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2
3 **IN THE HUALAPAI NATION COURT OF APPEALS**
4 **HUALAPAI RESERVATION, ARIZONA**
5
6

7 ROSELYN WESCOGAME, as guardian
8 of ANGELIQUE JACKSON, a minor

App. Court Case No.: 2017-AP-001
Tribal Court Case No.: 2016-CV-058

9 Appellants,

10 v.

OPINION AND ORDER

11 MONIQUE ALVIREZ, in her capacity
12 as Miss Hualapai Committee
13 Chairperson, and DAMON CLARKE, in
14 his capacity as Hualapai Tribal Council
15 Chairman,

Appellees

16
17 **Before Chief Justice Joseph Flies-Away and Justices Carole Goldberg and Wes Williams**
18 **Jr.**

19 **Opinion by Justice GOLDBERG, for herself and Chief Justice FLIES-AWAY**

20 **Justice WILLIAMS JR. filed a dissenting opinion**
21

22 Appellants Roselyn Wescogame [hereafter Wescogame] and her minor niece Angelique
23 Jackson [hereafter Jackson] are appealing a decision of the Tribal Court, dated December 7,
24 2016, dismissing their action for injunctive relief against Hualapai officials Monique Alvarez,
25 Chairperson of the Miss Hualapai Committee [hereafter Alvarez], and Damon Clarke, Chairman
26 of the Hualapai Tribal Council [hereafter Clarke]. This action, filed on November 8, 2016,
27 claimed that Jackson had been wrongfully divested of her title and banner as 1st Attendant to
28

1 Little Miss Hualapai, in violation of her rights to due process under the Hualapai Constitution.¹
2 Specifically, it alleged that neither the Miss Hualapai Committee nor the Tribal Council had
3 afforded Jackson or her guardian proper notice, a sufficient opportunity to be heard and to
4 petition for "redress of grievances," and an unbiased decision-maker. The requested relief was
5 an "emergency injunction" to restore Jackson to her title and banner as 1st Attendent.

6 After a Judge Pro Tem was assigned to the case, the Tribal Court scheduled a hearing on
7 the injunction for December 6, 2016. One day before that hearing date, Alvirez and Clarke filed
8 a Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim. The point of the
9 jurisdictional challenge was that Alvirez and Clarke enjoy sovereign immunity under Article
10 XVI, section 1 of the Hualapai Constitution, which states, "No tribal employee or Tribal Council
11 member acting within the scope of his duties or authority is subject to suit." The point of the
12 challenge based on failure to state a claim was that the notice and hearing opportunities afforded
13 to Wescogame and Jackson were sufficient to satisfy due process.

14 Without allowing Wescogame and Jackson time to respond in writing to the motion, the
15 Tribal Court granted the motion on December 7, 2016, reaching only the question of jurisdiction.
16 The Tribal Court's relatively brief opinion rested on Article XVI, section 1, which "immune [sic]
17 the Hualapai Nation from suits filed in tribal court;" the fact that Alvirez and Clarke were sued in
18 their capacity as "tribal officials of the Hualapai Nation;" and the absence of anything in the
19 Hualapai Tribal Code or elsewhere that expressly or implicitly waived the Tribe's immunity from
20 suit. To support its ruling, the Tribal Court relied on a 1998 Hualapai Court of Appeals decision,
21 rendered while the appellate jurisdiction of the Tribe was exercised through the Southwest
22 Intertribal Court of Appeals, *Hualapai Indian Nation v. Mukeche*, SWITCA No. 97-019

23 ¹ Article IX of the Hualapai Constitution, titled "Bill of Rights," states, "The Hualapai Tribe, in
24 exercising its powers of self-governanment shall not:... (d) ...deprive any person of liberty or
25 property without due process of law." It is unclear whether Wecogame and Jackson also assert
26 claims of right under the United States Constitution. Their petition asserts that the Hualapai
27 Constitution incorporates the due process protections of the U.S. Bill of Rights. However, the
28 United States Supreme Court has held that the U.S. Bill of Rights does not apply to actions taken
by tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1898). The Indian Civil Rights Act, 25
U.S.C. § 1302 (a) (8), does prohibit tribal governments from depriving any person of liberty or
property without due process of law. However, that law does not create a claim for relief against
tribes or their officials in federal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 439 (1978).
Because this opinion is only addressing the question of jurisdiction, we do not need to reach the
question whether Hualapai or federal law creates a claim for relief in tribal court based on the
Indian Civil Rights Act.

