NO. 2013-CI-APL-002

IN THE NOOKSACK COURT OF APPEALS
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON

SONIA LOMELI, ET AL.,

Appellants,

v.

ROBERT KELLY, ET AL.,

Appellees.

OPENING BRIEF OF APPELLANTS

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I. SUMMARY OF THE ARGUMENT

This appeal concerns whether, under Nooksack law, the doctrine of *Ex parte Young* allows Appellants to sue tribal officials for prospective injunctive relief, in their official capacity, for violating Nooksack law and acting in furtherance of unconstitutional ordinances, resolutions, and procedures. Because the Nooksack Tribal Council has thus far failed to act according to Nooksack law, its Councilmembers must be enjoined from taking actions that are unlawful, and taking actions in furtherance of an unconstitutional resolution, ordinance, or procedure (which are therefore unlawful). Here, the Trial Court's fundamental failure to read Appellants' Complaint(s) as pled — *i.e.*, as suit against Appellees in their official capacities for prospective injunctive relief only — has resulted in manifest error. The Trial Court's resulting and related failure to correctly apply *Ex parte Young* requires reversal.

Although it need not, were this Court to look to the merits of the Appellants' claims — as the Trial Court has inappropriately done — it must find that Appellees have violated the Constitution and laws of the Nooksack Indian Tribe. In sum, Appellees have:

- Refused to hold constitutionally mandated meetings of the Nooksack Tribal Council and the Nooksack People;
- Acted in furtherance of unconstitutional tribal law and regulations;
- Initiated disenrollment proceedings on their own accord, in violation of Nooksack law; and

- Deprived Appellants of the due process of law.

Appellants acknowledge that the Tribal Council possesses qualified constitutional authority to prescribe rules and regulations governing involuntary loss of membership. But here, Appellees have reached far beyond that authority. The Trial Court erred in holding otherwise. As a consequence of the Trial Court's errors, this matter must be reversed and remanded with instructions to enter a preliminary injunction pending trial on the merits.

Finally, the Trial Court's failure to analyze the merits of certain claims, while analyzing the merits of others, requires that, at minimum, its order granting Appellees' motion to dismiss, CP 78, be vacated and this case be remanded.[1]

II. TRIAL COURT ERRORS

A. Decision And Order Denying Defendant's Motion To Strike In Part And Granting In Part. CP 31.

The Trial Court erred in striking Exhibit A to the Declaration of Diantha Doucette. Any privilege that may have existed was waived when that enrollment record was disclosed to a third party and the opposing party.

B. Order Denying Motion For Preliminary Injunction. CP 44.

The Trial Court erred by holding that tribal sovereign immunity operates as a bar to injunctive relief against tribal officers, except in those instances where "the actions taken . . . clearly and unambiguously violate their official duties" in

[1] As directed by this Court of Appeals, Appellants cite to the Docket Report herein. As indicated in various footnotes below, that Report, and thus the appellate record potentially, appears incomplete. As further indicated, missing documents will not be filed with this pleading, but can and will be made readily available by Appellants upon the Court's request.

an "egregious" manner. CP 44, at 9.

The Trial Court also erred in holding that the *Ex parte Young* exception requires an analysis of the merits prior to a jurisdictional ruling.

The Trial Court also erred by holding that Appellees did not "act[] outside the procedures set out in Title 63." *Id.* at 13.

The Trial Court also erred in failing to find that N.T.C. § 63.04.001(B)(1)(a) and/or Resolution No. 13-02 are unconstitutional.

The Trial Court also erred in holding that Appellees' initiation of disenrollment proceedings, without first providing any evidence whatsoever that those Nooksacks subject to disenrollment do not meet the membership requirements of Article II, Section 1, of the Nooksack Constitution, was not unconstitutional.

The Trial Court also failed to employ the correct test for a preliminary injunction.

C. Decision And Order Denying Plaintiff's (sic) Motion For Temporary Restraining Order As To Issues Related To Resolution 13-38. CP 67.

The Trial Court erred by holding that tribal sovereign immunity operates as a bar to injunctive relief against tribal officers, except in those instances where the official does something illegal that is extremely outside of his or her job description. CP 67 at 4-5.

The Trial Court also erred in holding that the *Ex parte Young* exception requires an analysis of the merits prior to a jurisdictional ruling.

The Trial Court also erred in holding that Appellees have not violated the Equal Protection clause of the Indian Civil Rights Act as incorporated into the Nooksack Constitution. *Id.* at 6-7.

The Trial Court also erred in ending its analysis at whether Appellants have been targeted because of a "racial animus" and failing to employ the "rational basis" test. *Id.*

D. Order Denying Appellants' Second Emergency Motion For Temporary Restraining Order As To Issues Relating To Tribal Council Meetings. CP 71.

The Trial Court erred in failing to read Appellants' Complaint(s) as pled. Appellants did not sue Appellees "in their individual capacities." CP 71 at 4.

The Trial Court also erred by holding that tribal sovereign immunity operates as a bar to injunctive relief against tribal officers, except in those instances where the official does something illegal that is extremely outside of his or her job description. *Id.* at 3.

The Trial Court also erred in holding that the *Ex parte Young* exception requires an analysis of the merits prior to a jurisdictional ruling.

The Trial Court also erred in failing holding that Appellees are not required, by the Nooksack Bylaws, to hold monthly meetings. *Id.* at 6.

The Trial Court also erred in holding that Appellants do not have standing to assert a claim for violation of Article II, Section 3 of the Nooksack Bylaws when Appellants have clearly been harmed Appellees failure to hold a meeting,

and the harm will likely be redressed by a favorable decision. *Id.* at 8.

E. Order Granting Appellees' Motion to Dismiss Second Amended Complaint. CP 78.

The Trial Court erred in failing to take the non-moving parties' facts as true, and to resolve all factual disputes in the non-moving parties' favor.

The Trial Court also erred in failing to read Appellants' Complaint(s) as pled. Appellees were not "sued in their personal capacity" such that they became "personally liable." CP 78 at 2, 8.

The Trial Court also erred in failing to find that N.T.C. § 63.04.001(B)(1)(a), Resolution No. 13-02, and Resolution No. 13-38 are unconstitutional.

The Trial Court also erred in holding that the *Ex parte Young* doctrine applies only when "Appellees act[] outside the scope of their authority," and therefore requires an analysis of the merits prior to a jurisdictional ruling. *Id*. at 9.

The Trial Court also erred in failing to find that Appellees violated Title 63. *Id*. at 10-12.

The Trial Court also erred in holding that, even though Appellants qualify for membership under Section 1(H) of the Constitution, Appellees did not violate the Constitution initiating disenrollment proceedings against them. *Id*. at 14.

The Trial Court also erred in holding that obstructing the Tribal Council's ability to hold public meetings does not violate Nooksack law. *Id*. at 17-18.

The Trial Court also erred in holding that Appellants lack standing. *Id*. at

18-19.

The Trial Court also erred in dismissing Appellants' Second Amended Complaint without analyzing each claim made therein.

The Trial Court also erred in failing to find that Appellants have been denied due process, in violation of the Indian Civil Rights Act and the Nooksack Constitution.

F. Findings of Fact and Conclusions of Law in Answer to Court of Appeals' Order Extending Stay, CP 92.

The Trial Court erred in failing to strike the Declaration of Grett Hurley.

The Trial Court also erred in holding that the named Plaintiffs (Appellees) represent only themselves in this matter.

III. STATEMENT OF CASE

On December 20, 2012, Tribal Council Chairman Robert ("Bob") Kelly called a "special meeting" pursuant to Article II, Section 3 of the Bylaws of the Nooksack Indian Tribe ("Bylaws"). CP 6. The topic to be discussed at this special meeting was the enrollment application for Terry St. Germain's children.[2] *Id.* Enrollment Officer Roy Bailey attended this special meeting and testified that Mr. St. Germain's children were ineligible for enrollment, due to the Nooksack Tribal Enrollment Office having "incomplete files" and "missing documents" regarding these applicants. *Id.* Chairman Kelly then stated that he would contact

[2] Terry St. Germain is an enrolled member of the Nooksack Tribe and the brother of Nooksack Tribal Council Secretary Rudy St. Germain. *See generally* CP 3. The Special Meeting Agenda listed "Enrollment Recommendations" as the first item of Tribal Council business. CP 25, Ex. B. The agenda did not list any matter of disenrollment. *Id.*

Judith Joseph, Superintendent of the Puget Sound Agency for the Bureau of Indian Affairs ("BIA"), in order to determine the status of the missing documents and files. *Id.* As the meeting was described by former Nooksack Enrollment Officer Jewell Jefferson:

> On December 20, 2012, Roy Bailey and I were called into a Tribal Council meeting at which the enrollment of tribal member Terry St. Germain's children was being discussed. At that meeting, the Tribal Council asked Roy Bailey and I to look into the enrollment matter. Unbeknownst to me, at some time after December 20, 2012, the Tribal Council asked only Roy Bailey to look into the matter of Terry St. Germain's children's enrollment. . . . I still do not know why or how, between December 20, 2012 and February 12, 2013, an inquiry into the enrollment of Terry St. Germain's children, morphed into the disenrollment of over 300 enrollment members of Rapada, Rabang, and Narte/Gladstone families. I believe those families are being targeted.

CP 39, at 3, 6.[3]

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[3] Ms. Jefferson's testimony goes on:

> [M]any Nooksack members' enrollment letters do not specify a provision of Section 1 of the constitutional membership provision that they were enrolled under, meaning the letters do not specify 1(A), 1(B, (1C), 1(H) and so forth. That problem is not limited to only the Rapada, Rabang, and Narte/Gladstone families. It extends throughout the entire Tribe. . . . Before the disenrollment notices were mailed out, I asked Katherine Canete about one person, a minor Nooksack member, who was on the disenrollment list. I explained that although her father was on the disenrollment list as a descendant of Annie George, her mother was enrolled without any affiliation with Annie George, which made the minor properly enrolled irrespective of the proposed disenrollment of the Rapada, Rabang, and Narte/Gladstone families. Despite my concern, Katherine refused to take that minor off of the disenrollment list. . . . Dating back to when I started as Nooksack Enrollment Officer[,] I never received any formal written documentation requesting loss of membership of any other Nooksack tribal member with an explanation as to how that documentation was obtained. . . . **[T]he current disenrollment process was not properly started with a formal documented request for loss of membership of any tribal member by another tribal member, as required by Title 63.**

CP 39 at 2-5 (emphasis added).

On January 8, 2013, the Tribal Council held the "regular meeting" that is required by Article II, Section 2 of the Bylaws. CP 6. Roughly an hour after the regular meeting had commenced, Chairman Kelly met with other councilmembers to discuss information allegedly obtained by himself and Officer Bailey from the BIA earlier that day. *Id.* According to Chairman Kelly and Officer Bailey, not only did the BIA lack any documents or files that would support the St. Germain children, but supporting documents and files were "missing" from over three hundred currently enrolled Nooksack's files. *Id.*

On January 18, 2013, Officer Bailey issued a hand-written letter to Terry St. Germain, which stated the following:

> As of today 1/18/13 your Kids do not meet Constitutional requirements for eligibility for membership into the Nooksack Tribe. This letter is per your request of verification for your kids [sic] enrollment application.

Id., Ex. A. Terry St. Germain is 1/2 degree Indian blood and his great-great grandmother is Annie George, who was a "full-blooded Nooksack."[4] CP 3. Mr. St. Germain's children clearly met the requirements of Article II, Section 1(H) of the Constitution, but they were denied membership because Mr. St. Germain's

[4] *See also generally* Second Declaration of Gabriel S. Galanda ("Second Galanda Decl."), Ex. B; CP 64, Ex. P. Said Exhibit B, a Ph.D.-expert anthropological opinion affirming Appellants' status as properly enrolled Nooksack Indians, was filed with the Trial Court on May 29, 2013. It does not appear on the Docket Report. It may have been included in CP 54, but Appellants cannot be sure from the Docket Report. The document will not be filed with this pleading, but will be available upon request, should the Court so desire.

enrollment application apparently had was approved pursuant to Article II, Section 1(A) of the Constitution. *Id.*

On February 4, 2013, Chairman Kelly canceled the "regular meeting" of the Nooksack People required by Article II, Section 2 of the Tribe's Bylaws, stating that a regular meeting would be improper because two of the councilmembers were not eligible for Nooksack enrollment. *Id*. at 2. Chairman Kelly informed the rest of the Tribal Council that the Enrollment Officers Jewell Jefferson and Roy Bailey had taken the initiative to begin the process of disenrolling 306 Enrolled Nooksack Members, including Appellants. *Id.*

Late February 11, 2013, Chairman Kelly called an executive session of the Tribal Council, to be held the morning. *Id*., at 3; CP 29, Exs. F, G. On February 12, 2013, an executive session was held. CP 6. At the executive session, Chairman Kelly presented Resolution Nos. 13-01, 13-02, 13-04, and 13-04, then ordered Tribal Council Secretary Rudy St. Germain and Councilmember Michelle Roberts to excuse themselves from the session, as they were to be disenrolled by Resolution No. 13-02. *Id.*; CP 14, Ex. 4. While Mr. St. Germain and Ms. Roberts were forced to exit the executive session, Officers Jefferson and Bailey remained present at that session. CP 6. The Tribal Council did not "designate" these employees as required by Article II, Section 7 of the Bylaws. *Id.*

Because Mr. St. Germain and Ms. Roberts were forced to exit the February 12, 2013, executive session, they were not allowed to vote on

Resolution Nos. 13-01, 13-02, 13-04, and 13-04. *See generally* CP14, Ex. 1-4. Resolution No. 13-02 stated that it was "the Tribe's Enrollment Department" that "discovered that persons on the current tribal roll did not meet the then existing Constitutional requirements at the time of enrollment and were erroneously enrolled into the tribe." CP 14, Ex. 2. The Resolution states that this information was "discovered . . . in the normal course of processing enrollment applications." *Id.* Resolution No. 13-02 also stated that "erroneous enrollments originated from lineal descendants of an original Nooksack Public Domain allottee." *Id.*

According to the Resolution, neither Annie James (George) nor Andrew James were "original Nooksack Public Domain allottees or lineal descendants of an original Nooksack Public Domain allottee living on January 1, 1942." *Id.* Therefore, according to the Enrollment Department, "each member who descended from Annie James (George) or Andrew James and claim right to membership through lineal descendancy of an original Nooksack Public Domain allottee" must be disenrolled. *Id.* The Resolution did *not* conclude, however, that "Annie James (George) or Andrew James" were not Nooksack and that, therefore, any member who claims right to membership through their "ancestry to any degree" was not Nooksack. Const., art. II, § 1(H). Indeed, no inquiry was made into "whether the proposed disenrollees are Nooksack" under any constitutional provision other than Article II, Section 1(A). CP 6 at 4. Appellees, in other words, knew that Appellants were Nooksack pursuant to Article II, Section 1(H)

of the Nooksack Constitution,[5] but initiated disenrollment proceedings against them and their families because their original enrollment applications allegedly inaccurately claimed "right to membership through lineal descendancy of an original Nooksack Public Domain allottee," per Article II, Section 1(A).[6] CP14, Ex. 1-4. Appellees have provided no evidence or theory to explain precisely how they believe that Appellants are not entitled to Nooksack membership per Article II, Section 1(H) of the Nooksack Constitution.

