

MANDAN, HIDATSA, & ARIKARA NATION
FORT BERTHOLD RESERVATION

SUPREME COURT
NEW TOWN, NORTH DAKOTA

Carol Good Bear, Terrance Fredericks,
Todd Hall, Patti Jo Hall, Kelly Hosie, and
Edward S. "Tyke" Danks,

Appellees,

vs.

Mark N. Fox, as Three Affiliated Tribes'
Tribal Chairman, Cory Spotted Bear, as
Three Affiliated Tribes' Vice-Chairman,
Fred Fox, as Three Affiliated Tribes'
Executive Secretary, Mervin Packineau,
as Three Affiliated Tribes' Treasurer,
Robert White, as Three Affiliated Tribes'
Councilman, Sherry Turner-Lone Fight,
as Three Affiliated Tribes'
Councilwoman, Monica Mayer, as Three
Affiliated Tribes' Councilwoman, and
The Three Affiliated Tribes' Tribal
Business Council,

Appellants.

AP2024-002
Case No. CV-2023-0469

**RESPONSE/REPLY BRIEF OF THE
APPELLANTS-DEFENDANTS**

ORAL ARGUMENT REQUESTED

Timothy Q. Purdon (ND #05392 and TAT #051)
1201 West Divide Ave., Suite 200
Bismarck, ND 58501
Telephone: (701) 255-3000
TPurdon@RobinsKaplan.com

Timothy W. Billion (ND #4641 and TAT #131)
150 East 4th Place, Suite 704
Sioux Falls, SD 57104
Telephone: (605) 335-1300
TBillion@RobinsKaplan.com

Attorneys for Appellants

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INTRODUCTION

Courts cannot issue injunctions that merely order a party to follow the law in the future. While the Tribal Court correctly dismissed most of Appellee Plaintiffs' ("Plaintiffs") Complaint, it erred when it concluded that it could "order prospective injunctive relief upon a finding of an ICRA¹ violation *in order to avoid future violations.*" See TBC's Opening Brief, Addendum 1 at 22 (the "Order") (emphasis added). Injunctions must be specific, not generalized, speculative, or advisory. But here, the only relief that Plaintiffs can obtain would be a generalized advisory instruction to follow the law in the future.

The unavailability of relief against Appellees (the "TBC")—the MHA Nation's governing body—should not come as a surprise to Plaintiffs. The MHA Nation's Constitution explicitly limits relief against the TBC for an alleged ICRA violation to only injunctive relief. The TBC's sovereign immunity bars all other relief.

This Court should also reject Plaintiffs' cross-appeal and affirm Judge Jones' findings that: (1) the dismissed claims are barred on sovereign immunity and political question grounds and (2) Plaintiffs do not have a communal property interest in all tribal resources under the ICRA.

This Court should remand with an instruction to grant the TBC's motion to dismiss in its entirety.

¹ 25 U.S.C. §§ 1301 *et seq.*

ARGUMENT

I. The Tribal Court cannot properly award injunctive relief in this instance.

A. The TBC's arguments regarding the validity of injunctive relief are ripe for appellate review.

While the Tribal Court has not awarded any injunctive relief, this Court can—and should—address the scope and nature of injunctive relief the Tribal Court can impose against the TBC.

Ripeness is a “closely related doctrine” of standing that “originates from the same Article III limitation.” [*Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 997 (8th Cir. 2022) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014))]. The ripeness doctrine “prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Id.* at 997–98 (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). “[T]he complainant must show both ‘the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration’ ” “[t]o demonstrate that an alleged dispute is ripe for review.” *Id.* at 998 (quoting *Abbott Lab'ys*, 387 U.S. at 149, 87 S.Ct. 1507). **A case that “would not benefit from further factual development and poses a purely legal question not contingent on future possibilities ... is fit for judicial decision.”** *Id.*

Religious Sisters of Mercy v. Becerra, 55 F.4th 583, 608 (8th Cir. 2022) (emphasis added).