1 (Hualapai Ct. App. 1998) [hereafter *Mukeche*]. Without quoting from that opinion, the Tribal
2 Court wrote that *Mukeche* established that "neither the Constitution nor the Bills of Rights
3 authorized suit against the Hualapai Nation in Tribal Court" and "the Hualapai Tribal
4 Constitution protects the Hualapai Nation against law suits." According to the Tribal Court,
5 while Hualapai law allows enforcement of the Tribe's Bill of Rights in suits that are *not* against
6 the Tribe, if an individual wants to challenge the action of a tribal agency or office, the only
7 available venue is the agency itself.

8 Wescogame and Jackson filed a timely Notice of Appeal, and following the submission
9 of briefs, this Court held an oral argument on April 28, 2017. A majority of this Court now
10 concludes that the decision of the Tribal Court dismissing the action for lack of jurisdiction
11 misconstrued the scope of sovereign immunity afforded to tribal officials under the Hualapai
12 Constitution. This Court holds that sovereign immunity is not a bar to suit in the Tribal Court
13 when the action is brought to enforce provisions of Article IX of the Hualapai Constitution (the
14 Hualapai Bill of Rights), and the remedy sought is limited to injunctive relief against tribal
15 officials. Thus, the decision of the Tribal Court dismissing this action is reversed. Because the
16 Tribal Court did not address Wescogame and Jackson's due process claims, we remand for
17 consideration of those issues.

18 DISCUSSION

19 To resolve the question of sovereign immunity posed in this case, we begin, as we must,
20 with the language of the Hualapai Constitution. Different provisions in that Constitution,
21 however, point this Court in different directions. Article IX, the Hualapai Bill of Rights, insists
22 that "in exercising its powers of self-government [the Hualapai Tribe] *shall not*" (emphasis
23 added) deprive individuals of certain specified rights, including due process. This language
24 strongly suggests a need for some mechanism to restrain tribal officials who might otherwise
25 violate the Bill of Rights. At the same time, Article XVI, section 1 proclaims, "...[I]n exercising
26 self-determination and sovereignty to its fullest extent, the Tribe is immune from suit except to
27 the extent that the Tribal Council waives sovereign immunity, or as provided by this constitution.
28 No tribal employee or Tribal Council member acting within the scope of his duties or authority is
subject to suit." This language appears to close off litigation as a mechanism for holding the
Tribe accountable for violations of the Bill of Rights, at least in the absence of a waiver,

1 whenever tribal officials are found to be acting in their official capacity. There is no separate
2 language in the Bill of Rights (or elsewhere in the Constitution) providing for suit against the
3 Tribe or tribal officials to enforce its terms. By contrast, several other sections of the Hualapai
4 Constitution expressly authorize suit against the Tribe.² There also does not appear to be any
5 express waiver of immunity for civil rights suits seeking injunctive relief against tribal officials,
6 through the Hualapai Law and Order Code or otherwise.³

7 Like the Hualapai Constitution, the Law and Order Code sends some conflicting
8 messages about suits of the type presented in this case. On the one hand, it announces in Section
9 2.2 that the Tribal Court "shall have general civil jurisdiction over all actions arising under Tribal
10 law, including the Constitution, and establishes criminal offenses for tribal officials who engage
11 in "Official Misconduct" (Section 6.216) and "Official Oppression" (Section 6.218). Section
12 6.216 penalizes any "public servant" who, "with intent to ... harm another, ... willfully commits
13 an unauthorized act ... or refrains from performing a nondiscretionary duty imposed ... by law or
14 clearly inherent in the nature of the office." Section 6.218 penalizes any official who, "knowing
15 that the conduct is illegal," "subjects another to ... infringement of personal or property rights" or
16 "denies or impedes another in the exercise of enjoyment of any right, power, or immunity."
17 Both the civil jurisdiction provision and the designation of criminal offenses demonstrate
18 concern with the enforcement of individual rights when public officials violate those rights.
19 They might, for example, point a court in the direction of implying a civil claim against tribal
20 officials to enforce the requirements of the Bill of Rights. At the same time, however, another

21 ² Article IV, Section 11 provides that if a Tribal Council member should be removed from office
22 by the Council, "The decision of the Tribal Council shall be final and shall be appealable to the
23 Tribal Court only if a claim is made that the tribal constitution has been violated or due process
24 rights not afforded." Article VI, Section 11(c) states that a Tribal Court judge who has been
25 suspended, dismissed or removed "may appeal directly to the Tribal Court of Appeals under
26 Article VI, Section 11(a) (1-7) which shall have jurisdiction over such matters." Article VIII,
27 Section 13 allows tribal members to sue in Tribal Court to challenge election results. And finally,
28 Article XI, Section 4 requires a majority vote of the Tribe before the Tribal Council may develop
tribal natural resources "on a commercial or industrial basis," and further states, "Any tribal
member may enforce this section in Tribal Court which shall have jurisdiction over these
matters."