Beginning on February 14, 2013, the Enrollment Office issued a "Notice of Intent to Disenroll" to each of the 306 Enrolled Nooksack Members identified in a list that it had promulgated. CP 6, Ex. C. The Notice stated that the potential disenrollee is entitled to a "meeting" with the Tribal Council to dispute their disenrollment. *Id.* The letter was vague as to the process and/or procedures that

[5] At the January 8, 2013, meeting with BIA and its Superintendent Judith Joseph, Appellees received a set of federal probate records titled "Louie George Probate Testimony." CP 39 at 3. Particularly important in those heirship records, but ignored by Appellees, is a 1972 U.S. Department of the Interior Office of Hearings and Appeals Summary of Family History and Inventory listing Matsqui George, Ms. George's biological father, as "Nooksack" by blood. CP 23, Ex. A. According to a February 5, 2013, email from Appellees' counsel to the BIA, Appellees were specifically aware that Matsqui George, Annie George's biological father, was "Nooksack" by blood, yet they never publicly disclosed that information CP 64, Ex. H. In sum, the inquiry into Appellants' status as Nooksacks should have ended before it began in early February 2013, when Appellees realized that because Matsqui George is Nooksack according to federal records, so is Annie George, and thus so are Appellants, as "persons who possess at least one-fourth (1/4) degree Indian blood and who can prove Nooksack ancestry to any degree." Const., art. II, § 1(H).

[6] At some point between 2001 and 2013, Appellees or their predecessors sanitized Appellants' enrollment files of legal memoranda providing that Appellants likely qualify as Nooksack under Article II, Section 1(H) of the Constitution. *See generally* Declaration of Diantha Doucette. (Exhibit B thereto was filed with the Trial Court on March 28, 2013. It does not appear on the Docket Report, however. The document will not be filed with this pleading, but will be available upon request, should the Court so desire.) Appellees have also violated the confidentiality of Appellants' enrollment file information. *See e.g.* CP 18 at 2.

will be employed at the "meeting," if any. *Id.* The letter did not inform disenrollees of their right to a reconsideration request, as provided by N.T.C. § 63.04.001(C). *Id.*

On the morning of March 1, 2013, Chairman Kelly convened a Special Meeting, and the Tribal Council passed Resolution No. 13-38, which specifically targeted Appellants by deleting Article II, Section 1(H) of the Nooksack Constitution. CP 25, Ex. Q; *see also* CP 39 at 6 (testifying that Appellants "are being targeted" by Appellees passage of Resolution No. 13-38). Later that afternoon, Chairman Kelly hand-delivered the already signed and codified Resolution No. 13-38 to BIA Superintendent Joseph in Everett. CP 64, Exs. L, M. On March 4, 2013, Chairman Kelly, Kathryn Canete, and Grett Hurley met with the BIA and Superintendent Joseph again, in order to accelerate the Secretarial election to delete Article II, Section 1(H) of the Constitution as a proxy for Appellants' disenrollment. *See generally id.*, Exs. M, N.

On March 5, 2013, Appellees once again did not convene a General Meeting of the Nooksack People. *See* CP 55 at 7, 9 (admitting that the March first Tuesday meeting month was not held, for second consecutive month).

On March 6, 2013, Chairman Kelly issued an open letter to the Nooksack Tribal Membership regarding the Enrollment Office's initiation of "the involuntary disenrollment of numerous members of the Nooksack Tribe." *Id.,* Ex D. According to that letter, "[t]he Nooksack Constitution grants the Council the

power to disenroll members if it is found that they do not meet the requirements of membership." *Id.*

On March 11, 2013, Councilpersons St. Germain and Roberts requested a "special meeting" regarding Defendant Bob Kelly's March 6, 2013, letter that threatened the automatic disenrollment of over 300 Nooksacks. CP 19, Ex. E. Their request was never honored. *See* CP 55 at 7-8 ("[Appellees] admit that . . . a special meeting concerning a March 6, 2013 letter had not been scheduled.").

On March 12, 2013, Appellee Councilmembers met without Secretary St. Germain and Councilperson Roberts, "to discuss . . . matters of tribal concern." CP 25 at 2. Secretary St. Germain and Councilperson Roberts did not receive notice of this Tribal Council Special Meeting.

On March 21, 2013, Appellee councilmembers conducted a Special Meeting at the home of Nooksack Tribal Member Julie Jefferson. *Id.* Secretary St. Germain and Councilperson Roberts also did not receive notice of this Tribal Council Special Meeting.

On March 26, 2013, Chairman Kelly, while ignoring Councilpersons St. Germain and Roberts' March 11, 2013, proper written request for a Special Meeting, called another Special Meeting of his own. CP 25, Ex. T; CP 22 at 3-9. Secretary St. Germain and councilwoman Roberts were again not allowed to attend this meeting. *See* CP 25 at 4 ("Councilmembers Roberts and St. Germain were excused due to a conflict of interest."); *but see* CP 19 ("I am no more

'conflicted' than Chairman Kelly or any other member of Tribal Council. The suppression of diverse or dissenting voices from Nooksack Tribal governance is a clear attempt to immunize Chairman Kelly's unconstitutional and illegal official conduct."). The remaining six-person Council, specifically Appellee Councilmembers, proceeded to rescind Resolution No. 13-03, which amended Title 60 to foreclose recall petition rights to any Nooksack "subject to a disenrollment proceeding," recognizing that Resolution No. 13-03 was unconstitutional. CP 25, Ex. U. In furtherance of Resolution No. 13-38, Appellee Councilmembers also appointed a Secretarial Election Board to carry out the federal election to delete Article II, Section 1(H) of the Constitution. CP 39, at 6. Here Appellee Councilmembers appointed to the Election Board both Chairman Kelly and Kathryn Canete, as well as Officer Bailey whose particular appointment is an obvious tie that binds the disenrollment of Appellants, to the deletion of Article II, Section 1(H).[7] *Id.*

On April 2, 2013, Appellees yet again refused to convene a General Meeting of the Nooksack People, for the third consecutive month. CP 30 at 7-9. Appellees have admitted prohibiting the meeting from taking place. *Id.*

[7] Appellee Councilmembers also passed Resolution No. 13-54 at this meeting, which imposed a Tribe-wide "moratorium on new enrollment applications . . . until the Secretarial election is finalized." CP 25, Ex. W. Appellee Councilmembers cited "a lawsuit concerning, in part, specific enrollment recommendations and/or decisions made by the defendants" and the Secretarial election to "remove Article II, Section 1(h)" as the reasons for the moratorium. *Id*. Undoubtedly, the decision by only part of the Tribal Council to prohibit any new Nooksacks from being disenrolled, without any opportunity for public comment, has harmed the entire Tribe. CP 39 at 5.

On April 16, 2013, Appellees failed to notify Secretary St. Germain and Councilwoman Roberts of a Special Meeting that Chairman Kelly called. CP 22 at 3; CP 30 at 8. After Secretary St. Germain and Councilwoman Roberts were forced to leave the meeting, "Chairman Kelly and his Tribal Council majority went into executive session." CP 22 at 3. Secretary St. Germain "attempted to return to the meeting but the meeting room was locked, [he] was told the Council was in executive session, and Chairman Kelly and his Tribal Council majority refused to unlock the door or allow [him] to return to the Special Meeting." *Id*.

On April 25, 2013, Chairman Kelly sent an election literature packet to only those members not slated for disenrollment, "begging them to register to vote in the Secretarial election in an attempt to 'control [the] cultural identity of the Nooksack Tribe' . . . by targeting 'large groups or families that [allegedly] have much weaker ties to Nooksack than'" do other members. *Id.* at 5. Chairman Kelly's literature packet was "mass mailed through use of Tribal resources . . . to only those Nooksack who are not currently being subjected to disenrollment proceedings."[8] *Id.* at 3; *see also generally* CP 23. "Chairman Kelly had no

[8] On or about May 1, 2013, Appellees also caused a postcard to be designed, printed, and mailed with Tribal resources, which indicates that the Secretarial election to amend the Constitution is intended to "close a loophole in [the] tribal constitution . . . and protect the cultural identity of our Nooksack Tribe." CP 22, at 12. The postcard was also mailed only to those Nooksack who were not being subjected to disenrollment proceedings. *Id.*; *see also generally* CP 23. On May 2, 2013, Appellees also caused the publication of the Tribe's newsletter *Snee-Nee-Chum*, through expenditure of Tribal resources, with the following headline: "Upcoming Secretarial Election: Check your mail and register!" *Id.*, Ex. C. As with the postcard, the newsletter explains: "In June, you'll be voting on whether or not to close a loophole in our Tribal Constitution . . . and protect the cultural identity of our Nooksack Tribe." *Id.* Appellees have also conducted community

authority from the Tribal Council to mail anything to Nooksack voters, and certainly not only part of the Nooksack electorate." CP 22 at 3.

On April 29, 2013, Secretary St. Germain and Councilwoman Roberts again requested a "special meeting." CP 64, Ex. B. This request, too, was ignored. *Id.*; *see also* CP 25 at 7 (Councilman George stating that he is "aware requests for a special meeting from Councilmembers St. Germain and Roberts were submitted" but that, "[t]o date, the Chairman has not scheduled a special meeting for those requests . . .").

On May 6, 2013, Appellees met, once again without Secretary St. Germain and Councilperson Roberts, "to discuss . . . matters of tribal concern." CP 25 at 2; CP 22 at 2-3. Secretary St. Germain and Councilperson Roberts did not receive notice of this Tribal Council meeting either.

On May 7, 2013, Appellees once again prevented the convening of a General Meeting of the Nooksack People. CP 30 at 7-9. Appellees have admitted that "Council typically holds a meeting the first Tuesday of the month in accordance with the By-laws [but] as a result of the sensitive enrollment issues becoming public, Council cancelled the February 5, 2013, March 5, 2013, and April 2, 2013 meetings." CP 25. The Constitution does not except "sensitive

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meetings regarding the Secretarial election they have convened in order to disenroll Appellants. through amendment to Article II, Section 1(H) of the Constitution, but not invited Plaintiffs or other proposed disenrollees. *See generally* CP 64, Ex. S; CP 25 at 4 (admitting that the *ad hoc* General Services Executive, Kathryn Canete, "took actions in furtherance of the resolution" by advocating on behalf of those wishing to disenroll Appellants).

enrollment issues" from its public meeting mandate. In fact, "sensitive issues" require public meeting and process before of the Nooksack People. *See* Bylaws, art. II, § 6 ("**All** sessions of the tribal council (except executive) **shall** be open to all members of the public.") (emphasis added).

On May 20, 2013, Appellee Councilmembers again held a Special Meeting, and again failed to notify Secretary St. Germain Councilwoman Roberts of the meeting. *See generally* CP 25.

On June 4, 2013, Appellee Councilmembers yet again prevented the convening of a monthly General Meeting of the Nooksack People – for the sixth consecutive month. CP 64 at 1-2.

IV. ARGUMENT

A. The Trial Court Erred In Its Sovereign Immunity Analysis.

It is "a well-settled axiom of federal law that Indian tribes, like state and federal governments, are sovereign entities that cannot be sued absent their consent or an unambiguous abrogation of their immunity." *Mitchell v. Pequette*, No. 07-38, 2008 WL 8567012, at *7 (Leech Lake Tribal Ct. May 9, 2008). "There are however, numerous ways in which the sovereign immunity of a tribe can be waived or abrogated" — "situations in which a tribe is being sued for injunctive relief" being one of them. *Id.* (citation omitted); *see also Olson v. Nooksack Indian Housing Authority*, 6 NICS App. 49, 54-55 (Nooksack Ct. App. 2001) ("[I]ndividual tribal officers and employees have 'no immunity to

declaratory and injunctive relief.'") (quoting *Smith d/b/a Frosty's v. Confederated Salish & Kootenai Tribes*, 23 Ind. L. Rep. 6256, 6257-58, (C.S. & K.T. Ct. App. 1996)).

Thus, tribal sovereign immunity notwithstanding, "[i]t is well established that where a tribal official acts and such action is based upon an unconstitutional law," or where the tribal official acts and such action is in contravention of tribal law,[9] "then that official is not protected by the doctrine of sovereign immunity." *Honyaoma v. Nuvamsa*, 7 Am. Tribal Law 320, 324 (Hopi Ct. App. 2008) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *see also Fox v. Brown*, 6 Am. Tribal Law 446, 449 n.2 (Mohegan Tribal Ct. 2005) ("A limited exception to the general principle of sovereign immunity has long been recognized, where prospective injunctive or declaratory relief is sought challenging the actions of [tribal] officials."); *Ho-Chunk Nation Legislature v. Ho-Chunk Nation General Council*, 3 Am. Tribal Law 404, 407 (Ho-Chunk Tribal Ct. 2001) (holding that "Courts may exercise jurisdiction over officers who are required by their job duties to carry out allegedly unconstitutional directives").

[9] "[I]nstead of gauging whether an official acts in contravention of federal law, [a tribal court] examines whether the official acts in contravention of [tribal] law, whether constitutional or statutory." *Ho-Chunk Nation Legislature v. Ho-Chunk Nation General Council*, 3 Am. Tribal Law 393, 402 (Ho-Chunk Tribal Ct. 2001). Appellants take no position on the force of so-called "federal laws of general applicability" in Indian Country or whether those laws create an *Ex parte Young* exception. This lawsuit is about Nooksack officers acting in contravention of Nooksack law and Nooksack law only.

Known as "the *Ex parte Young* fiction"[10], the exception to tribal sovereign immunity has been described by the Ho-Chunk Tribal Court as follows:

> [T]he principle of sovereign immunity exists primarily to protect the public treasury from lawsuits seeking damages. It does not prevent people from suing the . . . government to enforce their rights . . . . Essentially, the plaintiff seeks to affect the future actions of the official or employee in an effort to avoid a continuing violation of the law. A plaintiff will typically request injunctive relief against the official or employee entrusted with implementing an allegedly illegal statutory provision.