“The hardship prong asks whether delayed review ‘inflicts significant practical harm’ on the plaintiffs.” *Parrish v. Dayron*, 761 F.3d 873, 875 (8th Cir. 2014) (citing *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

The TBC satisfies both prongs of the ripeness doctrine. First, the TBC challenges whether the Tribal Court has the authority to award injunctive relief against it in light of the TBC’s sovereign immunity. The TBC need not wait for an improper injunction to be

issued to challenge the legality of the underlying order. Whether the Tribal Court has the authority to issue the prescribed injunctive relief is a “purely legal question[.]” *Becerra*, 55 F.4th at 608. Independent of any future developments in this case, the Tribal Court cannot issue any form of injunctive relief if it lacks the authority to do so. “Additionally, judicial resolution of this matter will ... settle the parties’ dispute.” *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000). The TBC’s appeal of this issue is fit for judicial decision.

Furthermore, delaying review of this issue until the Tribal Court issues an injunction “inflicts significant practical harm” on the TBC. *Sierra Club*, 523 U.S. at 733. The TBC would be forced to expend time and financial resources litigating a case that, but for the erroneous ruling, should have been dismissed entirely. *Cf. Nebraska Pub. Power Dist.*, 234 F.3d at 1039 (“Where the uncertainty resulting from such a situation creates a sufficiently substantial financial risk, or will force parties to modify their behavior significantly, an issue may be ripe.”). One of the core aspects of sovereign immunity is the immunity to be free from suit entirely, which can only be preserved by hearing the TBC’s appeal at this stage of the proceedings. *See Dreith v. City of St. Louis, Missouri*, 55 F.4th 1145, 1150 (8th Cir. 2022) (finding that the Court had jurisdiction over the City’s interlocutory appeal because “a decision to forgo ruling on immunity is effectively unreviewable after the defendant has had to proceed to trial.”); *cf. Parton v. Ashcroft*, 16 F.3d 226, 228 (8th Cir. 1994) (“Like denials of qualified immunity, a refusal to rule on qualified immunity is effectively unreviewable on appeal because once the defendant has

had to proceed to trial, he or she has lost the benefit of qualified immunity, that is, the entitlement to be free from suit.”).

The TBC need only “satisfy both prongs to at least a minimal degree.” *Id.* The TBC has done so here – the issue of whether the Tribal Court can issue the requested injunctive relief against the TBC is ripe for appellate review because it only presents a question of law and failure to address it now will cause significant and unnecessary prejudice to the TBC.

B. The Tribal Court cannot issue an injunction that merely orders TBC to obey the law in the future.

In response to the TBC’s argument that well-established case law prohibits injunctions that only instruct a party to follow the law, Plaintiffs point this Court to Article VI, § 3(b) of the MHA Nation Constitution. *See* TBC’s Opening Brief at 12-13; Plaintiffs’ Principal Brief at 5-7. Plaintiffs’ argument misses the mark. The TBC is not contesting the *availability* of injunctive relief against the TBC in certain circumstances – the MHA Nation Constitution expressly grants the Tribal Court the ability to issue injunctive relief upon a finding of an ICRA violation. *See* MHA Nation Constitution Art. VI, § 3(b). Here, though, the Tribal Court erred when it determined that it could issue improperly vague injunctive relief in this instance.

The Tribal Court found that it had the authority “to enjoin the [Appellants’] from violating the [Appellees’] rights under Article VIII of the MHA Nation Constitution by failing to adhere to Article VI, Section 5 of the MHA Nation[.]” *See* Order at 25 (emphasis added). Based on that finding, the Tribal Court determined that it could issue injunctive