³ Article XVI, section 2 of the Hualapai Constitution sets forth specific requirements for certain
waivers of sovereign immunity, namely the approval of at least thirty percent of eligible tribal
voters at a special election. These requirements apply, however, only to waivers that would
expose the Tribe to a designated amount in liability or result in possible foreclosure or
encumbrance of a designated acreage of land.

1 provision of the same Code, Section 1.3, insists that "Nothing in this Code ... shall be construed
2 to be a waiver of the sovereign immunity of the Hualapai Tribe, its officers, officials, employees,
3 [or] agents ... or to be a consent to any suit beyond the limits now or hereafter specifically stated
4 by Tribal law." This provision points a court away from implying a civil claim.

5 In attempting to resolve these competing directions in Hualapai law, this Court does not
6 write on a blank slate. On previous occasions, this Court has been confronted with claims
7 against Hualapai officials alleging violation of tribal law, and has addressed the question of
8 sovereign immunity. None of these decisions, however, directly resolves the question presented
9 in this case.

10 The earliest of the sovereign immunity cases, and the only one cited by the Tribal Court
11 below, is *Mukeche*, decided in 1998 when this Court was administered through the Southwest
12 Intertribal Court of Appeals. Although few details are provided in the Court's opinion, *Mukeche*
13 involved an "employment dispute." Both the Hualapai Tribe and its officers were named
14 defendants, and the plaintiff invoked rights under the Hualapai Bill of Rights as well as federal
15 law. The crucial missing fact from that opinion, however, is the relief the plaintiff was seeking.
16 As employment disputes frequently involve claims for back pay and monetary damages, it is
17 quite possible that the plaintiff in *Mukeche* wanted more than an injunction. The opinion hints at
18 that fact in a passage justifying the Tribe's sovereign immunity: "Decisions on whether the
19 Hualapai treasury will be maintained for governmental services or for payment of claims to
20 aggrieved and injured parties lie entirely with the elected Hualapai Council representatives after
21 consultation with their constituents."⁴ It is hard to imagine that the Court would have made this
22 statement if the only remedy *Mukeche* was seeking was an injunction.

23 Both in the Tribal Court and before this Court, Alvirez and Clarke rely on a subsequent
24 opinion of this Court in *Hwal'Bay Ba:J Enterprises, Inc. v. Beattie*, 2008-AP-0007 (Hualapai Ct.
25 App. 2009)⁵, decided when this Court was sitting with only one Justice at a time, rather than, as
26 it has done since 2010, as rotating panels of three Justices. *Beattie* upheld the sovereign
27 immunity of the officers of a tribal corporation, who had been sued by a tribal employee through
28 a petition for an injunction against harassment. According to the petition, officers of the tribal

⁴ Vol. 9 (1998), Southwest Intertribal Court of Appeals at 24.

⁵ Appellees Alvirez and Clarke have cited to an opinion of this Court in *Beattie*, but it is the wrong opinion. The decision dated November 24, 2008 was subsequently vacated and superceded by another decision, dated April 8, 2009.

1 corporation and others were harassing him by, among other things, defaming his character and
2 accusing him of criminal activity, all in retaliation for concerns he had properly raised while
3 doing his job. Relying on the language in Article XVI of the Hualapai Constitution protecting
4 tribal officials from suit while acting in their official capacity, *Beattie* concluded that the Tribal
5 Court lacked jurisdiction in the absence of a waiver of sovereign immunity, either through
6 contract or statute.

7 The *Beattie* opinion emphasized that its conclusion applied regardless whether the relief
8 sought was an injunction or damages, and also regardless whether the claim rested on the
9 Hualapai Bill of Rights or on other sources of Hualapai law. Nonetheless, there are some crucial
10 distinctions between *Beattie* and the present case. First, it is unclear whether the petitioner in
11 *Beattie* actually raised any claims invoking the Hualapai Bill of Rights. His original petition
12 cited to many provisions of Hualapai law, including the Law and Order Code, the Employee
13 Personnel Policies and Procedures Manual, the Hwal'Bay Ba:J Plan of Operations, federal
14 employment law, "standard corporate law," and "standard corporate ethics," but made no
15 mention of the Hualapai Constitution, let alone the Bill of Rights. Although possible due
16 process and equal protection violations were apparently raised by Petitioner/Appellee's counsel
17 in oral argument before this Court, constitutional claims were not addressed in the Minute Order
18 of the Tribal Court. Thus, it is possible that any discussion in *Beattie* of sovereign immunity in
19 relation to injunctions against violations of the Hualapai Bill of Rights could be treated as dictum
20 (words that carry no weight or authority).