Kirkwood v. Decorah, No. 04-33, 2005 WL 6161103, at *13 (Ho-Chunk Tribal Ct., Feb. 11, 2005) (citation and quotation omitted). As noted by the leading treatise: "the doctrine of *Ex parte Young* [i]s indispensable to the establishment of constitutional government and the rule of law." Wright & Miller, *Ex Parte Young*, 17A Fed. Prac. & Proc. Juris. § 4231 (3d ed. 2013).

In determining whether a plaintiff has properly pled an *Ex parte Young* exception, the inquiry is "relatively simple [and] quite easy to apply": Prospective injunctive or declaratory relief to prevent the contravention of tribal law (constitutional or statutory) is permitted against a tribal official, but retrospective relief is barred. *Brennan*, 834 F.2d at 1253; *see e.g. Olson*, 6 NICS App. at 55

[10] The "fiction" of *Ex parte Young* is that acts by tribal officials that are contrary to tribal law (constitutional or statutory) cannot have been authorized or be ratified by the tribe; thus, illegal acts by tribal officials cannot be considered acts done under the tribe's authority. *Brennan v. Stewart*, 834 F.2d 1248, 1252 (5th Cir. 1988); *see also* Kenneth C. Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L.Rev. 435 (1962) ("You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign.").

(dismissing where plaintiff did not seek "declaratory and injunctive relief against individual tribal officers" and instead brought a "damage suit"). Critically, "**the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim**." *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635, 646 (2002) (emphasis added); *see also McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 416 (5th Cir. 2004) ("[A]nalyzing the applicability of the *Ex parte Young* exception should generally be a simple matter, which **excludes questions regarding the validity of the plaintiff's cause of action**.") (emphasis added).

The Trial Court's holding on sovereign immunity and its iteration of the *Ex parte Young* exception was as follows:

- The *Ex parte Young* exception allows suits against tribal officials sued in their "personal capacities"[11] when the tribal official has "act[ed] well outside the scope of [his] duties" by "exceed[ing] his official duties in a manner that verges on bad faith" — "simply making technical errors of law" will not suffice.[12]

- Thus, before conducting the *Ex parte Young* analysis, the Trial Court must first scrutinize the merits of a Plaintiff's claims.[13]

- If, indeed, a tribal official is found to have committed an "error of law," the court must then determine whether a tribal official's error is extreme enough to warrant application of the *Ex parte Young* exception, by

[11] CP 78 at 2, 8; CP 71 at 3.
[12] CP 44 at 7; *see also id.* at 9 ("[T]he Court finds that it can only act to grant prospective injunctive relief should the actions taken by Defendants clearly and unambiguously violate their official duties in ways more egregious than an error of law."); CP 59 at 5 ("[A] mere error of law does not does not itself open the door to stripping an official of his or her sovereign immunity.").
[13] *See e.g.* CP 78 at 9 ("In order to find that the *Young* exception . . . applies here, this Court must first find that the Defendants acted outside of the scope of their authority.").

> balancing "'[a]ny resulting disadvantage to the plaintiff'" with "'the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention.'"[14]

The Trial Court's holding on the *Ex parte Young* exception was in error. After the U.S. Supreme Court's opinion in *Verizon* there can be no question that there are only two straightforward requirements necessary to defeat a motion to dismiss on immunity grounds: (1) an allegation respondents have violated applicable law; and (2) that the suit seeks an injunction that would prospectively abate the alleged violation. *Verizon*, 535 U.S. 635; *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007)

1. Appellants Did Not Sue Appellees In Their Personal Capacities.

The Trial Court erred in holding that Appellants sued Appellees in their "personal capacity" such that they "became personally liable." CP 78 at 8; *id.* at 2; *see also* CP 71 at 3 ("Plaintiffs argue that . . . it [sic] has named the Defendants individually. However, [the requested relief] would by necessity fall against Defendants in their *official capacities* because the Defendants themselves have no authority to act on behalf of the Tribe and its government if they are acting privately.") (emphasis in original).[15] The Trial Court was dead wrong. **Appellants sued Appellees in their official capacities and in their official capacities only**. CP 1, 17, 62. There was nothing in the Complaint(s) or in any subsequent pleading to indicate that Appellants were suing Appellees in their

[14] CP 59 at 4 (citing *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997); quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 85 (1984)).

[15] The irony of the Trial Court's ruling here is almost amusing. The Trial Court found that Appellants were jurisdictionally barred because they did not sue Appellees in their official capacities. But that is exactly what Appellants did.

individual capacities. Indeed, Appellants expressly disclaimed suing Appellees in their personal capacities. *See e.g.* CP 54 at 3 ("Here, Plaintiffs have filed suit against Defendants in their **official capacities** and their official capacities only.") (emphasis in original); CP 64 at 32 ("Plaintiffs have alleged that Defendants**, sued in their official capacity**, have violated this most important governing document in virtually countless instances, and are seeking prospective injunctive relief to prevent these violations from continuing.") (emphasis added).

Appellant's spoon-fed explanations that they sued Appellees in their official capacities, not their personal capacities, were ignored or somehow misconstrued by the Trial Court. "The distinction is important" because it determines (1) whether the Trial Court should evaluate the merits of a plaintiff's claim and (2) whether the Trial Court should employ a balancing test. *Stockbridge-Munsee Community v. New York*, No. 86-1140, 2013 WL 3822093, at *2 n.4 (N.D.N.Y. July 23, 2013). As discussed in more detain below, the Trial Court's error in reading the Appellants' Complaint and related pleadings resulted in an extremely flawed analysis from the start.

2. The Trial Court Erred In Evaluating The Merits.

Likely due to the Trial Court's insistence in mischaracterizing Appellants as suing Appellees in their "personal capacity," the Trial Court erred in applying the *Ex parte Young* exception. CP 78 at 8. As noted above, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits

of the claim." *Verizon*, 535 U.S. at 646. Indeed, the Ninth Circuit Court of Appeals has explicitly held that "claims of immunity are separate from the merits of the underlying action. . . . [W]hether the tribal officials are subject to suit under the doctrine of *Ex Parte Young* is separate from the underlying merits of [the plaintiff]'s claim." *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (citation omitted). Rather, in conducting the *Ex parte Young* analysis, a court need only conclude that a party (1) alleges an ongoing violation of tribal law, and (2) seeks prospective relief. *Indiana Protection and Advocacy Svc. v. Indiana Family and Social Services Admin.*, 603 F.3d 365, 371 (7th Cir. 2010). If these factors are met, the *Ex parte Young* exception applies, and the suit may proceed.

"A motion to dismiss tests the sufficiency of the complaint, not its merits." *Cooney v. Casady*, 652 F.Supp.2d 948, 951 (N.D. Ill. 2009) (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990)). Thus, as to whether a plaintiff has sufficiently pled an ongoing violation of tribal law, a mere "*allegation* of an ongoing violation of [tribal] law [is] sufficient" to defeat a motion to dismiss. *Verizon*, 535 U.S. at 646 (emphasis in original, quotation omitted). Accordingly, the *Ex parte Young* analysis "is **limited to whether the *alleged*** violation is a substantial, and not frivolous, one; [the court] need not reach the legal merits of the claim." *In re Deposit Ins. Agency*, 482 F.3d 612, 621 (2nd Cir. 2007) (emphasis added; citing *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367,

374 (2d Cir. 2005)); *see also Cardenas v. Anzai*, 311 F.3d 929, 935 n.3 (9th Cir. 2002) ("The Supreme Court has recently clarified . . . that the *Ex parte Young* inquiry does not include an analysis of the merits of the claim."); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474 (6th Cir. 2008) ("The test for determining whether the *Ex parte Young* exception applies is a straightforward one. . . . The focus of the inquiry remains on the allegations only; it does not include an analysis of the merits of the claim.") (quotation and citation omitted); *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610, 616 (6th Cir. 2003) ("Importantly, determining whether the *Ex parte Young* doctrine applies does not involve an analysis of the merits of a plaintiff's claims."); *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (same); *Williams v. Board of Parole Hearings*, No. 08-0402, 2008 WL 4809213, at *2 (C.D. Cal. Nov. 3, 2008) ("[T]he inquiry into whether suit lies under *Ex Parte Young* does not include an analysis of the merits . . . .").

Here, Appellants clearly meet this prong of the analysis. Appellants have alleged numerous violations of codified tribal law and the Nooksack Constitution. *See generally* CP 32 (alleging violations of the Constitution and Bylaws of the Nooksack Indian Tribe; the Indian Civil Rights Act, 82 Stat. 77; and N.T.C. §§ 63, et al.). This is where the Trial Court's inquiry upon Appellee's dismissal motion, should have ended. *See e.g. Tigrett v. Cooper*, 855 F.Supp.2d 733, 745-46 (W.D. Tenn. 2012) (*Ex parte Young* exception applicable where plaintiff

alleged a violation of constitution and codified law – refusing to go to the merits of whether a violation had actually occurred). Instead, though, the Trial Court refused to determine whether Appellants had alleged an ongoing violation of Nooksack law, and went directly to the merits. *See* CP 69 at 5-6 (finding that the Trial Court "did not reach the issue" of *Ex parte Young* "because it found Appellants' acts did not violate the Nooksack Constitution or Title 63"); CP 78 at 9 ("In order to find that the *Young* exception . . . applies here, this Court must first find that the Defendants acted outside of the scope of their authority."). In so doing, the Trial Court inappropriately turned the *Ex parte Young* analysis on its head — a clear error of law that warrants reversal.[16] *See e.g. Verizon*, 535 U.S. 635; *see also Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 480 (4th Cir. 2005) (holding that a trial court "necessarily acts *ultra vires* when it considers the merits of a case" prior to conducting the *Ex parte Young* analysis); Wright & Miller, *Scope of the Young Doctrine*, 17A Fed. Prac. & Proc. Juris. § 4232 n.3 (3d ed. 2013) ("[T]he inquiry into whether suit lies

[16] Notably, the Trial Court's analysis would have been proper had Appellants sued Appellees in their individual capacities, seeking to hold them individually liable. *See e.g. Edgerson v. Matatall*, No. 12-1785, 2013 WL 3185723, at *4 (6th Cir. June 25, 2013) (holding that when a government official sued in his personal capacity asserts a sovereign immunity defense, the court must first determine "whether considering the allegations in a light most favorable to the party injured, a constitutional right has been violated") (quotation omitted); *Starkey ex rel. A.B. v. Boulder County Social Services*, 569 F.3d 1244, 1262 (10th Cir. 2009) (holding that "Defendants in their official capacities could be held liable only if there was an underlying constitutional violation — that is, only if at least one of the Defendants in a personal capacity had violated at least one of the [Plaintiffs]' constitutional rights."). But, again, **Appellants explicitly and unambiguously sued Appellees in their "official capacities," seeking prospective injunctive relief only**. CP 1, 17, 62. The Trial Court's recasting of the unambiguous text of Appellants' Complaint and related pleadings does not make it so, and does not warrant the application of a clearly inapplicable test.

under *Ex Parte Young* does not include an analysis — or prediction — of the merits of the . . . claim. Thus, the lower court err[s] when [it] denies the applicability of *Ex Parte Young* . . . on the ground that the [official's act is] probably not inconsistent with [the] law.").

3. Appellants Seek Prospective Relief — The Trial Court Erred In Conducting A Balancing Test.

The application of *Ex parte Young* simply does not depend on the egregiousness of the constitutional or statutory violation alleged — or on conduct "that verges on bad faith." CP 44 at 7. Also likely due to the Trial Court's mischaracterization of Appellants as having sued Appellees in their "personal capacity," the Trial Court erred in holding that some sort of balancing test is required whereby only "egregious" violations of law will suffice to render the *Ex parte Young* exception applicable. CP 44 at 9.

In holding that *Ex parte Young* exception requires a balancing of "'[a]ny resulting disadvantage to the plaintiff'" with "'the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention,'" the Trial Court relied on *Couer d'Alene*, 521 U.S. 261, and *Pennhurst*, 465 U.S. 85. These cases have been overruled, are inapplicable to the facts at hand, and do not stand for the position proffered by the Trial Court.

First, the portion of the *Pennhurst* case that the Trial Court relied upon was overruled in 1999. *See Nelson v. Miller*, 170 F.3d 641, 646 n.5 (6th Cir. 1999) ("It is error to read the language about the 'party in interest' as an extension

of [sovereign] immunity to actions seeking injunctive relief against a[n] officer who is violating federal law. . . . To the extent the text of *Pennhurst* supports such a reading, it is overruled . . . .") (quotation omitted); *Rosario v. Rambo*, No. 05-0091, 2005 WL 1610687, at *3 (W.D. Mich. July 1, 2005) (recognizing that this holding of *Pennhurst* has been overruled); *Fisher v. Ohio Dept. of Rehabilitation and Correction*, No. 06-0559, 2006 WL 2711492, at *2 (S.D. Ohio Sept. 91, 2006) (same); *Bryant v. New York State Educ. Dept.*, 2010 WL 3418424, at *6 (N.D.N.Y. Aug. 26, 2010) (same). This should be clear, given the more recent rule announced in *Verizon*, 535 U.S. 635.

Second, the discussion in *Pennhurst* cited by the Trial Court involved the ability of a petitioner to sue a *state* officer under the *Ex parte Young* doctrine for violations of *state* law — which would be the equivalent of Appellants herein seeking to enjoin Appellees in federal court for a violation of tribal law.[17] Appellants are in a tribal forum because they recognize that this tribal judiciary, not a federal court, is the proper forum to resolve violations of a tribal constitution and tribal law; just as a state court, not a federal court, is the proper forum to resolve violations of a state constitution and state law. Thus, even if the decision had any precedential authority, the section of *Pennhurst* relied upon by the Trial Court is inapposite here.

[17] Clearly, there would be no federal jurisdiction over such an action. *See e.g. Rivera v. Puyallup Tribe of Indians*, No. 12-5558, 2012 WL 4023350 (W.D. Wash. Sept. 12, 2012).

Finally, the *Couer d'Alene* opinion that the Trial Court relied upon is not controlling; and subsequent decisions of the Supreme Court and the federal circuit courts of appeal have made this crystal clear. As noted by the Tenth Circuit Court of Appeals in *Hill v. Kemp*:

> Justice Kennedy wrote the lead opinion but commanded a majority with respect only to certain sections. When it came to the key question how lower courts should change their analyses under *Ex parte Young*, Justice Kennedy wrote for just himself and Chief Justice Rehnquist to suggest a "case-by-case approach" in which lower courts should "reflect a sensitivity" to a "broad" range of questions ranging from the nature and significance of the federal rights at stake, the state interests implicated by the lawsuit, and the availability of a state forum. Federalism and comity interests, Justice Kennedy wrote, should receive consideration in every case.