relief “in order to avoid future violations.” Order at 22. But the law is clear: “an injunction which does little or nothing more than order [a party] to obey the law is not specific enough” to satisfy the requirements of appropriate injunctive relief. *Daniels v. Woodbury Cnty., Iowa*, 742 F.2d 1128, 1134 (8th Cir. 1984); see also TBC’s Opening Brief at 11-12 (collecting cases). “An obey-the-law injunction departs from the traditional equitable principle that injunctions should prohibit no more than the violation established in the litigation or similar conduct reasonably related to the violation.” *E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 841 (7th Cir. 2013) (collecting cases). Indeed, courts have overwhelming found that such an “obey-the-law” injunction is impermissible and unenforceable. See *Daniels*, 742 F.2d at 1134; *Calvin Klein Cosmetics Corp.*, 824 F.2d at 669; *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 n.1 (8th Cir. 2004); *Bennie v. Munn*, 822 F.3d 392, 397 (8th Cir. 2016); *Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 507 (D. Neb. 2007); *Powell v. Noble*, 36 F.Supp.3d 818, 836-37 (S.D. Iowa 2014); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978); *Louis W. Epstein Family P’ship v. Kmart Corp.*, 13 F.3d 762, 771-72 (3d Cir. 1994); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200-01 (11th Cir. 1999). Consistent with this settled authority, this Court should find that the Tribal Court may not issue an injunction that simply requires the TBC to follow the law in the future.

Furthermore, in this instance the Tribal Court cannot narrow the scope of the injunction because doing so would violate the MHA Nation Constitution and the political question doctrine. The TBC’s motion to dismiss should have granted in its entirety.

C. Plaintiffs' claims relating to notice are barred based on sovereign immunity and the political question doctrine.

The Tribal Court correctly dismissed the vast majority of Plaintiffs' claims pursuant to the political question doctrine and sovereign immunity. In fact, Plaintiffs themselves recognize that the political question doctrine prohibits judicial interference with the TBC's constitutional authority to make policy decisions. Plaintiffs' Principal Brief at 8 ("Injunctive relief that would invade the decision of how to spend tribal funds would therefore be improper. Plaintiffs do not disagree with this portion of the analysis.").

In an effort to avoid the political question doctrine, Plaintiffs attempt to recast their complaint as asking the Tribal Court to compel notice of its decisions in a particular manner. But Plaintiffs' "notice" argument would require the Tribal Court to impermissibly tell the TBC how it must hold its meetings. *See, e.g.*, Plaintiffs' Principal Brief at 10 n.3 ("Plaintiffs further maintain that a 'duly passed resolution' in the context of the Tribes' Constitution & Bylaws and the past practice of the Tribes before the current administration means a resolution passed in an open session as opposed to a closed session."). There is no requirement in the MHA Nation's Constitution or Bylaws that requires the TBC to pass all resolutions at open meetings, nor does anything in the MHA Nation Constitution or Bylaws prohibit the TBC from meeting in executive session or passing resolutions at those meetings. Past practices do not create judicially enforceable requirements. Whether the TBC decides to hold an executive session or pass a specific

resolution at a particular time is solely within the discretion of the TBC. As the Tribal Court recognized, courts cannot encroach upon this authority:

Similarly, the Plaintiffs complain that the Defendants discuss important issues to the membership in Executive sessions where the public is not permitted to be present. This does not present a justiciable claim under the political question doctrine because the TBC has exclusive control over how to debate and discuss issues of importance to the Tribe, provided there is some public resolution of the matter.

See Order at 21-22. This passage from the Trial Court's opinion is correct—but it contradicts the Tribal Court's ruling that it can issue generalized prospective injunctive relief. To the extent Plaintiffs intend to ask the Tribal Court to issue prospective injunctive relief requiring the TBC to act only in open meetings, the Tribal Court cannot issue such relief.

The TBC is further protected by sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (collecting cases). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). While the MHA Nation Constitution provides a limited waiver of sovereign immunity for only injunctive relief if the TBC violates ICRA, *see* MHA Nation Constitution Art. VI, § 3(b), Plaintiffs' claims do not fall within the scope of the waiver. The waiver only applies to alleged ICRA violations. ICRA does not create a due process right to any particular type of notice of meetings, nor does it prohibit executive sessions.

The generalized right to a referendum does not support an ICRA violation or create a specific requirement that the TBC not act in executive session. Moreover, there is no time limit for tribal members to initiate a referendum, so enjoining TBC action to permit time for a referendum would paralyze the TBC—which is contrary to the MHA Nation’s Constitutional grant of authority to the TBC to manage all affairs of the Tribe.² Any attempt to frame the claims under the protections of ICRA should be rejected.

