal officers do have the authority to investigate violations of law on tribal land, and detain persons, including non-Indians, suspected of violating the law." *United States v. Green*, 140 Fed. App'x 798, 800 (10th Cir. 2005).

In 2020, the Minnesota Supreme Court also followed *Terry*. In *State v. Thompson*, 937 N.W.2d 418, 419-20 (Minn. 2020), a Red Lake Tribal Police Officer detained a non-Indian suspected of driving under the influence on the Red Lake Reservation and administered a preliminary breath test and three field sobriety tests with the suspect's consent. The Minnesota Supreme Court affirmed the denial of the suspect's motion to suppress "all evidence obtained following what he described as [the tribal officer's] unlawful arrest." *Id*. at 420. The court relied on *Duro* for the propositions that Indian tribes "'possess the traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands,'" that "[t]ribal law enforcement authorities therefore 'have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them,'" and that "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.'" *Id*. at 421 (quoting *Duro*, 495 U.S. at 696-97) (modification normalized).

Additionally, the *Thompson* court relied on *Terry* for the proposition that, "'because the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations,

tribal police must have such power.'" *Thompson*, 937 N.W.2d at 421 (quoting *Terry*, 400 F.3d at 579-80) (modification normalized). It held that the tribal officer in *Thompson* "detained and *investigated*" the non-Indian suspect pursuant to this authority. *Id.* (emphasis added). It further noted that the suspect had consented to the preliminary breath test and field sobriety tests and did "not argue that these procedures violated his rights under the Fourth Amendment to the United States Constitution or Article 1, Section 10, of the Minnesota Constitution." *Id*. at 422 n.3. *Thompson* thus reaffirmed *Terry*'s holding that a tribe's inherent law enforcement authority includes the authority to investigate non-Indians within a reservation for violations of federal or state criminal law subject to the same constitutional standards that apply to state and federal officers.

District courts in the Eighth Circuit have also followed *Terry*, upholding the authority of tribal officers to detain and investigate non-Indians suspected of violating tribal laws within a reservation subject to the same Fourth Amendment constraints that apply to state and federal officers. *See*, *e.g.*, *United States v. Santistevan*, No. 3:19-CR-30017-RAL, 2019 U.S. Dist. LEXIS 72263 at *7 (D.S.D. Apr. 29, 2019) (citing *Terry*, 400 F.3d at 580, for the proposition that tribal officers have authority to search a non-Indian's vehicle "subject to the same Fourth Amendment constraints as state and federal officers"); *Peters*, 2017 U.S. Dist. LEXIS 56488 at *7 (citing *Terry*, 400 F.3d at 580, for the proposition that tribal officers' detention of non-Indian for about five-and-a-half hours on suspicion of assault was reasonable under the circumstances); *United States v. Keys*, 390 F. Supp. 2d 875, 879-84 (D.N.D. 2005) (upholding BIA officers' search of defendant's

vehicle under automobile exception to warrant requirement but finding officers' detention of defendant was unreasonable once they learned he was a non-Indian and intended to release him "no matter the outcome" of an additional interview).

In sum, before the Supreme Court decided *Cooley*, multiple courts including the Eighth Circuit, district courts within the Eighth Circuit and the Minnesota Supreme Court held that tribes have inherent authority to investigate on-reservation violations of state and federal criminal law by non-Indians subject to Fourth Amendment standards. Nothing in *Cooley* calls those holdings into question; to the contrary, the Court cited with approval the decisions in *Ortiz-Barazza*, *Pamperien*, *Terry* and other similar cases. Thus, whether or not *Cooley* itself was limited to a search necessary for the immediate safety of the officer or others, it is well established that tribes have inherent authority to investigate possible violations of state or federal criminal law by non-Indians, including the authority to conduct investigatory searches under Fourth Amendment standards.[6]