478 F.3d at 1257 (citation omitted). The *Hill* Court then went on to describe the proper test to apply, holding that whatever "balancing test" that Justice Kennedy may have envisioned, the Supreme Court did not adopt it:

> Justice O'Connor's opinion provides the controlling guidance for lower courts. . . . Justice O'Connor wrote separately for herself and Justices Scalia and Thomas to express disagreement with this "reformulation" of *Ex parte Young*. Justice O'Connor worried that Justice Kennedy's approach would replace "a straightforward inquiry" under *Ex parte Young* with a "vague balancing test that purports to account for a 'broad' range of unspecified factors." . . . Justice O'Connor seemed to suggest that we must assess whether a claim seeks relief effectively equivalent to a retrospective judgment regardless of how it is formally pled or denominated. . . . [I]n *Verizon*[, 535 U.S. 635, the Supreme Court], had occasion to return to this area. There, . . . a clear majority of the Supreme Court followed Justice O'Connor's approach in *Coeur d'Alene* and instructed lower courts definitively that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into

> whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Emphasizing the importance of the adverb "properly" and that formal pleading titles do not necessarily control, the Court explained that, in the case before it, "no past liability of the State, or of any of its commissioners, is at issue. [The lawsuit] does not impose upon the State a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials. . . . Insofar as the exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction." . . . **In rejecting the Fourth Circuit's analysis, the Supreme Court in *Verizon* clarified that the courts of appeals need not (and should not) linger over the question whether "special" or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought.** Thus, to the extent that our decision in *ANR Pipeline*[*v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998)] read *Coeur d'Alene* as requiring "federal courts [to] examine whether the relief sought against a state official 'implicates special sovereignty interests,'" . . . we recognize today that *Verizon* abrogated this step. **Instead, the Supreme Court has instructed that we are to proceed immediately in every case to the "straightforward [or so one might hope] inquiry" whether the relief requested is "properly" characterized as prospective or is indeed the functional equivalent of impermissible retrospective relief**. . . . [T]he sole question for us becomes whether the relief sought by [the plaintiff] is prospective, not just in how it is captioned but also in its substance.

Id. at 1257-60 (citation omitted; emphasis added).

Here, the relief that Appellants have requested is prospective both in substance and as captioned.

- Count one seeks to enjoin Appellees from interfering with the monthly regular Tribal Council meeting required by Article II, Section 2 of the Bylaws of the Nooksack Indian Tribe. CP 32 at 19. The relief requested seeks to prevent the Tribe's current violation of the law. The *Ex parte Young* exception clearly permits relief against tribal officials "to prevent a continuing violation" of tribal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985).

- Count two alleges that the following enactments of Tribal Council are unconstitutional: Resolution No. 13-01; Resolution No. 13-02; Resolution No. 13-03; Resolution No. 13-04; Resolution No. 13-52; Resolution No. 13-53; Resolution No. 13-38; N.T.C. § 63.00.04; N.T.C. § 63.06.001; N.T.C. § 63.02.001(D)(5); N.T.C. § 60.01.050(A); N.T.C. §§ 65, *et seq.* CP 32 at 19-20. Count two seeks to enjoin Appellees, who are the tribal officials tasked with enforcing the referenced statutes and resolutions, from "continu[ing] to enforce unconstitutional statutes and resolutions." *Id.* at 20; *see also Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (holding that "officials who threaten to enforce an unconstitutional . . . statute may be enjoined"); *West Virginia Oil and Natural Gas Ass'n v. Wooten*, 631 F.Supp.2d 788, 795 (S.D.W.Va. 2008) ("[T]he *Ex parte Young* doctrine allows a plaintiff to bring a suit against an officer [where the plaintiff] names the . . . officer with the duty to enforce the allegedly unconstitutional regulations in his or her official capacity.").

- Count three also seeks to enjoin Appellants from "act[ing] in excess of statutory and constitutional authority." CP 34 at 20-21. Count four seeks "an injunction that prevents the Defendants from moving forward with the disenrollment process unless the appropriate due process is afforded." *Id.* at 22 (citing *Quair v. Sisco*, 359 F.Supp.2d 948, 977 (E.D. Cal. 2004)).

- Count four[18] seeks a declaration that "the various Resolutions and Tribal laws utilized in the disenrollment action are discriminatory" and therefore violate Article IV of the Nooksack Constitution. *Id.* at 23; *see also Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1483 (10th Cir. 1995) ("Declaratory relief is prospective when sought to prevent a . . . current violation of the law.").

- Count five seeks a declaration that "Defendants have no statutory or legal authority to initiate disenrollment proceedings against Plaintiffs [because] they possess at least one-fourth degree Indian blood and are of Nooksack ancestry, and are therefore are Nooksacks pursuant to, at least, Article II, Section 1(H) of the Constitution." CP 34 at 23. Count five also seeks a declaration that the Defendants are currently failing to fulfill numerous constitutional and statutory obligations. *Id.* at 24.

[18] The Second Amended Complaint mistakenly titled the Fifth Cause of Action as a second Fourth Cause of Action, and in turn the Sixth Cause of Action as the Fifth Cause of Action.

Clearly, Appellants have sought prospective relief only. There is no balancing test; the inquiry ends at a determination of prospective versus retrospective relief. The Trial Court's determination otherwise was in error.[19]

In sum, Appellants have requested prospective relief, to be enforced against tribal officials in their official capacities. Thus, Appellants are not barred by tribal sovereign immunity, and are entitled to proceed with their claims. The Trial Court erred in dismissing Appellants' Second Amended Complaint on sovereign immunity grounds. *See* CP 51 (moving to dismiss "because the Defendants possess sovereign immunity and this Court lacks subject matter

[19] As noted above, the Trial Court's insistence in mischaracterizing Appellants as suing Appellees in their "personal capacity" and seeking to hold them "personally liable" likely led to the flawed analysis. Officials sued in their **personal capacity** are immune from suit when "perform[ing] discretionary functions so long as 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Crue v. Aiken*, 370 F.3d 668, 680 (7th Cir. 2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In making this determination, the court "balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Under this test, immunity is available even where an official's legal reasoning is mistaken, so long as the error in law is not "egregious." *Philip v. Cronin*, 537 F.3d 26, 34 (1st Cir. 2008); *see also Mihos v. Swift*, 358 F.3d 91, 101 (1st Cir. 2004) (holding that "government officials performing discretionary functions generally are shielded from liability . . . insofar as their conduct does not violate clearly established statutory or constitutional rights"); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1282 (10th Cir. 2007) (holding that "[t]he more obviously egregious the conduct in light of prevailing constitutional principles," the more likely an official sued in his personal capacity is not entitled to immunity); *McGhee v. Pottawattamie County*, 475 F.Supp.2d 862, 909 (S.D. Iowa 2007), *aff'd in part and rev'd on other grounds*, 547 F.3d 922 (8th Cir. 2008) ("In analyzing whether the conduct at issue is sufficiently egregious to deny qualified immunity, it is well established that mere negligence is never sufficient. Proof of intent to harm is usually required, and in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold.") (quotation and modification omitted). When Appellants raised attention to this error, the Trial Court "decline[d] to so find that [sic] ha[d] confused" personal and official capacities, and continued to apply the test for agents sued in their personal capacities. CP 59 at 2; *see e.g.* CP 54 at 3. "The plaintiff is the master of the compliant." *Danley v. Allen*, 540 F.3d 1298, 1306 (11th Cir. 2008). Appellants are mystified as to why the Trial Court refused to read the Complaint(s) as written.

jurisdiction"); CP 78 at 17 (dismissing because "the sovereign immunity of the Tribe extends to [Defendants] as tribal officials and this Court lacks jurisdiction over them"). The decision of the Trial Court must be reversed.

B. The Trial Court Erred By Holding That Appellees Did Not Violate The Nooksack Constitution.

As discussed above, although the Trial Court purported to "limit[] its discussion to the jurisdictional question," it inappropriately evaluated to the merits of Appellants' claims. CP 78 at 6. Because the Trial Court's error was jurisdictional, the Court need not appraise the Trial Court's rulings on the merits. But even were the Court to evaluate the Trial Court's rulings on the merits — and it need not — it must find that the Trial Court erred in evaluating Appellants' constitutional claims.[20]

1. N.T.C. § 63.04.001(B)(1)(a) Is Unconstitutional.

The crux of the issue below boils down to the Tribal Council's acts in furtherance of a statute that directly conflicts with the Nooksack Constitution. Article II, Section 4, of the Nooksack Constitution states, in relevant part:

[20] The Court did not address all of Appellants' constitutional claims. Count two alleges that Resolution No. 13-01; Resolution No. 13-03; Resolution No. 13-04; Resolution No. 13-52; N.T.C. § 63.00.04; N.T.C. § 63.06.001; N.T.C. § 63.02.001(D)(5); N.T.C. § 60.01.050(A); and N.T.C. §§ 65, *et seq.*, are unconstitutional. CP 32 at 19-20. The Trial Court inappropriately dismissed Appellants' Second Amended Complaint without addressing these claims (as well as other non-constitutional claims). *Anglo-Iberia Underwriting Management Co. v. Lodderhose*, 235 Fed.Appx. 776 (2nd Cir. 2007); *see also Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1170 n.5 (9th Cir. 2013) (remanding with instructions to address a claim that was not addressed). Admittedly, the procedural posture here is odd, because the Trial Court should not have valuated the merits at all — it dismissed the Complaint for lack of jurisdiction. But if the Trial Court was going to evaluate the merits of Appellants' claims, it should have evaluated all of them.

> The tribal council shall, by ordinance, prescribe rules and regulations governing involuntary loss of membership. **The reasons for such loss shall be limited exclusively to failure to meet the requirements set forth for membership in this constitution** . . . .

Const., art. II, § 4 (emphasis added).

As alleged in the Complaint(s) and argued in response to Appellees' Motion to Dismiss,[21] N.T.C. § 63.04.001(B)(1)(a) is unconstitutional because it conflicts with Article II, Section 4, of the Nooksack Constitution.[22] *See Mohegan Tribe of Indians of Connecticut v. Mohegan Tribal Court*, 8 Am. Tribal Law 213, 220 (Mohegan Elders Council 2009) ("To the extent that provisions of [an] Ordinance conflict with the [the] Constitution, the provisions of the . . . Constitution take precedence. The Constitution is the supreme law of the Tribe and its provisions cannot be amended though legislative acts of the . . . Tribal

[21] *See e.g.* CP 17 at 11-12; Response in Opposition to Defendants' Motion to Dismiss, CP 64 at 33-34, 34 n.16 (arguing that because Resolution No. 13-02 and N.T.C. § 63.04.001(B)(1)(a) allow disenrollment for anything other than a "failure to meet the requirements set forth for membership in th[e] constitution" they are "violative of the Constitution" and must be stricken down).

[22] For the same reasons discussed in this subsection, N.T.C. § 63.00.04 was unconstitutional as well. *See generally* CP 17 at 11-12. Nooksack Tribal Code § 63.00.04 states that in determining the "direct descent" requirement of Article II, Section 1(H) of the Constitution, "base enrollees" are "those persons who are original Nooksack Public Domain allottees and/or all persons of Indian blood whose names appear on the official census roll of the Nooksack Tribe dated January 1, 1942." Although the Constitution says nothing about a "base enrollee," N.T.C. § 63.02.001(D)(5) requires that persons applying for Nooksack membership under Article II, Section 1(H), submit "[d]ocumentation providing the direct descent of each Nooksack Tribe ancestor from a base enrollee . . . ." *See also* N.T.C. § 63.06.001 ("[T]he blood listed on the official census roll of 1942 will be used in computing Indian blood for lineal descendants."). But Article II, Section 1(H) of the Constitution — before it was removed — was crystal clear in that it requires only that the enrollee "prove Nooksack ancestry to **any** degree." The use of the term "any" was dispositive — the Constitution does not require proof of ancestry to a person listed on the official census roll of 1942, it requires proof of "Nooksack ancestry to any degree." To the extent that N.T.C. § 63.00.04 conflicted with Article II, Section 1(H), of the Constitution, but will be used to determine whether Appellees met the criteria of Section 1(H) at the time of enrollment, the statute must also be stricken down.

Council . . . .") (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *Little River Band of Ottawa Indians Elections Bd. v. Beccaria*, No. 05094–AP, 2006 WL 6351712, at *2 (Little River Ct. App. 2006) ("Unconstitutional laws . . . must not be allowed to stand."); *Terry-Carpenter v. Las Vegas Paiute Tribal Council*, No. 01-02, at 9 (Las Vegas Paiute Ct. App. Feb. 14, 2002) ("Tribal judges . . . simply cannot enforce or give any other legal force or effect to any enactment of the Tribal Council contrary to the Constitution since it is null and void."); *see also generally Young v. Election Board of Sac and Fox Nation*, 5 Am. Tribal Law 481 (Sac & Fox 2004); *Honyaoma v. Nuvamsa*, 7 Am. Tribal Law 320 (Hopi Ct. App. 2008).

N.T.C. § 63.04.001(B)(1)(a) provides that a member "shall be disenrolled when it is discovered that he/she . . . did not submit adequate documentation proving he/she met the constitutional membership criteria at the time or enrollment." But Article II, Section 2 of the Nooksack Constitution, **explicitly limits the reasons for disenrollment** to a "failure to meet the requirements set forth for membership in this constitution." Const., art. II, § 2. Simply because a member failed to "submit adequate documentation . . . at the time or enrollment," does not mean that they do not met the requirements set forth for membership in the Constitution. N.T.C. § 63.04.001(B)(1)(a). Whether a member submitted a perfect application at the time of enrollment — at the time that the Enrollment Department, at no fault of the member, maybe upwards of forty years ago,

determined that the applicant *did* submit adequate documentation — is irrelevant. *Terry-Carpenter*, No. 01-02; *Terry–Carpenter v. Las Vegas Paiute Tribal Council*, Nos. 02-01 (Las Vegas Paiute Ct. App. 2003); *see also Henrickson v. Ho-Chunk Nation Office of Tribal Enrollment*, No. SU02-06, (Ho-Chunk Sup. Ct. Mar. 21, 2003) ("uncovered evidence that [a tribal member] failed to meet the criteria for enrollment" at time of application not a constitutional reason for disenrollment). An individual either meets the requirements for membership or they do not. The Constitution does not allow disenrollment for anything less than failing to meet the requirements for membership. The Tribal Council cannot statutorily add to or subtract from these requirements — modifying the disenrollment criteria is a power reserved to the Nooksack membership, vis-à-vis a constitutional amendment. *See Allen v. Cherokee Nation Tribal Council*, 6 Am. Tribal Law 18, 31 (Cherokee 2006) (Dowty, J., concurring) ("To exclude a class of citizens from membership, the constitution would have to do so with specific and clear language. Exclusion cannot be left to inference by omission or by silence."). N.T.C. § 63.04.001(B)(1)(a)'s mandate otherwise is unconstitutional, and must be "considered void in its entirety and inoperative as if it had no existence." *Heritage Bldg. Group, Inc. v. Plumstead Tp.*, No. 95–4424, 2011 WL 3803899, at *1 n.4 (E.D. Pa. Aug. 26, 2011).