D. Ex parte Young does not save Plaintiffs’ claims.

Ex parte Young does not permit Plaintiffs to pursue their claims against the TBC either. First and foremost, *Ex parte Young* does not permit courts to issue obey-the-law injunctions. In other words, even if *Ex parte Young* applied—which it does not here—it would not change the TBC’s primary argument on appeal: that the Tribal Court cannot issue an injunction that simply instructs the TBC to follow the law in the future.³

Moreover, the *Ex parte Young* exception cannot apply where a suit in reality is against the government, rather than an official. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 853 F. Supp.

² The Supreme Court recently examined the scope of presidential immunity in *Trump v. United States*. The Court held “that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.” 144 S. Ct. 2312, 2328 (2024). While this case does not involve a criminal prosecution, the TBC’s sovereign immunity serves a similar function—it ensures that the TBC can make decisions for the Tribe without interference. Abrogating the TBC’s sovereign immunity by recognizing a communal property right in tribal funds threatens the function of the TBC and “chill[s] [the TBC] from taking the ‘bold and unhesitating action’ required of an independent Executive.” *Trump*, 114 S. Ct. at 2330-31 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982)). That concern also highlights why the political question doctrine applies here. As the Supreme Court recognized, “courts cannot examine” executive decisions made by the TBC that within its “‘conclusive and preclusive’ constitutional authority.” *See id.* at 2328.

³ Plaintiffs are also incorrect when they suggest that the TBC waived any argument related to *Ex parte Young*. To the contrary, the scope of injunctive relief and the impact of the political question doctrine were raised in the Tribal Court and in this appeal. The TBC can respond here to Plaintiffs’ efforts to circumvent those arguments using the *Ex parte Young* doctrine.

1118, 1128 (D. Minn. 1994). The general rule is that relief sought “is in fact against the sovereign if the decree would operate against the [sovereign]. And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.” *Pennhurst*, 853 F. Supp. at 1128. Here, Plaintiffs have named the TBC itself as a defendant and seek to restrain the actions of the TBC—hallmarks of an action that is against the government and not subject to review under *Ex parte Young*.

Finally, the Tribal Court cannot use *Ex parte Young* as a basis to compel discretionary actions of government officials. “[S]uits seeking to compel executive officials to perform a discretionary task . . . are not permitted.” *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1128 (D. Minn. 1994) (citing *Ex parte Young*, 209 U.S. 123, 158 (1908)). Here, not only are the challenged decisions discretionary, as opposed to ministerial, but they are also exclusively committed to the TBC under the political question doctrine. The Tribal Court may not compel discretionary acts nor may it interfere with the decisions committed to the constitutional authority of a different governmental body.

II. This Court should affirm the rest of Judge Jones’ Order.

A. Judge Jones properly rejected Plaintiffs’ arguments that they have a communal property interest enforceable under ICRA.

Plaintiffs continue to assert that they have a communal property interest in tribal funds, and that this interest supports a due process claim under ICRA. Just as Judge Jones did, this Court should reject this argument.

As the TBC argued below, Plaintiffs cannot skirt around the issue of sovereign immunity by asserting a due process claim under ICRA based on a notion of “communal property.” To assert a due process claim, Plaintiffs must show that: (1) they were deprived of a protected interest and (2) if so, what process was due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). When determining what process is due, a court must consider three factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

ICRA “modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.” *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978) . Therefore, tribal law governs when determining whether a protected interest exists. *See id.* at 64 n.14.

As Judge Jones properly found, Plaintiffs do not have a property interest in tribal funds as “communal property.” Plaintiffs rely on *Bordeaux v. Wilkinson*,⁴ which is not binding on this Court or the Tribal Court. Regardless, Plaintiffs’ application of the case stretches *Bordeaux*’s communal property right beyond the original confines of the decision. The court in *Bordeaux* never evaluated or applied the communal property

⁴ 21 Indian L. Rep. 6131 (Ft. Bert. Tr. Ct. Oct. 1, 1993).

concept in the context of a due process claim under ICRA. Rather, the focus was on whether the plaintiff had standing to bring the lawsuit. Plaintiffs have not cited a single case where a court has relied on *Bordeaux* to find an enforceable communal property due process right under ICRA. The Court should decline to make such an extension here.