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[6] In *Texas v. Astorga*, No. 08-20-00180-CR, 2021 Tex. App. LEXIS 8678 at *21 (Tex. Ct. App. Oct. 27, 2021), the court cited Justice Alito's concurrence for the proposition that "a tribal officer's policing authority only extends to the right to detain an individual suspected of committing a state or federal offense on a tribal reservation 'for the period of time reasonably necessary for a non-tribal officer to arrive on the scene,' and to conduct a search only 'to the extent necessary to protect' the officer and others while at the scene of the detention." *Id*. at *21 (quoting *Cooley*, 141 S. Ct. at 1646 (Alito, J., concurring)). However, the *Astorga* court *held* that the tribal officers in the case before it properly stopped a vehicle for a traffic violation on a reservation, detained the vehicle's occupants and conducted an investigation in which they observed a glass pipe that they believed was used to ingest methamphetamine. *Id*. at *2-3, 22-23. The court held that the officers exceeded their authority under *Cooley* because, after the initial stop, detention *and investigation*, they did not contact a state law enforcement agency and instead arrested the vehicle's occupants, transported them to the tribal jail and then conducted additional searches, including a strip search. *Id*. at *25-26. The court found that this *additional*

Moreover, for several reasons, *Cooley* itself supports that proposition. First, the search that *Cooley* held to be within the scope of the tribe's inherent authority included an investigatory search after the tribal officer secured the suspect. *See Cooley*, 141 S. Ct. at 1642 (after removing the suspect from his vehicle and conducting a pat-down search, the tribal officer returned to the suspect's vehicle, observed contraband in plain view, and later seized that contraband and discovered additional contraband).

Second, when the Court in *Cooley* stated that "[t]he authority to search a non-Indian prior to transport is ancillary to this authority that we have already recognized" (namely, the authority recognized in *Strate* and *Duro* to detain offenders for possible violations of state or federal law and transport them to the proper authorities), it did not limit its holding to searches needed for the immediate safety of the officer or others. *Id.* at 1644. To the contrary, it then pointed out that "several state courts and other federal courts have held that tribal officers possess the authority [to search] at issue here." *Id*. As we have explained, the cases cited do not limit the authority of tribal officers to conduct searches necessary to protect the officer or others but allow tribal officers to conduct searches under the same Fourth Amendment standards applicable to non-tribal officers. *See*, *e.g.*, *Terry*, 400 F.3d at 578-80.

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detention, which lasted more than four hours, was unreasonable under Fourth Amendment standards. *Id*. at *26-27. *Astorga* is consistent with the proposition, discussed in the text, that tribal officers have authority to investigate non-Indian violations of federal or state law on a reservation provided that such investigations comply with Fourth Amendment standards and do not entail more than temporary detentions of non-Indians.

Third, *Cooley* rejected the more restrictive standard adopted by the Ninth Circuit, which required an "obvious" or "apparent" violation before tribal officers could detain a non-Indian, *Cooley*, 919 F.3d 1142, because it would "introduce[] a new standard into search and seizure law." *Cooley*, 141 S. Ct. at 1645. The Court's rejection of "a new standard" indicates that in exercising their authority to stop, detain and search a non-Indian for a potential violation of state or federal law, tribal officers are subject to the same Fourth Amendment standards that apply to such stops by state or federal officers. As the United States explained in its brief in *Cooley*:

> [A]lthough Indian tribes are not directly bound by the Fourth Amendment itself, see *Duro*, 495 U.S. at 693, they are bound by similar statutory language courts have interpreted *in pari materia* with the Fourth Amendment. … Under that language, the ultimate touchstone for policing decisions is reasonableness, as informed by familiar Fourth Amendment standards. *See Heien v. North Carolina*, 574 U.S. 54, 60 (2014) ("As the text indicates and we have repeatedly affirmed, 'the ultimate touchstone of the Fourth Amendment is "reasonableness."'") (citation omitted). Those standards are generally satisfied when investigatory stops are based on reasonable suspicion, *see, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), and arrests are supported by probable cause, see, *e.g.*, *Beck v. Ohio*, 379 U.S. 89, 91 (1964).
>
> Because a tribe lacks authority to prosecute or punish a non-Indian, its "arrest" authority with respect to a non-Indian is necessarily limited to detention for the purpose of allowing state or federal law-enforcement to take custody. *See Duro*, 495 U.S. at 697. But so long as neither the length nor the conditions of such detention are excessive, the detention is not "unreasonable." 25 U.S.C. § 1302(a)(2). In particular, no heightened level of suspicion, such as an "apparent" or "obvious" violation of law … is required simply because the action is carried out by a tribal officer.

Brief for the United States at 34-35, *United States v. Cooley* (U.S. June 1, 2021).

Under the Fourth Amendment, police officers may under appropriate circumstances engage in investigatory searches, not just searches necessary to protect the officers or others. As the United States explained in *Cooley*:

> The Ninth Circuit's approach would also foreclose a tribal officer from investigating or "searching a known non-Indian for the purpose of finding evidence of a crime." [*Cooley*, 919 F.3d at 1142.] "Thus, if a tribal officer pulls over a vehicle based merely upon reasonable suspicion of drunk driving, then once the officer has determined that the driver is not an Indian, the officer may conduct no investigation"—"no questions, no breathalyzer, no walking in line, etc." [*United States v. Cooley*, 947 F.3d 1215, 1229 (9th Cir. 2020)] (Collins, J., dissenting from the denial of rehearing en banc) (emphases omitted). The officer would simply have to let the non-Indian continue to endanger public safety by driving on the right-of-way while possibly substantially impaired. *See Schmuck*, 850 P.2d at 1342 (explaining that "if the Suquamish Indian Tribe did not have the authority to detain, the non-Indian suspect would have been free to drive away with an alcohol level exceeding the limit for legal intoxication"). And if, during the encounter, evidence of some other crime arose—for example, if a drug-detecting dog alerted—the officer would not be able to pursue that lead either. See *Florida v. Harris*, 568 U.S. 237, 248 (2013) (recognizing that a dog's alert can provide probable cause).

Id. at 43 (modifications normalized). Because the Supreme Court specifically rejected the Ninth Circuit's more restrictive standard, its decision in *Cooley* supports the many prior cases holding that tribes have inherent authority to investigate possible on-reservation violations of state and federal criminal law by non-Indians, including the authority to conduct investigatory searches, subject to Fourth Amendment standards.

B. THE BAND'S FEDERALLY DELEGATED LAW ENFORCEMENT AUTHORITY

After the United States agreed to assume concurrent federal jurisdiction over the Band's Indian country under the Tribal Law and Order Act, 18 U.S.C. § 1162(d), the Band

and the BIA entered into a Deputation Agreement allowing the BIA to issue Special Law Enforcement Commissions (SLECs) to qualified Band officers. Doc. 217 at 21 (citing Deputation Agreement, Doc. 150-39). The Deputation Agreement allows Band officers holding SLECs to enforce federal law within the Band's Indian country, *id.,* and was intended to authorize Band officers "to *make lawful arrests in Indian country* within the jurisdiction of the Tribe or as described in section 5 [of the Agreement]." Doc. 150-39 at 1-2 (emphasis added). Specifically, Band officers carrying SLECs were "given the power to enforce":

> All Federal laws applicable within Indian country, and specifically the Mille Lac Band of Ojibwe's Indian country, including the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153, consistent with the authority conveyed pursuant to Federal law through the issuance of commissions or other delegations of authority.

Id. at 4 (§ 3.A).