The case of *Allen v. Cherokee Nation Tribal Council*, 6 Am. Tribal Law 18, is instructive here. In *Allen*, the Cherokee Nation Court of Appeals was faced

with determining whether a provision contained in the Tribe's enrollment code was "unconstitutional because it is more restrictive than the membership criteria set forth in Article III of the 1975 Constitution." *Id.* at 20. The enrollment code in question stated that "tribal membership is derived only through proof of Cherokee blood." *Id.* at 22. The Constitution, however, contained no such "by blood" requirement:

> Article III of the 1975 Constitution defines eligibility for tribal membership very broadly: "All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls . . . and/or their descendants." There is simply no "by blood" requirement in Article III. There is no ambiguity to resolve. The words "by blood" or "Cherokee by blood" do not appear. Article III only requires proof of citizenship by referencing the "Dawes Commission Rolls." Article III does not exclude anyone who is listed on the Dawes Commission Rolls.
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> The Council lacks the power to redefine tribal membership absent a constitutional amendment. The Council is empowered to enact enrollment procedures, but those laws must be consistent with the 1975 Constitution. The current legislation is contrary to the plain language of the 1975 Constitution. . . . [T]he legislation requires individuals to prove they possess Cherokee blood. This goes over and above the proof required by the Constitution.

Id. at 21, 31. The Grand Ronde Court of Appeals, faced with the same situation, has found likewise. *See Loy v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 132, 135 (Grand Ronde Ct. App. 2003) ("The Tribal Council did not, and does not, have the authority to create by ordinance membership requirements inconsistent with those expressly defined in the Constitution.").

Here, as in *Allen* and *Loy*, the Article II, Section 4, of the Nooksack Constitution clearly states that reason that a tribal member may be disenrolled "**shall be limited exclusively** to failure to meet the requirements set forth for membership in this constitution." In order to remove this restriction, the Constitution must be amended; and it has not. The Tribal Council is empowered to enact enrollment procedures, but those laws must be consistent with the Constitution. N.T.C. § 63.04.001(B)(1)(a)'s additional reason for disenrollment goes over and above the disenrollment criteria set forth in the Constitution, and must be stricken down.[23]

2. Resolution No. 13-02 Is Unconstitutional.

On February 12, 2013, the Tribal Council passed Resolution No. 13-02, which "initiate[ed] involuntary disenrollment proceedings pursuant to Title 63,Section [sic] 63.04.001(B)." CP 14, Ex. 1. But N.T.C. § 63.04.001(B) does not — and indeed cannot constitutionally — grant the Tribal Council authority to initiate disenrollment proceedings. That power instead rests with the Nooksack People. *Id*.

The Nooksack Tribal Council owes its authority to the powers expressly entrusted by "the members of the Nooksack Indian Tribe" in the Nooksack

[23] The Trial Court summarily dismissed this claim with no discussion. Thus, there is technically no error to assign to the Tribal Court, other than to argue that a decision of the Trial Court must be vacated and remand when it does not "meaningfully consider" an argument raised in opposition to dismissal. *U.S. v. Flores-Mejia*, No. 12-3149, 2013 WL 3776221, at *3 (3rd Cir. 2013). Again, the procedural posture here is odd here, though, because the Trial Court should not have gone to the merits at all — it improperly dismissed the Second Amended Complaint on sovereign immunity grounds.

Constitution. Const., Preamble (citing Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476); *see also* Const., art. VI, § 4 ("Any rights and powers heretofore vested in the Nooksack Indian Tribe but not expressly referred to in this Constitution . . . may be exercised by the people of the Nooksack Indian Tribe . . . ."); *In re Village Authority to Remove Tribal Council Representatives*, 11 Am. Tribal Law 80, 84 (Hopi Ct. App. 2010) (noting that "tribal governments adopted under section 16 of the Indian Reorganization Act of 1934 . . . owe their authority to powers delegated by their people"). While this sovereign power is inherent and unrestricted (unless explicitly divested by Congress or by Treaty),[24] the Tribal Council's power has been limited, by the Nooksack membership, to those powers specifically enumerated in the Constitution. *See Pearsall v. Tribal Council for The Confederated Tribes of The Grand Ronde Community*, 4 Am. Tribal Law 156, 162 (Grand Ronde Tribal Ct. 2003) ("Tribal Council derives its power from the Tribal Constitution"); *see Lay v. Cherokee Nation*, 1 Am. Tribal Law 23, 27 (Cherokee Ct. App. 1998) ("There is no question that the Constitution grants important powers to the Council."). In adopting the Constitution, the Nooksack

[24] *See* Robert A. Williams, Jr., Module 8: The Marshall Trilogy and United States v. Winans, Federal Indian Law and Policy for Tribal Leaders Series, *available at* http://www.arizonanativenet.com/media/arro/module8/module8.swf ("whatever [aspect of tribal sovereignty] hasn't been taken away by Congress, by treaty or statute, remains.").

Membership granted some powers to the Tribal Council, and reserved others to the People.[25] Const., art. VI, § 4.

Nowhere in the Constitution has the power to "determine loss of membership" been granted to the Tribal Council. CP 78 at 9. Again, Article II, Section 4, grants the following power to the Tribal Council:

> The tribal council shall, **by ordinance**, prescribe rules and regulations governing involuntary loss of membership. The reasons for such loss shall be limited exclusively to failure to meet the requirements set forth for membership in this constitution . . . .

Const., art. II, § 4 (emphasis added). As it relates to disenrollment, then, the Tribal Council is a mere legislative body; nothing more, nothing less.

The Trial Court, however, held that the "Constitution grants the authority to determine loss of membership to the Tribal Council." CP 78 at 9; *see also* CP 44 at 12 ("The Constitution plainly reserves the authority to determine membership and loss of membership to the Tribal Council . . . ."). Notably, in making this broad finding, the Trial Court failed — not once, but twice — to cite to any provision of the Constitution that reserved this authority to the Tribal Council. Instead, the Court simply reasoned that "[t]o hold that the Tribal Council could not [initiate disenrollment proceedings] requires that the Court ignore the provision in the Constitution that reserves determinations regarding

[25] If this were not the case, Article VI of the Constitution, titled "Powers of the Tribal Council," and Article II, Section 2, which grants the Tribal Council "the power to enact ordinances . . . governing future membership of the tribe," would be superfluous.

Loss of Membership to the Tribal Council." *Id.* The Trial Court's reasoning was flawed, for at least two reasons.

First, the "provision in the Constitution that reserves determinations regarding Loss of Membership to the Tribal Council" simply does not exist. *Id.* Article II of the Constitution is the only section that addresses membership. Section 1 therein lays out eight separate ways that a person may obtain Nooksack membership, and states that "[t]he membership of the Nooksack Indian Tribe **shall** consist" of these persons. Const., art. II, § 1 (emphasis added). Section 2 states that "[t]he Tribal Council shall have the power to enact ordinances in conformity with [the] constitution . . . governing future memberships . . . and loss of memberships." *Id.* at § 2. Section 3 involves enrollment in other "organized Indian tribe[s]" and does not reference the Tribal Council. *Id.* at § 3. Section 4, as discussed above and consistent with Section 2, grants the Tribal Council the authority to "**by ordinance**, prescribe rules and regulations governing involuntary loss of membership." *Id.* § 4 (emphasis added); *see also Menefee v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 97-12-092-CV, 2000 WL 35750183, at *3 (Grand Traverse Ct. App. Feb. 9, 2000) (holding that Article II, Section 3 of the Tribe's constitution, which stated, "[t]he Tribal Council shall promulgate ordinances governing enrollment, disenrollment, and adoption[,] is silent except to allow the Council to pass regulations for membership" and "does

not specifically grant power to the Council" to do anything else). The Constitution grants the Tribal Council a legislative role, and nothing more.

Second, even if "determinations regarding Loss of Membership" were "reserved to the Tribal Council," this would not mean that the Tribal Council has been granted the separate authority to *initiate* disenrollment. CP 44 at 12. Even if, in other words, the power to "determine" was somehow granted to the Tribal Council, the authority to "determine loss of membership" is a neutral and objective judicial role; not a subjective investigatory role, where Councilmembers, with their own axes to grind, are allowed to rummage through enrollment files in order to arbitrarily initiate disenrollment proceedings against political foes and their families.[26] CP 78 at 9.

The Tribal Code has two clauses that discuss the initiation of disenrollment proceedings: (1) "at no time will staff employed in the Disenrollment Department purposely initiate a reason for loss of membership," and (2) "[a]ny tribal member requesting loss of membership of another tribal member will need to present written documentation on how the information was obtained that warrants disenrollment." N.T.C. § 63.04.001(B). Once disenrollment proceedings are initiated, the tribal member has a right to protest

[26] The Trial Court's discussion on former Title 63 is helpful: "In 1975, Title 63's enactment provided that '[t]he decision of the Council [on enrollment] . . . is final, except that the Tribal Court (Northwest Intertribal Court) shall have exclusive jurisdiction to hear all appeals of enrollment [and] disenrollment . . . ." CP 44 at 9. In 2004, however, this **judicial role** was conferred upon the Tribal Council by an amended Title 63. *Id.*

the disenrollment by "meeting with the Tribal Council" whereupon "[t]he Tribal Council shall determine if the member is to be disenrolled." N.T.C. § 63.04.001(B)(2). This is the first point at which the Tribal Council may be substantively involved in the disenrollment proceedings. At this point, "[t]he decision of the Nooksack Tribal Council is final." *Id.*; *see also* N.T.C. § 63.04.001(B) ("The Tribal Council will have the final say on loss of membership."). If the member fails to request a "meeting" within thirty days, they will be "automatically removed from the roll book by resolution." N.T.C. § 63.04.001(B)(2). Thus, although Title 63 does carve out a judicial role for Tribal Council, it does does not grant the power to do anything other than act as a reviewing body.[27]

Resolution No. 13-02 purported to "initiate[] involuntary disenrollment proceedings pursuant to Title 63, Section [sic] 63.04.001(B)." CP 14, Ex. 1. But N.T.C. § 63.04.001(B) does not — and indeed cannot constitutionally — grant the Tribal Council authority to initiate disenrollment proceedings. As noted above, N.T.C. § 63.04.001(B) contains two clauses that pertain to the initiation of disenrollment proceedings; only one of these clauses grant the authority to initiate disenrollment proceedings, and that one requires that it be initiated by a "tribal member" only upon the "present[ation of] written documentation." *Id.*

[27] As discussed above, because the Constitution delegates a mere legislative role to the Tribal Council, even this judicial role is beyond the authority granted by the Constitution.

The Trial Court held, however, that N.T.C. § 63.04.001(B) *does* grant this authority to the Tribal Council, and it does so pursuant to a Constitutional clause that explicitly "reserved" the power to do so:

> The Constitution and Code expressly reserve determinations about membership to the Tribal Council. . . . [T]o read N.T.C. § 63.04.001(B) as limiting the Tribal Council's power, . . . would require the Court to both ignore the clear mandate of the Constitution reserving the authority to determine loss of membership to the Council, as well as the intention of the Membership Ordinance, which states that it was adopted in conformity with the Constitution . . . .

CP 78 at 10. As discussed above, however, **the Constitution does not "expressly reserve" this power to the Tribal Council**. *Id.* The Constitution *only* grants the power to "**by ordinance**, prescribe rules and regulations governing involuntary loss of membership." Const., art. II, § 4. This is all that the Constitution has to say on the topic. The Trial Court's ruling otherwise finds no place in the law.

Any power to initiate disenrollment was reserved to the Nooksack membership, consistent with (1) the general rule that "tribal governments . . . owe their authority to powers delegated by their people," *In re Village Authority*, 11 Am. Tribal Law at 84; (2) the Constitution's reservation of those powers not "expressly referred to in th[e] Constitution [to] the people of the Nooksack Indian Tribe," Const., art. VI, § 4; and (3) the statutory requirement that disenrollment be initiated by a "tribal member," upon the "present[ation of] written

documentation."[28] N.T.C. § 63.04.001(B). The Trial Court's ruling otherwise was in error.

3. Resolution No. 13-38 Is Unconstitutional.

On March 26, 2013, the Tribal Council passed Resolution No. 13-38, which "propos[ed] an amendment to the Tribal Constitution in Article II – Membership, to remove § 1(h)." CP 14, Ex. 6. The stated reason for the amendment was that the term "Nooksack ancestry to any degree" is "so ambiguous that [Section 1(H)] cannot be fairly applied and has potential for abuse." *Id.* The actual reason for the amendment, however, was to "control [the] cultural identity of the Nooksack Tribe" by targeting for disenrollment "large groups or families that [allegedly] have much weaker ties to Nooksack than [others] who are currently enrolled." Second Declaration of Diantha Doucette ("Second Doucette Decl."), Ex. B.[29] Appellants are in fact "being targeted." CP 39 at 6 (Former Enrollment Officer Jewell Jefferson: "I still do not know why or how . . . an inquiry into the enrollment of Terry St. Germain's children, morphed into the disenrollment of over 300 enrollment members of Rapada, Rabang, and Narte/Gladstone families. **I believe those families are being targeted**.") (emphasis added). Yet all of the members that are currently targeted for

[28] *See* CP 39 (former Enrollment Officer testifying that the at-issue "disenrollment process was not properly started with a formal documented request for loss of membership of any tribal member by another tribal member, as required by Title 63.").

[29] This document was filed with the Trial Court on May 7, 2013. Yet it does not appear on the Docket Report. The document will not be filed with this pleading, but will be available upon request, should the Court so desire.

disenrollment meet the requirements of Section 1(H). *See* CP 54 at 12 ("Plaintiffs are persons who possess at least one-fourth (1/4) degree Indian blood and who can prove Nooksack ancestry in any degree."); *see also generally* Second Galanda Decl., Exs. A-C.