Tribal courts have recognized several property rights under ICRA based on tribal employment contracts,⁵ a continued expectation of employment,⁶ and tribal membership.⁷ Plaintiffs' allegation of communal property rights do not fall into any of these categories. "[T]he range of interests protected by procedural due process is not infinite." *The Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972). Similarly, the right to a referendum in the MHA Nation Constitution does not create an enforceable property right for any particular individual. Such a finding would be an unwarranted and unsupported expansion of the due process protections under ICRA.

Even more, expanding due process protections to include a communal property right would trample on the TBC's constitutional mandate "[t]o manage all economic affairs and enterprises of the Three Affiliated Tribes[.]" See MHA Nation Constitution Art. VI § 4. Judge Jones correctly identified the practical (and unconstitutional) result of recognizing a communal property interest:

⁵ See *Francis v. Wilkinson*, 1992 Northern Plains App. LEXIS 5, at *8 (N. Plns. Intertr. Ct. App. Jan. 21, 1993)

⁶ See *Simmonds v. Hale*, 2001 Northern Plains App. LEXIS 3, at *3 (N. Plns. Intertr. Ct. App. June 25, 2001) (citing *Lenz v. Dewey*, 64 F.3d 547 (10th Cir. 1995))

⁷ *Jackson v. Enrollment Dep't, Tribal Council for Confederated Tribes of Grand Ronde Cnty. of Oregon*, No. C-13-08-005, 2014 WL 7684858, at *8 (Grand Ronde Tribal Ct. Sept. 15, 2014) (finding "that the loss of Tribal membership and related loss of Petitioner's health, social service, financial and other benefits presents strong grounds for the necessary establishment of due process property rights at issue with a disenrollment action."); *Burns Paiute Indian Tribe v. Dick*, 22 Indian L. Rep. 6016, 6017 (Burns Paiute Ct. App. 1994) (finding that tribal members were denied due process when they were banned from the reservation under a vague tribal ordinance that provided insufficient notice about which offenses warranted exclusion).

A close examination of Bordeaux however reveals that the “property” right found therein is more nuanced than the broad concept of communal property, which makes for a good Kumbaya moment but would render any tribal expenditure of monies a potential property deprivation and would turn this Court into some type of super-legislative body with veto power over TBC decisions, thus flipping the Constitution on its head.

* * * * *

The Court rejects the notion of communal property rights that is somewhat endorsed in the Bordeaux decision. Although that concept sounds “tribal” in nature it would open the floodgates to endless litigation over how the Tribes spend money as there are always going to be tribal members who disagree with how the TBC spends tribal funds. This Court should not be the ultimate arbiter of whether tribal expenditures serve the common good of the membership as those are political decisions the membership elects leaders to make.

See Order at 16; 17-18. Plaintiffs attempt to distance themselves from this reality by arguing that any property interest “is only implicated to enforce the rules where those rules have been broken.” *See* Plaintiffs’ Principal Brief at 18-19 n.7. But that argument lacks logical consistency. Nothing would prevent tribal members in the future from challenging every action of the TBC, alleging that “rules were broken” and thereby circumventing the TBC’s sovereign immunity. The extremely limited waiver of immunity in the MHA Nation’s Constitution was not intended to open the floodgates to permit litigation by any member of the Tribe against the TBC to enforce rules generally – a power that even Plaintiffs agree the courts do not have. *See* Plaintiffs’ Principal Brief at 8-9. Any recognition that tribal members have a community property interest in tribal funds would eradicate MHA Nation’s sovereign immunity. Even though ICRA protects tribal members’ due process rights, the statute “also manifest[s] a congressional purpose to protect tribal sovereignty from undue interference.” *Martinez*, 436 U.S. at 63. The

possibility of judicial intervention after every expenditure decision made by the TBC is not only untenable, but also unconstitutional. The Court should not disturb Judge Jones' holding: Plaintiffs do not have a communal property interest in tribal resources.