Given this Court's holding that the original boundaries of the Mille Lacs Reservation remain intact, Doc. 313 at 93, the law enforcement authority of Band officers holding SLECs extends throughout the Reservation and is not limited to trust lands. In a November 8, 2017, letter to the County Attorney, the Department of the Interior wrote that "'SLECs support the sovereignty of tribes by allowing tribal law enforcement officers to enforce Federal law, to investigate Federal crimes, and to protect the rights of people in Indian country[.]'" Doc. 150-5 at 2 (quoting 69 Fed. Reg. 6321 (Feb. 10, 2004)) (footnote omitted). The Department explained that, because "'Indian country'" is defined in federal law to include "'all land within the limits of any Indian reservation under the jurisdiction

of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,' 18 U.S.C. § 1151 … all of the Band's reservation is included [in the authority conferred by the SLECs], not just the trust lands." *Id*. at 2 n.1.

C. DECLARATORY AND INJUNCTIVE RELIEF

The Declaratory Judgment Act provides that any federal court, "[i]n a case of actual controversy within its jurisdiction … may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). "The phrase 'case of actual controversy' in § 2201 'refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III.'" *Maytag Corp. v. Int'l Union, United Automobile, Aero. & Agric. Implement Workers of Am.*, 687 F.3d 1076, 1081 (8th Cir. 2012) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007)). "To proceed successfully under the Declaratory Judgment Act, there must be a 'substantial controversy' that presents a 'concrete and specific' question." *Rosebud Sioux Tribe*, 9 F.4th at 1025 (quoting *Caldwell*, 755 F.2d at 649-50).

This Court has already determined that Plaintiffs' claims are justiciable under Article III. Doc. 217 at 29-36. Accordingly, this is "a case of actual controversy within [the Court's] jurisdiction" under § 2201(a). Moreover, this case presents a substantial controversy presenting concrete and specific questions warranting application of the Declaratory Judgment Act. *Rosebud Sioux*, 9 F.4th at 1025. Specifically, and as discussed above, the questions presented are: (1) whether the Band's law enforcement authority

extends to all lands within the Reservation or is limited to trust lands; (2) whether the Band's authority includes the authority to investigate violations of federal and state criminal law as well as Band law or whether Band officers are limited to investigating violations of Band law; and (3) whether, with respect to non-Indians, the Band has investigatory authority in addition to the authority to detain and turn over violators to jurisdictions with prosecutorial authority. *See* Part III *supra*.

The declaratory judgment Plaintiffs seek answers these concrete and specific questions. Moreover, as this Court found, such relief is "specifically designed" to redress Plaintiffs' injuries by "recogniz[ing] and restor[ing] the Band's sovereign law enforcement authority." Doc. 217 at 34. Accordingly, the Court should award the declaratory relief sought by Plaintiffs.

The Court should also award permanent injunctive relief. In addition to "actual success on the merits," *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 229 (8th Cir. 2008), Plaintiffs must satisfy a four-part test to obtain a permanent injunction:

> "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."

Monsanto, 561 U.S. at 156-67 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Each part is satisfied here.

First, the Court has already determined that Plaintiffs suffered actual, concrete, and particularized injuries related to the exercise of their law enforcement authority. *See* Part

III *supra.* These injuries, including interference with the Band's sovereign law enforcement authority, the decline in morale among and resignations of Band police officers, and impacts to public safety are irreparable and cannot adequately be compensated by money damages. *See*, *e.g.*, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1005-06 (10th Cir. 2015) (Gorsuch, J.).[7] In that case, then-Judge Gorsuch explained that a county prosecution of a tribal member for an on-reservation traffic offense caused irreparable injury to the tribe because it was "an infringement on tribal sovereignty" and was "part of a renewed campaign to undo the [reservation's] boundaries." *Id*. at 1005. Here, Defendants' interference with tribal sovereignty was even more direct; rather than prosecuting a tribal member for an offense lying outside county jurisdiction, Defendants directly interfered with the law enforcement activities of Band police officers themselves. Moreover, they did so in contravention of a substantial body of case law, including an