Article IX of the Nooksack Constitution affords to the Nooksack membership "equal rights pursuant to tribal law" and "[t]he protection guaranteed to persons by Title II of the [Indian] Civil Rights Act of 1968 (82 Stat. 77)." Const., art. IX. These rights are enforceable "against actions of the Nooksack Indian Tribe in the exercise of its power of self-government."[30] *Id.* Title II of the Indian Civil Rights Act ("ICRA") states, in relevant part, that "[n]o Indian tribe . . . shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8). This provision of the ICRA "incorporate[s] . . . the safeguards of

[30] Because Appellants have sued Appellees in their official capacities for prospective injunctive relief, a waiver of sovereign immunity is not needed. *See De La Cruz v. Irizarry*, No. 12-1837, 2013 WL 1531649, at *9 (D. Puerto Rico Apr. 12, 2013) ("The *Ex Parte Young* doctrine allows federal courts, **notwithstanding the absence of consent [or] waiver** . . . to enjoin [tribal] officials to conform future conduct to the requirements of [tribal] law. . . . [C]ourts need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of [tribal] law and seeks relief properly characterized as prospective.") (citation omitted, emphasis added). Article IX likely provides a waiver for ICRA/constitutional claims at any rate. *See e.g. McGee v. Spirit Mountain Gaming, Inc.*, 5 Am. Tribal Law 85, 88 n.1 (Grand Ronde Tribal Ct. 2004) (allowing an ICRA/constitutional claim to move forward because, as here, "[t]he Tribal Constitution incorporates the ICRA by reference . . . and charges the Tribal Court with enforcing its provisions."); *Works v. Fallon Paiute-Shoshone Tribe*, No. CV–FT–96–014, 1997 WL 34704273, at *2 (Nev. Inter–Tribal Ct. App. Feb. 25,1997) ("[T]he Indian Civil Rights Act itself is a waiver of the immunity of the tribe for the narrow purpose of vindicating rights guaranteed by the Act and ordering an appropriate remedy."); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the Field*, 21 Vt. L. Rev. 7, 22 (1996) (with respect to ICRA claims, noting that "tribal courts have found a waiver of sovereign immunity, explicitly or implicitly, in the tribal constitution").

the Bill of Rights to fit the unique needs of tribal governments" by guaranteeing the equal protection of tribal laws and regulations. *Long v. Mohegan Tribal Gaming Authority*, 1 Am. Tribal Law 385, 398 (Mohegan Gaming Trial Ct. 1997).

Discriminatory tribal laws and regulations and/or discriminatory application of tribal law and regulation do not satisfy the scrutiny applied under Section § 1302(a)(8). To withstand equal protection review, legislation that has a "disparate impact . . . on a particular group," *Nunez v. Cuomo*, No. 11-3457, 2012 WL 3241260, at *15 (E.D.N.Y. Aug. 17, 2012), "must be rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). Legislation passed with "a bare desire to harm a politically unpopular group" will always fail this test because such a desire is never a "legitimate state interest." *Id.* (quotation omitted); *see also* Francis Amendola, et al., *Rational or Reasonable Basis Test*, 16B C.J.S. Constitutional Law § 1120 (2013) ("[A] bare congressional desire to harm a politically unpopular group does not constitute a legitimate governmental interest sufficient to sustain a legislative classification against an equal protection challenge."). This is so even if the challenged law or regulation does not target a "suspect class."[31] *See U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)

[31] A "suspect class" is a class of persons "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary

("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *Perry v. Brown*, 671 F.3d 1052, 1085 (9th Cir. 2012) (a change in law violates equal protection clause "where a privilege or protection is withdrawn without a legitimate reason from a class of disfavored individuals, even if that right may not have been required by the Constitution in the first place."); *Ariz. Dream Act Coalition v. Brewer*, No. 12-2546, 2013 WL 2128315, at *15-*20 (D. Ariz. May 16, 2013) (same). While rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *Heller v. Doe*, 509 U.S. 312, 319 (1993), neither is it an abdication of the court's responsibility to strike down legislation that arbitrarily targets an unpopular political group:

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the [statute] and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of [the Court's] authority.

Romer v. Evans, 517 U.S. 620, 632 (1996). Thus, reviewing courts must examine the possible justifications for the statute or regulation in light of *the factual context in the record*. *Cleburne*, 473 U.S. at 448; *Heller*, 509 U.S. at 321

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protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

("[E]ven the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation."); *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir.), *cert. denied*, 506 U.S. 1020 (1992) (holding that the government must "establish on the record that its policy had a rational basis"). And when, as here, "applying rational basis review to a classification that adversely affects an unpopular group, courts apply a 'more searching'" review of the evidence submitted by the parties. *Golinski v. U.S. Office of Personnel Management*, 824 F.Supp.2d 968, 996 (N.D. Cal. 2012) (citing *Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011)); *see also Arizona Dream Act Coalition v. Brewer*, No. 12-2546, 2013 WL 2128315, at *17 (D. Ariz. May 16, 2013).

Here, Resolution No. 13-38 undoubtedly has disparate impact on a politically unpopular group. The Appellees are currently attempting to disenroll a politically unpopular group of 300-plus Nooksacks who are similarly situated. These Nooksacks meet, at least, the requisites of Article II, Section 1(H), of the Nooksack Constitution. CP 54 at 12; Second Galanda Decl, Exs. A-C. Pursuant to the unconstitutional provisions of Title 63 that allow disenrollment for a failure to "submit adequate documentation . . . at the time or enrollment," N.T.C. § 63.04.001(B)(1)(a), Appellees have initiated disenrollment proceedings against Appellants because of an alleged error on their enrollment applications that

occurred, in most instances, many years ago.[32] The Tribal Council then plans to disallow these Nooksacks to reenroll under Article II, Section 1(H), because Resolution No. 13-38 has removed the provision. *See U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973) (courts are to examine how a law works in "practical operation"). Resolution No. 13-38 has disparate impact on the Appellants, and no one else. Resolution No. 13-38 unconstitutionally targets Appellants by ensuring that once they are illegally disenrolled — per N.T.C. § 63.04.001(B)(1)(a) and Resolution No. 13-02 — they remain disenrolled forever. *See generally* Doucette Decl.; *id.* at Ex. A-D.

The record does not reveal any rational basis for trusting that Section 1(H) poses any special threat to the Tribe's legitimate interests. *Cleburne*, 473 U.S. at 448. Although modifying statutory language that "cannot be fairly applied and has potential for abuse" may be a legitimate governmental interest, CP 14, Ex. 6, there is not a sliver of evidence in the record that their fear has any "footing in . . . realit[y]."[33] *Heller*, 509 U.S. at 321. Appellants, on the other hand, have

[32] The alleged error on enrollment applications is not unique to Appellants, who have been targeted nonetheless. *See* CP 39 ("[M]any Nooksack members' enrollment letters do not specify a provision of Section 1 of the constitutional membership provision that they were enrolled under . . . . That problem is not limited to only the Rapada, Rabang, and Narte/Gladstone families. It extends throughout the entire Tribe.").

[33] Because limiting the *future* Nooksack membership to those "groups or families that have [strong] ties to Nooksack" is not the stated purpose of Resolution 13-38, the Court need not analyze whether Resolution No. 12-38 bares some rational relation to that objective. Second Doucette Decl., Ex. B; *see U.S. v. City of Black Jack, Missouri*, 508 F.2d 1179, 1186-87 (8th Cir. 1974) (noting that under an equal protection analysis, the court "must examine: first, whether the ordinance in fact furthers the governmental interest asserted."). But even assuming that the Appellants have a legitimate interest in that goal, Resolution No. 13-38 still unconstitutionally

presented evidence that real objective of Resolution No. 13-38 is to "control [the] cultural identity of the Nooksack Tribe" by ensuring that Appellants are disenrolled forever. Doucette Decl., Ex. B; *see also id.* at Exs. A, C-D; CP 39 at 6. At minimum, Appellants have presented enough evidence to survive any motion to dismiss.[34]

The Trial Court, however, focused solely on finding that Appellants were not a "suspect class" and went no further in the analysis. According to the Trial Court,

> since tribal membership is considered a political status, th[e] line must be drawn somewhere. . . . The Court cannot find that racial animus has driven the Defendants. . . . [Because] tribal membership requires, at least in part, analysis of race, descendancy and blood, it is hard to imagine an argument that would find such determinations to violate the Council's scope of authority.

CP 78 at 16. The Trial Court's examination misses the point. Appellants have continuously maintained that "Resolution No. 13-38 . . . specifically target[s] those Nooksacks currently subject to disenrollment proceedings" and have presented evidence that this targeting "clearly establishes a discriminatory intent as to that specific identifiable group." CP 64 at 37 n.10. Whether or not "racial animus" has driven Appellees' targeting of Appellants is irrelevant. *See*

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targets Appellants, who *are* currently enrolled and should be treated equally under the law. It issue, in other words, pertains to Appellees' ability to reenroll once they are unconstitutionally disenrolled per N.T.C. § 63.04.001(B)(1)(a) and Resolution No. 13-02.

[34] Again, because the Trial Court evaluated this claim under the guise of a jurisdictional analysis, it is not clear what standard it was applying. Appellants maintain that the claim survives under any standard, even a highly deferential one.

Mountain Water Co. v. Montana Dept. of Public Service Regulation, 919 F.2d 593, 598 (9th Cir. 1990) ("[A] court may hold a statute not implicating a suspect class violative of equal protection if the statute serves no legitimate governmental purpose and if impermissible animus toward an unpopular group prompted the statute's enactment."); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 204 (4th Cir. 2000) ("[E]ven if the disadvantaged group does not rise to the level of a suspect class entitled to the application of strict scrutiny, the court **must** closely scrutinize laws that disadvantage a politically unpopular group . . . .") (emphasis added). Simply because Appellees are not "member[s] of a quasi-suspect class does not leave them entirely unprotected from invidious discrimination." *Pugliese v. Long Island R.R. Co.*, No. 01-7174, 2006 WL 2689600, at *8 (E.D.N.Y. Sept. 19, 2006). The Trial Court's failure to determine whether Resolution No. 13-38 was enacted with a "desire to harm a politically unpopular group" was in error. *Moreno*, 413 U.S. at 534; *see e.g. Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) (reversing lower court for failing to make this inquiry).

4. Appellants Have Been Denied Due Process.

Appellees have not produced one scintilla of evidence to prove — nor does Resolution No. 13-02 provide any basis to believe — that Plaintiffs do not

"meet the requirements set forth for membership in th[e] constitution."[35] Const. art. II, § 4. In fact, Appellees know Plaintiffs are Nooksack, and they have known that fact since at least February 5, 2013. *Cf.* CP 64, Ex. H, *with* Second Galanda Decl., Ex. A. Appellees initiated disenrollment against Appellants nonetheless, arguing that because a person "identified as 'Jobe'" was not an "original Nooksack Public Domain allottee living on January 1, 1942," any "member who descended from Annie James (George) or Andrew James" was not properly enrolled. CP 14, Ex. 1. Appellees did not provide evidence as to how or why Appellants are not entitled to Nooksack membership. *Id.* Instead, they simply pointed out that there may be errors on Appellants' original enrollment applications. *See generally id.*; *see also* CP 39 at 2 (Jefferson: "[M]any Nooksack members' enrollment letters do not specify a provision of Section 1 of the constitutional membership provision that they were enrolled under, meaning the letters do not specify 1(A), 1(B, (1C), 1(H) and so forth. That problem . . . extends throughout the entire Tribe.").

As noted above, Title II of the ICRA, as incorporated into the Nooksack Constitution, provides that the Tribal Council must provide Appellants with "due process of law." 25 U.S.C. § 1302(a)(8). This "due process" guarantees that enrolled members cannot be forced to undergo haphazard legal attacks on their membership without the Tribal Council first making a "preliminary showing of

[35] Again, even if Appellees had provided evidence that that Plaintiffs' original enrollment files had the wrong box checked, this is not enough to initiate disenrollment. *See* Const. art. II, § 4.

good cause" as to why they do not meet the constitutional membership criteria. *US v. Costello*, 142 F.Supp. 290, 292 (S.D.N.Y. 1956) (quotation omitted). As the Supreme Court made clear many years ago in *U.S. v. Zucca*:

> The mere filing of a proceeding for [disenrollment] results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. [A] person, once admitted to [Nooksack] citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded. We believe that, not only in some cases but in all cases, the [Tribal Council] must, as a prerequisite to the initiation of such proceedings, file [evidence] showing good cause.

351 U.S. at 676 (modified to reflect application to the case at bar); *see also U.S. v. Diamond*, 255 F.2d 749, 750 (9th Cir. 1958) (noting that the presentation of some evidence "prior to institution of action [i]s an indispensable requirement" of due process). The purpose of this due process requirement of some pre-hearing evidence "is to give the concrete facts behind the charge as distinguished from its abstract theory." *Costello*, 142 F.Supp. at 291. "[T]he mere statement of a theory" in a mass mailing does not provide due process. *Id.*

The closest that the Trial Court came to making a ruling on this issue below was simply to state that Appellees "have identified those who appear to not be enrollable under the Constitution and have proceeded to disenroll them on the

basis of that information."[36] CP 78 at 16. That the alleged "information" had not been presented to those targeted for disenrollment was apparently of no consequence; despite crystal clear Supreme Court precedent to the contrary.[37] At the time that Appellees initiated disenrollment, Appellants were Nooksack and entitled to Nooksack membership pursuant to, at least, Article II, Section 1(H) of the Constitution. Appellees have not — upon the initiation of disenrollment proceedings or otherwise, to this day — presented any disagreeing evidence. The Trial Court erred by ruling that the due process clause of the ICRA does not require that Appellees make a minimum showing of good cause prior to the initiation of disenrollment proceedings.

C. The Trial Court Erred By Holding That Appellees Did Not Violate The Nooksack Bylaws.

1. Tuesday Meetings.

Article II, Section 2 of the Nooksack Bylaws unequivocally requires that the Tribal Council "meet regularly on the first Tuesday of each month." Bylaws, art. II, § 1. Appellees have interfered and otherwise obstructed the calling of a monthly regular Tribal Council meeting from February 5, 2013, to the present. Appellees have admitted this. CP 51 at 24. The Trial Court found that the Bylaws are "to be followed by the Council in the same manner as the

[36] This statement is factually incorrect. Appellees did not "identif[y] those who appear to not be enrollable under the Constitution." CP 78 at 16. Rather, Appellees simply pointed out that there were errors on Appellants' enrollment applications. *See generally* CP 14, Ex. 1.