Plaintiffs also do not have a due process right enforceable under ICRA to hold a referendum. First, a referendum is not a "private interest" that would satisfy the first portion of a due process analysis. *See Mathews*, 424 U.S. at 335. Second, there is no way for a tribal court to craft prospective injunctive relief regarding past resolutions—doing so would run afoul of the MHA Nation's constitutional limitation on relief against the TBC. Any such relief would be inherently backward-looking or would amount to a judicial instruction to the TBC on matters committed to the TBC, violating the political question doctrine. Finally, Plaintiffs' invocation of a referendum is purely speculative. Permitting tribal members to stop governmental action because they claim they might be able to pursue a referendum—particularly when the MHA Nation's Constitution contains no time limits for a referendum—would permit any tribal member to veto any TBC action at any time. Plaintiffs' claims simply do not fit within the limited waiver of sovereign immunity for ICRA violations.

B. Even if Plaintiffs could establish an ICRA violation, the MHA Nation's Constitution limits Plaintiffs to prospective injunctive relief only.

To obtain meaningful relief, Plaintiffs need Judge Jones to issue a ruling that invalidates past TBC action or compels the TBC to take additional discretionary action. But they cannot obtain that relief, as Judge Jones correctly held. There may be other cases

where injunctive relief against the TBC could be available without violating Tribal law or the political question doctrine, but this is not such a case.

Plaintiffs argue that “[t]he Tribal Court did not cite any authority that expressly supports limiting the relief to injunctive relief[.]” This is mistaken. The Tribal Court relied on the *Francis* decision when limiting Plaintiffs’ relief to prospective injunctive relief. *See* Order at 14-15; 22. The court in *Francis* (on reconsideration) was clear: if the TBC violates ICRA, “the only relief that the Court can impose against the Tribal Court is injunctive relief.” *Francis*, 1992 Northern Plains App. LEXIS 5 at *14. Following *Francis*, the Tribal Court properly found that Article VI, § 3(b) of the MHA Nation Constitution restricts the form of relief the Court can grant.

Furthermore, the Tribal Court was correct in finding that any injunctive relief must be prospective. To the extent that Plaintiffs rely on ICRA and the MHA Nation’s constitutional waiver of sovereign immunity, any injunctive relief in this situation must be prospective because there is nothing that a court could retroactively enjoin without violating the political question doctrine.

Plaintiffs are not entitled to declaratory relief because they did not present that argument to the Tribal Court in opposing the TBC’s motion to dismiss. Furthermore, the MHA Nation’s Constitution explicitly limits relief against the TBC to injunctive relief and issuing declaratory relief would violate the political question doctrine. While declaratory and injunctive relief sometimes go hand in hand, “[t]ribal sovereign immunity is a ‘jurisdictional threshold matter’” that cannot be circumvented by a request for declaratory relief. *Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662,

671 (8th Cir. 2015). Absent congressional authorization or a clear waiver by MHA Nation, “[the] tribe’s sovereign immunity bars suits against the tribe for injunctive and declaratory relief.” *Id.* Neither ICRA nor the MHA Nation Constitution abrogates MHA Nation’s sovereign immunity. “Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief.” *Martinez*, 436 U.S. at 1677. The MHA Nation Constitution’s limited waiver of sovereign immunity *only* permits injunctive relief. As discussed above, permitting a Tribal Court to issue declarations invalidating past actions of the TBC would violate the political question doctrine. Judge Jones correctly found that that Plaintiffs are not entitled to declaratory relief.