21 An even more important distinction between *Beattie* and the present case involves the
22 relationship between the parties. Crucially, *Beattie* was complaining about his treatment as the
23 Chief Financial Officer of a Tribal corporation. As someone who had entered into a contractual
24 relationship with a Tribal entity, he was in a position to insist on a waiver of sovereign immunity
25 for related contracts and torts disputes before accepting the position. As this Court noted in
26 *Beattie*,

27 Many courts have recognized that dismissing a case based on a sovereign immunity
28 defense effectively ends all recourse for a litigant as no other forum may be available
to address asserted violations. ... Any person or entity dealing with a Tribe or Tribal
entity is responsible for designing their affairs to address such a contingency.⁶

⁶ Decision at page 8.

1 Not all Bill of Rights violations, however, occur within the context of a contractual
2 arrangement. For example, an individual may be deprived of rights protected by the Bill of
3 Rights when excluded from eligibility for a government benefit (such as housing) or when
4 subjected to a discriminatory tax. Under those circumstances, there would be no effective way
5 for the individual to ensure a forum for the vindication of constitutional rights through a
6 negotiated prior contractual waiver of sovereign immunity. The present case is one in which
7 Wescogame and Jackson did not have a realistic means of securing an advance contractual
8 waiver of sovereign immunity by the Tribe. The terms of the Miss Hualapai competition were
9 preset, and only the Hualapai Tribe offered an opportunity to compete. Given that fact, the
10 relative weights of sovereign immunity and the Hualapai Bill of Rights in this Court's analysis
should not be the same as they were in *Beattie*.

11 Finally, the most recent decision of this Court to find sovereign immunity is *WD at the*
12 *Canyon, LLC v. Hwal'Bay Ba: J Enterprises, Inc dba Grand Canyon Resort Corp.*, 2015-AP-004
13 (Hualapai Ct. App. 2016) [hereafter *WD at the Canyon*], in which a majority of the panel upheld
14 sovereign immunity over a suit seeking damages and other remedies for breach of contract,
15 various related torts, and related denials of constitutional rights against a tribal corporation and
16 its officers. In upholding sovereign immunity of the tribal officials, this Court carefully noted
17 the distinction between suits for damages, where sovereign immunity interests are greatest, and
18 suits solely for injunctive relief, where interests in enforcing constitutional rights may take
19 greater precedence. The present suit falls into the latter category, and therefore *WD at the*
20 *Canyon* should not be viewed as controlling. Furthermore, *WD at the Canyon*, like *Beattie*,
21 involved a plaintiff who was complaining about the breakdown of a contractual relationship.
22 There had actually been several sequential contracts between the plaintiff in that case and the
23 Tribal corporation, some of which had included waivers of sovereign immunity, and a final one
24 which did not. Under those circumstances, this Court found that the denial of a forum based on
25 sovereign immunity was justified, even for claims invoking the Hualapai Bill of Rights. The
26 balance of constitutional concerns tipped in favor of sovereign immunity, especially given that
27 the plaintiff could have protected himself with a contractual waiver, and obviously knew how to
28 do so.

In the absence of controlling Hualapai authority, this Court must consider the appropriate
balance among provisions of the Hualapai Constitution, as further elaborated in the Hualapai
Law and Order Code, when a plaintiff seeks solely an injunction to enforce provisions of the

1 Hualapai Bill of Rights, and the relationship between the parties is not essentially contractual.
2 Although this Court is permitted to seek guidance in the laws of other governments, whether
3 federal, state, or tribal, we must be cautious in importing legal concepts that do not reflect values,
4 choices, and traditions incorporated into Hualapai law. At the outset, as in *WD at the Canyon*,
5 this Court notes the express references to sovereign immunity in Article XVI, including
6 protection for tribal officers acting in their official capacity. In most other non-tribal American
7 court systems that apply sovereign immunity, including federal and Arizona courts, the doctrine
8 is invoked without any constitutional language to support it. Although the Eleventh Amendment
9 to the U.S. Constitution protects states from suit in federal court, neither the federal government
10 nor the state of Arizona is protected from suit in its own courts by virtue of language in their
11 respective constitutions. Common law has been deployed in those courts to defend the federal or
12 state sovereign from suit.⁷ By contrast, the people of the Hualapai Tribe ensured that sovereign
13 immunity would be enshrined in the language of their constitution, thereby giving it special force
14 and durability. The concerns that lay behind such language are set forth in the *WD at the*
15 *Canyon* opinion:

16 If anything, tribal governments have greater need for sovereign immunity than
17 federal, state, or local governments, because tribal governments have less capacity to
18 raise tax revenues and are at an earlier stage of economic development. Large
19 monetary judgments and even the costs of litigation could overwhelm tribal
20 treasuries. Further, to the extent sovereign immunity promotes governmental dignity
21 interests and respect for sovereign status, tribes need it to combat the many threats to
22 that status, historic and contemporary, from federal and state courts and legislatures.

23 *WD at the Canyon* at 5.

24 Because Article XVI includes exceptions to sovereign immunity, either by constitutional
25 provision or waiver, this Court should apply a strong presumption against actions against the
26 Tribe or its officials beyond those exceptions. *Mukeche*, *Beattie*, and *WD at the Canyon* all
27 reflect this Court's reluctance to poke holes in the protection afforded by sovereign immunity.
28 Whenever the claim brought against the Tribe or its officials seeks a monetary remedy; or fails to
invoke rights protected by the Bill of Rights; or could have been brought had plaintiff negotiated
a contractual waiver, this Court has struck the balance between individual rights and sovereign

⁷ *WD at the Canyon* at 6 n.3.

1 immunity in favor of the latter. Under these circumstances, the competing rights are not as
2 compelling as constitutional individual rights; and opportunities to vindicate rights, either by
3 seeking alternative remedies or negotiating a waiver in advance, may be available. In contrast,
4 where the government takes harmful action against an individual in violation of rights protected
5 under the Hualapai Bill of Rights, and the relationship between the parties is not essentially
6 contractual, an injunction may be the only means of vindicating those rights. If injunctive relief
7 is denied in the name of sovereign immunity, those rights may become meaningless. Although
8 political processes may constrain the government from taking such action, those restraints tend to
be least effective when members of powerless groups or political minorities are the targets.

9 Before contact with the United States led to adoption of a formal, written constitution,⁸
10 the Hualapai people were not subject to the coercive power of a centralized government.⁹
11 Extended family groups were the main form of social and political organization, and “headmen”
12 of those groups provided guidance and mediation, without authority to compel compliance.
13 When conduct threatened the community as a whole, it was subjected to collective consideration.
14 No one was too powerful to escape this scrutiny. Speaking to anthropologists in the early
15 twentieth century, one Hualapai elder explained that medicine men were killed if they lost too
16 many patients.¹⁰ It is reasonable to believe that the Hualapai Constitution captures or
17 incorporates this practice and includes governmental action. After all, government is facilitated
18 by various persons. The Hualapai Bill of Rights also reflects the people’s skepticism about
19 creating a more powerful tribal government through the Constitution. Its purpose, incorporated
20 through the statement in Article IX that the Tribe “shall not” violate those rights, is to stop the
Tribe and its officials from using their coercive power to treat individuals unfairly.

21 ⁸ The Hualapai Tribe voted to accept the Indian Reorganization Act of 1934, 25 U.S.C. § 441 et
22 seq., on June 22, 1935, and adopted its first constitution under the terms of that Act on December
23 17, 1938. Theodore H. Haas, Ten Years of Tribal Government under the Indian Reorganization
Act, U.S. Indian Service (1947) at 14 and Appendix B.

24 ⁹ See Fred Kniffen et al., Walapai Ethnography in A. L. Kroeber, ed., Memoirs of the American
25 Anthropological Association (American Anthropological Association 1935) at 153: “The place
26 of the chief in Walapai society was ill-defined. There was no one chieftain accorded a
27 recognized place as the head of the entire tribe.... *Id.* at 155: “A man will start talking in the
28 morning and talk all day. He tells them to be good; admonishes his people to prepare for winter,
etc. The camp learns to depend on him and he may become the chief. He also goes around to
other camps and does a lot of talking ‘like a preacher,’ and makes himself known as a leader.”
Id. at 157: “In quarrels a third party might intervene to bring about a settlement. Such a person
had, however, no powers to enforce a decision.”