[37] If there is any question as to whether a minimal showing of evidence is required by Nooksack law, the Court's ruling must be construed in a light most favorable to the disenrollee. *Gorbach v. Reno*, 219 F.3d 1087, 1097-98 (9th Cir. 2000).

Constitution." CP 78 at 18; *see also Garfield v. Coble*, No. ITCN/AC 03-020, 2004 WL 5748178 (Nev. Inter-Tribal Ct. App. June 28, 2004) (Bylaws are enforceable against the Tribal Council).

The Trial Court held, however, held that "the sovereign immunity of the Tribe protects the Council" from suits seeking to enjoin their interference with these constitutionally mandated monthly meetings. CP 78 at 18. For the reasons discussed above, the *Ex parte Young* exception allows Appellants' claim to proceed, tribal sovereign immunity notwithstanding. The Trial Court's ruling otherwise was in error.

2. Special Meetings.

Article II, Section 5 of the Bylaws provide that the Tribal Council "shall" hold a special meeting "upon written request of either two (2) members of the tribal council or by petition signed by twenty five (25) legal voters of the tribe." Bylaws, art. II, § 5. The Trial Court found that two members of the Tribal Council had properly submitted a special meeting request, but held that Appellants' "simply lack standing to bring these issues to this Court." CP 78 at 18-19. According to the Trial Court, Appellants are not "among the injured." *Id.* at 78.

To possess standing, a plaintiff must have "such a personal stake in the outcome of the controversy" as to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204 (1962). This judicial power

"exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). While "[t]here is no general, citizen standing to challenge government actions," *Christie v. President of the U.S.*, No. 13-2520, 2013 WL 3870781, at *1 (3rd Cir. July 29, 2013), where a plaintiff alleges to be "harmed by the defendant" in such a manner "that the harm will likely be redressed by a favorable decision, that plaintiff has standing." *Clinton v. City of New York*, 524 U.S. 417, 434-35 (1998).

Here, Appellants have alleged that Appellees failed to comply with a direct mandate of the Nooksack Bylaws by interfering with the Special Meeting validly requested by two members of the Nooksack Tribal Council on their behalf. The requested special meeting required the Tribal Council to examine the Appellees' initiation of "involuntary disenrollment of numerous members of the Nooksack Tribe" and Appellees' interference with the "regular monthly Tribal Council meeting" required by the Nooksack Bylaws. CP 32 at 15. While the two members of the Tribal Council that properly submitted a Special Meeting request surely have been injured by Appellees' acts, the inquiry does not end there. *See United States v. SCRAP*, 412 U.S. 669, 688 (1973) ("To deny standing to persons

who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."). Appellants, all of whom are the very "members of the Nooksack Tribe" for whom the Special Meeting was requested, have "alleged far more than an abstract, and uncognizable, interest in seeing the law enforced." *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 432 (D.C. Cir. 1998). Appellants seek to obtain, through the requested special and monthly meetings, crucial information about their disenrollment. The Trial Court's failure to grant the requested relief has put Appellants at a vast disadvantage as to their individual disenrollment proceedings. Appellants have clearly "suffered an injury that is any greater than that which might have been suffered by other concerned citizens," i.e. those members not targeted for disenrollment. *Starr v. Mandanici*, 152 F.3d 741, 750 (8th Cir. 1998). The Trial Court erred in holding otherwise.

D. The Trial Court Erred In Failing To Find That Appellees Violated Title 63.

Even if N.T.C. § 63.04.001(B) did grant the Tribal Council the power to initiate disenrollment proceedings — which, as discussed above, it clearly does not, and constitutionally cannot — the statute does not grant Enrollment Officer Roy Bailey the authority to do so. Indeed, the statute explicitly prohibits such action. *See id.* ("[A]t no time will staff employed in the Enrollment Department purposely initiate reason for loss of membership."). Defendants have admitted that Officer Bailey does not possess this authority. *See* CP 35 at 21 ("Title 63

does not give staff the authority to start the disenrollment process."). The Enrollment Office employees, too, know that a tribal member may only initiate the disenrollment process. According to the sworn testimony of former Enrollment Officer Jewell Jefferson:

> I do not believe that the current disenrollment process was properly started with a documented request for loss of membership of a tribal member by another tribal member, as required by Title 63, the Nooksack Tribal Membership Ordinance. . . . Dating back to when I started as Nooksack Enrollment Officer, I would occasionally hear verbal complaints from tribal members that the Rapada, Rabang, and Narte/Gladstone families were "non-Nooksack." I would always tell the folks complaining that unless a tribal member submitted a documented request for loss of membership of another tribal member, there was nothing I or the Nooksack Enrollment Office could do about those complaints.

CP 39.[38]

Appellants alleged in their Complaint(s) that Officer Bailey "had taken the initiative to begin the process of disenrolling the 306 Enrolled Nooksack Members." CP 32 at 7. This allegation was based upon a February 4, 2013, statement of Defendant Chairman Robert Kelly. *Id.*; *see also* CP 6 at 2-3 ("Mr. Kelly also informed the Tribal Council that . . . Ron Bailey at the Nooksack Tribal Enrollment Office had taken the initiative to begin the process of disenrolling 306 currently enrolled Nooksacks, including myself and another councilmember."). Former Enrollment Officer Jefferson has also testified that Officer Bailey initiated disenrollment. *See generally* CP 39.

[38] Ms. Jefferson was ultimately fired from her position at the Enrollment Office for refusing to violate Nooksack law by initiating disenrollment proceedings against Appellants. CP 39 at 2, 5-6.

The Trial Court denied this claim, however, finding that Officer Bailey did not initiate the disenrollment process on his own accord. According to the Trial Court:

> Officer Bailey processed applications from Terry St. Germain for his children and, in so doing, found they lacked the necessary documentation for enrollment. Upon the questioning of Secretary St. Germain, Chairman Kelly stated that he would research the issue and both he and officer Bailey were tasked with doing so. Upon conducting research with the [BIA], Chairman Kelly and Officer Bailey found that there was no documentation to support the enrollment of the Plaintiffs . . . . Officer bailey did not, on his own accord, initiate a disenrollment process.

CP 78 at 12.

First, the Trial Court erred in failing to treat Appellants' allegations as true. At the preliminary stages of this litigation, the Trial Court ordered "that the rules that should govern these proceedings from this point forward shall be the Federal Rules of Civil Procedure." CP 31 at 3. Under these rules, "courts treat the alleged facts as true when reviewing motions to dismiss," and "[f]actual disputes are considered at later stages of the litigation." *Harris v. CitiMortgage, Inc.*, 878 F.Supp.2d 154, 157 n.2 (D.D.C. 2012). Although this is what the Trial Court purported to do here, *see* CP 78 at 2 ("[A]llegations of fact by the non-moving party are taken as true and viewed in a light most favorable to the non-movant."), it did not actually occur. The Trial Court did not take Chairman Kelly or Officer Jefferson's admission that Officer Bailey initiated disenrollment

proceedings into account. Instead, the Trial Court took Appellees' facts as true, and ignored much of Appellants' facts.[39]

Second, the Trial Court's finding does not follow logically. That Officer Bailey processed applications, attended Tribal Council meetings, and conducted research with the BIA has no bearing on whether he initiated disenrollment proceedings. The undertakings are not mutually exclusive. At minimum, Appellants have presented a factual issue that cannot be resolved on a dismissal motion. *See e.g. Navajo Nation v. Urban Outfitters, Inc.*, No. 12-0195, 2013 WL 1294670, at *18 (D.N.M. Mar. 26, 2013).

E. The Trial Court Erred By Striking Appellants' Exhibit And Refusing To Strike Appellees' Declaration.

1. Declaration Of Grett Hurley.

On August 30, 2013, Appellees' attorney Grett Hurley filed a declaration testifying to his own thoughts regarding the "the purpose" and intent of the Stipulation filed between the parties. *See generally* CP 81. This testimony was improper, as it was not "a formal policy interpretation of a regulation, but merely a self-serving declaration prepared for this litigation." *Ritchie v. U.S.*, 210 F.Supp.2d 1120, 1126 (N.D. Cal. 2002); *see also United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (a declaration is improper where "an agency has not formulated an official interpretation of its regulation, but is

[39] *See also e.g.* CP 78 at 3 (finding that "Secretary St. Germain stated that if the St. Germain applicants were not eligible for enrollment, then neither was he."). Appellants did not plead this — it was lifted directly from Appellees' response papers. *See* CP 25 at 4; Declaration of Enrollment Officer Roy Bailey, CP 25 at 4.

merely advancing a litigation position"). Likewise, in making the declaration, Mr. Hurley violated the "advocate-witness" rule, which prohibits an attorney from appearing as both a fact witness and an advocate in the same litigation. *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002); RPC 3.7. In addition, ethically, a lawyer may not serve as a witness regarding contested matters. *See* Model Rule of Professional Conduct 3.7; RPC 3.7; *Matter of Feldman*, 500 A.2d 377, 378 (N.J. 1985) (attorney unfit to practice law where he "knowingly made himself a fact witness while representing a client and should have withdrawn from the case").[40] "Adherence to this time-honored rule is more than just an ethical obligation of individual counsel; enforcement of the rule is a matter of institutional concern implicating the basic foundations of our system of justice." *United States v. Prantil*, 764 F.2d 548, 553 (9th Cir. 1985).

The usual consequence for filing the type of declaration that Mr. Hurley submitted is that the declarant be foreclosed from appearing on behalf of his client. *See id.* ("The advocate-witness rule generally admits of only one solution to avoid the improprieties inherent in advocate testimony. Attorneys must elect in which capacity they intend to proceed, either as counsel or as a witness, and promptly withdraw from the conflicting role."). Upon receiving the declaration, however, Appellants merely requested that the document be stricken from the

[40] Per N.T.C. § 10.02.020, Mr. Hurley "shall be subject to the same ethical obligations of honesty and confidentiality toward his/her client and the Court as would a professional attorney."

record. CP 88. The Trial Court erred in, at minimum, refusing to strike the Declaration of Mr. Hurley. *See generally* CP 95.

2. Exhibit A To The Declaration Of Diantha Doucette.

On March 28, 2013, Appellants filed the declaration of Tribal member Diantha Doucette. In this declaration, Ms. Doucette testifies that Appellant Sonia Lomeli and other Nooksacks' enrollment files have been sanitized of an enrollment record pertaining to the membership of Mary Louise Rapada, Ms. Lomeli's aunt. That document states that Ms. Rapada was likely eligible for enrollment under Article II, Section 1(H) of the Constitution, which "encompasses persons who are at least ¼ degree Indian blood and who can prove Nooksack ancestry to any degree." The letter was of utmost importance to Appellants. Appellees moved to strike the exhibit, "based upon the attorney-client privilege." CP 24 at 18. The Trial Court granted the motion, finding that "[t]he letter was prepared by an attorney for an organizational client" and that "there is no evidence whatsoever that disclosure to a third party occurred."[41] CP 31 at 5.

[41] The Trial Court purported to apply the attorney-client privilege. CP 31 at 5. It should have applied the attorney work-product privilege. The attorney-client privilege only protects "confidential communications made for the purpose of obtaining legal advice," *In re Grand Jury Subpoena*, 256 F. App'x 379, 382 (2d Cir. 2007), whereas the work-product privilege establishes a zone of privacy for an attorney's preparation to represent a client in anticipation of litigation. *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998). The work-product privilege "provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial." *In re Grand Jury Subpoenas*, 318 F.3d 379, 383 (2d Cir. 2003). At any rate, the case that the Trial Court cites to support its privilege analysis involves neither privilege, and the word "waiver" is not mentioned once in the case. *Soter v. Cowles Pub. Co.*, 174 P.3d 60

The Trial Court's holding was in error. The work-product privilege is codified by Fed. R. Civ. Proc. 26(b)(3), which states that:

> a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

Even where the evidence meets this requirement, though, disclosure to a third party waives the work-product privilege if the third party makes the evidence available to an adverse party. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991).

Here, although the enrollment record was admittedly prepared by an attorney for the Nooksack Tribal Enrollment Clerk, Appellants have submitted ample evidence that disclosure to a third party has occurred. In her declaration, Ms. Doucette directly testifies that the exhibit was disclosed to her by the Enrollment Department. Ms. Doucette is a third party — neither the Tribal Council nor the Enrollment Office employs her. Ms. Doucette subsequently made the document available to Appellants herein. The Trial Court's simply ignoring this evidence was in error.

F. The Trial Court Erred In Holding That The Named Plaintiffs Represent Only Themselves In This Matter.

On March 20, 2013, the parties in this suit filed a Stipulation with the Trial Court dated March 19, 2013, which provides in pertinent part:

(Wash. 2007) (analyzing Washington State's Public Record Act, Wash. Rev. Code. §§ 42.56*, et seq.*).

> Undersigned counsel for Plaintiffs and Defendants have conferred and stipulate and agree as follows:
>
> 1. On or before April 13, 2013, Galanda Broadman will furnish a list of those individuals **for whom they are then authorized to act in this matter and in the related proceedings regarding disenrollment of certain Nooksack Tribal Members pursuant to Title 63**. Defendants will treat Mr. Galanda's letter of March 15, 2013, to Chairman Kelly regarding the Notice of Intent to Disenroll as a timely request for a meeting pursuant to Title 63.04.001(B)(2) before the Tribal Council for the individuals identified on that list.
>
> 2. No person will be disenrolled prior to completion of the meetings before the Tribal Council, regardless of whether that individual has requested a meeting with the Tribal Council.

CP 90, Ex. D ("Stipulation") (emphasis added). On March 28, 2013, the Trial Court "approve[d] this Stipulation and incorporate[d] it by reference," thereby reducing it to an Order of the Court. CP 21.

"An agreement made on the record, in open court, and under the eyes of the Court, is a most solemn undertaking requiring the lawyers and the parties to make every reasonable effort to carry out all the terms to a successful conclusion." *Scharf v. Levittown Public Schools*, 970 F.Supp. 122, 129 (E.D.N.Y. 1997) (internal quotation omitted). Stipulations "are favored by the courts and are not lightly cast aside, and this is all the more so in a case of open court stipulations where strict enforcement not only serves the interest of efficient dispute resolution but is also essential to management of court calendars and integrity of the litigation process." *Purcell v. Town of Cape Vincent*, 281

F.Supp.2d 469, 473 (N.D.N.Y. 2003). Further, when a stipulation is by incorporated into an order of the court, as here, the "court stamp[s] it with the requisite 'judicial imprimatur,'" *Carbonell v. I.N.S.*, 429 F.3d 894, 902 (9th Cir. 2005), thereby rendering noncompliance with the Stipulation and Order contemptuous. *Roberson v. Giuliani*, 346 F.3d 75, 82 (2d Cir. 2003).