And to the extent Plaintiffs rely on *Ex parte Young* to provide an alternate avenue of jurisdiction they cannot evade the clear limitation on such relief: “state officials may be sued in their official capacities for *prospective* injunctive relief when the plaintiff alleges that the officials are acting in violation of the Constitution or federal law.” *Missouri Child Care Ass’n v. Cross*, 294 F.3d 1034, 1037 (8th Cir. 2002) (emphasis added) (citing *Ex parte Young*, 209 U.S. 123 (1908) and *Green v. Mansour*, 474 U.S. 64 (1985)). The Eight Circuit has repeatedly affirmed that *Ex parte Young* only permits prospective injunctive relief. See *Randolph v. Rodgers*, 253 F.3d 342, 345 (8th Cir. 2001); *Gibson v. Arkansas Dept. of Corr.*, 265 F.3d 718, 720 (2001); *Klingler v. Director, Dept. of Revenue*, 281 F.3d 76, 777 (8th Cir. 2002); *Monroe v. Arkansas State Univ.*, 495 F.3d 591, 594 (8th Cir. 2007); *McDaniel v. Precythe*, 897 F.3d 946, 951-52 (8th Cir. 2018); *Minnesota RFL Republican Farmer Lab. Caucus v. Moriarty*,

108 F.4th 1035, 1037-38 (8th Cir. 2024). The weight of the authority supports the Tribal Court's conclusion.

In sum, where a governmental official is proved to have violated the law in a specific way, courts can issue prospective injunctive relief to prevent that specific violation from recurring. If this Court finds that any portion of Plaintiffs' claims survive, it should affirm that any relief is limited to prospective injunctive relief.

CONCLUSION

For the foregoing reasons, the Court should reverse Judge Jones' decision to partially deny the TBC's motion to dismiss and remand with instructions to dismiss the Complaint entirely.

Dated: October 9, 2024

ROBINS KAPLAN LLP

By: Timothy Q. Purdon

Timothy Q. Purdon (ND #05392 and TAT #0051)
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501
Telephone: (701) 255-3000
TPurdon@RobinsKaplan.com

Timothy W. Billion (SD#4641 and TAT#131)
150 East 4th Place, Suite 704
Sioux Falls, SD 57104
Telephone: (605) 335-1300
TBillion@RobinsKaplan.com

Attorneys for Defendants

MANDAN, HIDATSA, & ARIKARA NATION
FORT BERTHOLD RESERVATION

SUPREME COURT
NEW TOWN, NORTH DAKOTA

Carol Good Bear, Terrance Fredericks, Todd Hall, Patti Jo Hall, Kelly Hosie, and Edward S. "Tyke" Danks,

Appellees,

vs.

Mark N. Fox, as Three Affiliated Tribes' Tribal Chairman, Cory Spotted Bear, as Three Affiliated Tribes' Vice-Chairman, Fred Fox, as Three Affiliated Tribes' Executive Secretary, Mervin Packineau, as Three Affiliated Tribes' Treasurer, Robert White, as Three Affiliated Tribes' Councilman, Sherry Turner-Lone Fight, as Three Affiliated Tribes' Councilwoman, Monica Mayer, as Three Affiliated Tribes' Councilwoman, and The Three Affiliated Tribes' Tribal Business Council,

Appellants.

AP2024-002
Case No. CV-2023-0469

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 9, 2024, a true and correct copy of the Response/Reply Brief of the Appellants-Defendants was filed with the Court by U.S. Mail and Email at the following addresses:

Clarine DeGroot
MHA Supreme Court Clerk
Fort Berthold District Court
New Town, ND 58763
deputyclerks@mhanation.com

Fort Berthold District Court
P. O. Box 969
New Town, ND 58763
deputyclerks@mhanation.com

and served by U.S. Mail and Email on Appellees' counsel at the following address:

Jack E. Zuger
30 E. Seventh Street
2800 Wells Fargo Place
St. Paul, MN 55101
jzuger@larsonking.com

Dated: October 9, 2024

ROBINS KAPLAN LLP

By: Timothy Q. Purdon

Timothy Q. Purdon (ND #05392 and TAT #0051)
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501
Telephone: (701) 255-3000
TPurdon@RobinsKaplan.com

Timothy W. Billion (SD#4641 and TAT#131)
150 East 4th Place, Suite 704
Sioux Falls, SD 57104
Telephone: (605) 335-1300
TBillion@RobinsKaplan.com

Attorneys for Defendants