[7] *See also Poarch Band of Creek Indians v. Hildreth*, 656 Fed. Appx. 934, 944 (11th Cir. 2016) (state tax assessment of Indian trust property "would amount to irreparable violation of tribal sovereignty"); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (subjecting tribe to an agency subpoena for which the agency lacks jurisdiction results in irreparable injury to the tribe's sovereignty); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) ("an invasion of tribal sovereignty can constitute irreparable injury"); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001) (interference with tribe's motor vehicle registration system threatened to interfere with tribal self-government and constituted irreparable injury); *Mashpee Wampanoag Tribe v. Bernhardt*, Civil Action No. 18-2242 (PLF), 2020 U.S. Dist. LEXIS 99024 at *9-10 (D.D.C. June 5, 2020) (loss of sovereignty cannot be calculated in terms of money and therefore "unquestionably" constitutes irreparable harm); *Chemehuevi Indian Tribe v. McMahon*, ED CV 15-1538 DMG (FFMx), 2016 U.S. Dist. LEXIS 189513 at *24 (C.D. Cal. Aug. 16, 2016) (subjecting tribe to unlawful exercise of jurisdiction is an irreparable injury).

Eighth Circuit decision, on the scope of tribal law enforcement authority and as part of a deliberate challenge to the continued existence of the Mille Lacs Reservation. *See* Mar. 3, 2022, Order at 20-22 (Doc. 312); *see also* Doc. 150-7 (Band Attorneys' 12-22-2016 Letter to County Attorney outlining tribal law enforcement authority); Doc. 150-5 (Interior Department's 11-8-2017 Letter to County Attorney outlining SLEC authority).

Second, the balance of hardships tips sharply in favor of Plaintiffs. The requested injunctive relief will prevent interference with Plaintiffs' inherent and federally delegated law enforcement authority without diminishing in any respect Defendants' law enforcement or prosecutorial authority. As then-Judge Gorsuch explained, "[o]n the Tribe's side of the ledger lies what this court has described as the 'paramount federal policy' of ensuring that Indians do not suffer interference with their efforts to 'develop strong self-government.'" *Ute Indian Tribe*, 790 F.3d at 1007 (quoting *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989)) (modification normalized). In this case, an injunction will prevent such interference and the multiple harms that flowed from it—a loss of morale among and resignations of Band police officers and adverse impacts to public safety. And, because prohibiting Defendants from interfering with Plaintiffs' law enforcement authority does not prevent Defendants from exercising *their own* law enforcement and prosecutorial authority, it does not cause them any injury. *See id.*

Finally, an injunction will serve the public interest. As this Court found, Defendants' interference with Plaintiffs' law enforcement authority undermined law

enforcement and public safety on the Reservation. *See* Doc. 217 at 16-21. An injunction "recogniz[ing] and restor[ing] the Band's sovereign law enforcement authority," *id.* at 34, will serve the public interest by providing clear authority to Band police officers and thereby strengthening law enforcement on the Reservation, for Indians and non-Indians alike.

VI. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment Awarding Plaintiffs' Declaratory and Injunctive Relief.

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LOCKRIDGE GRINDAL NAUEN P.L.L.P.
/s Charles N. Nauen
Charles N. Nauen (#121216)
David J. Zoll (#0330681)
Arielle S. Wagner (#0398332)
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981
cnnauen@locklaw.com
djzoll@locklaw.com
aswagner@locklaw.com

ZIONTZ CHESTNUT
s/ Marc Slonim
Marc Slonim, WA Bar #11181
Beth Baldwin, WA Bar #46018
Wyatt Golding, WA Bar #44412
Anna Brady, WA Bar #54323
2101 Fourth Ave., Suite 1230
Seattle, WA 98121
Phone: 206-448-1230
mslonim@ziontzchestnut.com
bbaldwin@ziontzchestnut.com
wgolding@ziontzchestnut.com

abrady@ziontzchestnut.com

Attorneys for Plaintiffs