In determining what, exactly, the "terms" of a stipulation are, courts are to construe the agreement consistent with established rules of contract interpretation. *Washington Hosp. v. White*, 889 F.2d 1294, 1300 (3rd Cir. 1989). "The overriding rule is that an agreement should be interpreted so as to give effect to the parties' intentions. Consequently, the court's primary task is ascertaining what the parties intended by their stipulation." *Brinkman v. Dept. of Corrections of the State of Kansas*, No. 91-4208, 1992 WL 371658 at *1 (D. Kan. Nov. 4, 1992) (citation omitted). "The court initially looks to the four corners of the stipulation applying established rules of contract construction to the face of the document. The stipulation is interpreted using plain and prevailing meanings for its terms, giving effect to all of its terms, and looking for reasonable rather [than] unreasonable readings." *Id.* (citation omitted).

Here, the Parties entered into an unambiguous agreement regarding the identity of each and every Plaintiff involved in this lawsuit. The agreement was made "on the record, in open court, and under the eyes of the Court," *Scharf*, 970 F.Supp. at 129 (internal quotation omitted); then reduced to writing, CP 90, Ex. B;

then entered into the record as a filing in this litigation; *id.*, Ex. D; and was finally incorporated into an order of this Court. CP 21. Indeed, during the Court's initial hearing in this matter, counsel for Defendants assured that "whether a person has requested a hearing or not, they are not going to be removed from the rolls until the hearings have been held." Audio Recording of Hearing (Mar. 18, 2013). A March 18, 2013, letter from Defendants' counsel entitled "*Sonia Lomeli et al v. Robert Kelly, Chairman, et al.*," noted that "[d]isenrollment meetings before the Tribal Council have been requested by some of your clients" and further assured that "no person will be disenrolled before completion of the timely requested hearings." CP 90, Ex. B. The Stipulation – drafted by Defendants – sought to clarify to whom the "clients" in the Galanda Broadman March 18, 2013 letter referred.

The Stipulation required that Plaintiffs' counsel submit "a list of those individuals for whom they are then authorized to act **in this matter** and in the related **proceedings regarding disenrollment** of certain Nooksack Tribal Members." *Id.*, Ex. D, at ¶1 (emphasis added). "[I]n this matter" clearly refers to the "matter" captioned in the Stipulation itself, this *Lomeli v. Kelly* litigation. The term "[p]roceedings regarding disenrollment" is also quite clear, it refers to the disenrollment hearings now stayed by the Court of Appeals. The "list of those individuals" was sent to Defendants on April 12, 2013, and includes 271 of the 306 Nooksacks that have been targeted for disenrollment. *Id.*, Ex. F. The

Stipulation is clear and unambiguous – there was no reason to look beyond the text of the Stipulation.

The Trial Court, however, held that a colloquy between Appellants' counsel and the Court somehow modified the clear and unambiguous text of the Stipulation. The Trial Court's looking beyond the clear text of the Stipulation was in error.

But even were the colloquy relevant to the analysis, it does not stand for the position proffered by the Trial Court. The Trial Court latches onto the passage, where Appellants' attorney was seeking a temporary restraining order ("TRO") against a select group of Appellees:

> **Judge Montoya-Lewis:** Just to clarify Mr. Galanda, in many of your pleadings and indeed in your argument today you made reference a number of times to the 300 etc. Your client list however has not changed is that correct? So you currently represent the six individuals . . . .
>
> **Gabriel Galanda:** Correct for the purpose of this proceeding.

CP 95 at 3. Obviously, "this proceeding" did not refer to the entirety of the litigation, but only the motion before the Court where four (not six) plaintiffs sought a TRO to prevent the defendants from further violating the Constitution. *See generally* CP 9. The Trial Court's ruling otherwise was in error.

G. The Trial Court Erred By Failing To Address Multiple Claims And Related Arguments.

Appellants Complaint(s) made the following claims that were not addressed by the Trial Court:

- Councilmembers St. Germain and Roberts were forced to exit a Tribal Council executive session in violation of the Nooksack Constitution and Nooksack customary law.[42] CP 32 at 6; CP 64 at 18-19.

- Jewell Jefferson and Roy Bailey remained present at a Tribal Council session without being properly designated by Defendant Robert Kelly, in violation of Article II, Section 7 of the Bylaws. CP 32 at 7; CP 64 at 10.

- Defendant Council Members' exclusion of Mr. St. Germain violated Nooksack customary law and Article I, Section 3 of the Constitution, which requires the Tribal Secretary's attendance "at all meetings of the tribal council." CP 32 at 7; CP 64 at 16.

- Resolutions passed while Councilmembers St. Germain and Roberts were not allowed to vote on or abstain from voting, in violation of Nooksack Customary law, were void. CP 32 at 7.

- Nooksack Tribal Code § 63.00.04's requirement that all Nooksacks must prove ancestry to a person listed on the official census roll of 1942, conflicts with Article II, Section 1(H) of the Constitution, and muss therefore be stricken down as unconstitutional. *Id.* at 12; CP 64 at 8-9, n.9.

- During a March 1, 2013, special meeting, Appellees refused to even acknowledge a Motion proposed by Tribal Council Secretary Rudy St. Germain to rescind Tribal Council Resolution Nos. 13-02 and 13-03, in violation of customary and codified Tribal law. CP 32 at 15; CP 64 at 8-9.

- On multiple occasions since February of 2013, the Councilperson defendants have called and carried out ad hoc Special Meetings without inviting all eight Tribal Councilpersons of those meetings, in violation of, at least, Article II of the Tribe's Bylaws and Nooksack Customary Law. CP 32 at 16; CP 64 at 22.

- At least once since February of 2013, Chairman Kelly has convened an afternoon Special Meeting without providing the Tribal Council at least

[42] *See* CP 20 at 2-3 ("During general or special meetings of the Tribal Council, since at least 1999, the Council has adhered to a custom, tradition and understanding of following Robert's Rules of Order. . . . [I]t is the custom, tradition and understanding of the Nooksack Tribal Council – including that of following Robert's Rules of Order – that no Tribal Councilperson is or should be ever told to leave a Council general or special meeting . . . .").

twenty-four hour advance notice, in violation of Article II, Section 3 of the Nooksack Bylaws and Nooksack Customary Law. CP 32 at 16.

- Appellees violated Article II, Section 6 of the Bylaws by failing to hold a public meeting as to amendments of Titles 10 and 60, disenrolling over 15 percent of the Nooksack membership, and enacting a Tribe-wide moratorium on new enrollments. CP 64 at 23.

As discussed above, because the jurisdictional test employed by the Trial Court is erroneous, this Court need not go any further down the foxhole of errors committed by the Trial Court. But if the Court determines that an analysis of the merits is warranted, it must not sanction the Trial Court's dereliction. A court cannot selectively choose what claims it wishes to analyze (or allow a movant to selectively chose which claims it wishes to attack), find that only those claims are meritless, and then dismiss the entire suit based on its analysis of those claims only. The Trial Court's failure to review the entirety of Appellants' claims is "simply inadequate to allow for satisfactory review" and warrants remand.[43] *Soc'y for Good Will to Retarded Children v. Cuomo*, 902 F.2d 1085, 1089 (2nd Cir. 1990); *see also Atlantic Thermoplastics Co. v. Faytex Corp.*, 5 F.3d 1477, 1479-81 (Fed. Cir. 1993) (vacating judgment and remanding for the second time because order simply reiterated fact-dependent conclusions concerning on-sale

[43] As noted above, the Trial Court has selected the Federal Rules of Civil Procedure to govern this litigation. Fed. R. Civ. Proc. 52(a) requires that a trial court "find the facts specially and state separately its conclusions of law thereon." *See Inverness Corp. v. Whitehall Laboratories*, 819 F.2d 48, 50 (2nd Cir. 1987) ("Rule 52(a)' s requirement that the trial court find facts specially and state its conclusions of law is mandatory and cannot be waived."). The requirement that the trial court find analyze all claims "specially" serves two purposes: "to aid the trial court by requiring it to marshal the evidence before it and, more importantly, to aid [the court of appeal] in [its] review." *Republic of Philippines v. New York Land Co.*, 852 F.2d 33, 37 (2nd Cir. 1988).

bar issue); *Cablestrand Corp. v. Wallshein*, 989 F.2d 472, 473 (Fed. Cir. 1993) (same); *Neff v. Port Susan Camping Club*, Nos. TUL–CV–GC–2005–0368, TUL–CV–GC–2005–0390, 2007 WL 7011053 (Tulalip Ct. App. Dec. 10, 2007) (same). At minimum, the Trial Court's decision must be vacated and this matter remanded for a more exhaustive analysis of Appellants' claims.

H. The Trial Court Erred By Failing To Issue The Requested Injunction.

On March 18, 2013, Appellants filed a motion for temporary restraining order ("TRO"), requesting that the Trial Court enjoin Appellees "from proceeding any further in the illegal and unconstitutional disenrollment of 306 Enrolled Nooksack Members." CP 9 at 25. Appellants argued in that motion that N.T.C. § 63.04.001(B)(1)(a) and Resolution No. 13-02 were unconstitutional, and that, therefore, Appellees acts in furtherance of those unconstitutional provisions of law required that the Trial Court employ the *Ex parte Young* exception. CP 9 at 12; CP 28 at 16-19. On May 20, 2013, the Trial Court issued an order denying Appellants' TRO request,[44] holding that the *Ex parte Young* exception did not apply, and that, therefore, the Trial Court could not issue the requested relief. CP 44.

[44] Because the Trial Court took roughly two months to rule on Appellants' TRO motion, the Trial Court *sua sponte* converted Appellants' TRO motion into one for a preliminary injunction.

The Trial Court erred in failing to issue the requested injunction.[45] A trial court abuses its discretion by denying a preliminary injunction based on an error of law. *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). For the reasons discussed above, the Trial Court made an error of law in its attempt to apply the *Ex parte Young* exception. Trial Court also made an error of law by holding that N.T.C. § 63.04.001(B)(1)(a) and Resolution No. 13-02 are not unconstitutional, also for the reasons discussed above.[46]

When a Trial Court fails to issue preliminary or temporary injunctive relief to prevent a government official from acting in furtherance of an unconstitutional law or regulation, the correct remedy is to remand the case "for the issuance of an injunction consistent with [the appellate court's] holding." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1129 (6th Cir. 1991). In the very recent

[45] The Trial Court also failed to apply the correct preliminary injunction test. A plaintiff may be awarded a preliminary injunction by establishing: (1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm absent a preliminary injunction; (3) the balance of equities tips in the plaintiff's favor; and (4) injunctive relief is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A movant will meet their burden for a preliminary injunction by showing the second, third, and fourth factors "tip strongly in [their] favor," and then satisfy the first factor "by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Okla. ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006). The Trial Court found that the merits of "this case involves serious issues for all of the individual plaintiffs, defendants, and the Tribe itself." CP 21 at 2. The Trial Court then failed to analyze second, third, and fourth factors. CP 44 at 13. In so doing, the Trial Court committed a clear error of law.

[46] If, indeed, this is what the Trial Court was holding — it is unclear that the Trial Court got past the sovereign immunity question, due to its failure to read Appellants' Complaint as pled and the resultant flawed application of the *Ex parte Young* exception. It appears, though, that the Trial Court did at least implicitly find N.T.C. § 63.04.001(B)(1)(a) and Resolution No. 13-02 constitutional. *See* CP 44 at 8, 12 ("The Tribal Council acted on its authority delegated by the Constitution [by] enacting Title 63 . . . . Under Title 63[, the Tribe must] prove a member has been enrolled erroneously.") (citing N.T.C. § 63.04.001(B)(1)(a)).

case of *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), for example, the Tenth Circuit Court of Appeals overturned a trial court's holding that a section of the Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg–13, was not unconstitutional. In moving to the "remaining preliminary injunction factors," the Court of Appeals held that "'[i]f the district court fails to analyze the factors necessary to justify a preliminary injunction, [the appellate] court may do so [in the first instance] if the record is sufficiently developed.'" *Id.* at 1145 (quoting *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009)); *see also id.* at 1224 n.21 (citing additional cases from other circuit courts of appeal). The court then found that the allegation of unconstitutionality will almost always warrant a finding in favor of the movant:

> [T]he likelihood of success on the merits will often be the determinative factor. That is because: the loss of [constitutional guarantees], for even minimal periods of time, unquestionably constitutes irreparable injury[47]; when a law is likely unconstitutional, the interests of those the government represents, such as voters do not outweigh a plaintiff's interest in having its constitutional rights protected; and it is always in the public interest to prevent the violation of a party's constitutional rights.

Id. at 1145 (citation, quotation, and modifications omitted). The court then "remand[ed] to the district court with instructions to enter a preliminary injunction." *Id.* at 1147; *see also e.g. Ezell v. City of Chicago*, 651 F.3d 684, 711 (7th Cir. 2011) (same order to the trial court); *Mohr v. Bank of New York Mellon*

[47] *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the loss of protections guaranteed by the Constitution, "for even minimal periods of time, constitutes irreparable injury")

Corp., 393 Fed.Appx. 639, 647 (11th Cir. 2010) (same). Here, the substantially same factors exist and require that the Court remand with instructions to enter an injunction pending trial.

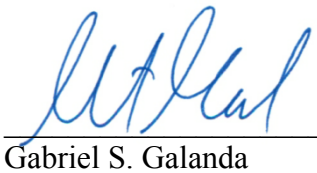
V. CONCLUSION

Appellants respectfully request that (1) this matter be reversed and remanded for disposition consistent with a reversal of the Trial Court's dismissal and (2) the Trial Court's denial of Appellants' motions for temporary restraining order be reversed, enjoining Appellees pending trial on the merits.

In the alternative, Appellants respectfully request that the Trial Court's opinion be vacated, and that this matter be remanded for a more exhaustive analysis of Appellants' claims consistent with the Court's opinion.

DATED this 18th day of October, 2013.

Respectfully submitted,



Gabriel S. Galanda
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Attorneys for Appellants

DECLARATION OF SERVICE

I, Gabriel S. Galanda, say:

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am employed with Galanda Broadman, PLLC, counsel of record for Appellants.

2. Today, I caused the attached documents to be delivered to the following:

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

A copy was emailed to:

Thomas Schlosser
Morisset, Schlosser, Jozwiak & Somerville
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509

The foregoing statement is made under penalty of perjury under the laws of the Nooksack Tribe and the State of Washington and is true and correct.

DATED this 18th day of October, 2013.

GABRIEL S. GALANDA