1 In view of the competing provisions in the Hualapai Constitution, this Court’s challenge
2 is to afford the widest berth possible to tribal sovereign immunity, while still allowing for
3 meaningful enforcement of the Hualapai Bill of Rights. For guidance in achieving that goal, this
4 Court looks to the federal courts, which have also struggled to reconcile sovereign immunity
5 with protection of individual constitutional rights. In the case of *Ex parte Young*, 209 U.S. 123
6 (1908), the United States Supreme Court overcame a state’s sovereign immunity claims under
7 the Eleventh Amendment to allow a suit challenging the state’s rate-making for railroads. In a
8 transparently creative move, the Court claimed to avoid a direct clash with sovereign immunity
9 doctrine by declaring that even though the suit was framed against state officials, and could not
10 proceed without some element of “state action,” those officials would be deemed stripped of
11 their official capacity if they had acted to deny individual rights protected by the United States
12 Constitution.¹¹ Although many scholars and some subsequent courts have disparaged this
13 interpretive contortion, the ruling of *Younger v. Harris* has become a “bedrock” of federal
14 constitutional law.¹² According to the late federal courts scholar, David Currie, “[b]ehind the
15 outlandish conceptual justification concocted to support this holding lay the not implausible
16 conviction that federal constitution rights could not be adequately protected without the
17 intervention of federal equity; therefore the philosophy of immunity had to yield.”¹³ *Ex parte*
18 *Young* involved the courts of the federal government enforcing federal constitutional protections
19 as against a state – an intergovernmental situation not present in our case. Nonetheless, the
20 imperative to ensure enforcement of individual rights and the competing constitutional protection
21 of sovereign immunity are similar. We agree with the strategy the U.S. Supreme Court pursued
22 in applying the Eleventh Amendment in *Ex parte Young*, and adopt a similar reading of Article
23 XVI of the Hualapai Constitution. Tribal officials will be deemed to have lost their official
24 capacity when they are alleged to have acted to deny rights protected under the Hualapai Bill of
25 Rights, and they are sued solely for injunctive relief. Under those circumstances the Hualapai
26 courts will have jurisdiction to proceed to determine whether the plaintiff has in fact been denied
27 such rights.

28 ¹⁰ *Id.* at 158, 187.

¹¹ *Ex parte Young*, 209 U.S. at 159-60.

¹² See Barry Friedman, “The Story of *Ex parte Young*: Once Controversial, Now Canon,” in Vicki C. Jackson and Judith Resnik, eds., Federal Courts Stories (2009) at 247.

¹³ David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 4 (1964).

The dissenting opinion casts this conclusion as a destruction of the tribal sovereign immunity recognized in federal Indian law as well as in Hualapai law. It is noteworthy, however, that in the very United States Supreme Court case the dissent cites as acknowledging tribal sovereign immunity, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the federal high court stated that the tribal official sued for injunctive relief under the Indian Civil Rights Act was “not protected by the tribe’s immunity from suit,” even “[a]s an officer of the Pueblo.” Among the supporting citations for this assertion was “cf. *Ex parte Young*.” 436 U.S. at 59.

Our decision regarding jurisdiction does not, of course, dispose of Wescogame's and Jackson's petition. We are remanding this case to the Tribal Court to resolve the underlying claims that Wescogame and Jackson were deprived of their liberty and property without due process of law when Jackson was divested of her title and banner as 1st Attendant to Little Miss Hualapai. The Tribal Court must determine, among other things, whether Jackson holds a liberty and/or property interest in that title, sufficient to support a claim based on a violation of procedural due process. It must also resolve any disputed questions of fact regarding what procedures, if any, were followed before the decision to divest her of the title was made. Most important, assuming it has found a deprivation of liberty or property, the Tribal Court must determine whether the process afforded to Wescogame and Jackson satisfies the requirements of procedural due process as protected under the Hualapai Bill of Rights, namely the rights to notice, to be heard, and to have the matter resolved by a neutral or unbiased decision-maker (*e.g.*, one who has no conflict of interest or demonstrated preference for one side).¹⁴ We offer no view on those matters at this time.

CONCLUSION

This Court concludes that the Tribal Court did have jurisdiction to hear Wescogame's and Jackson's petition against Alvarez and Clarke, seeking to enjoin violation of due process rights protected under the Hualapai Bill of Rights. The Tribal Court erred in dismissing the petition based on the sovereign immunity of Alvarez and Clarke as tribal officials. Accordingly, the decision of the Tribal Court dismissing the petition is REVERSED, and this matter is

¹⁴ Although this Court is not bound to follow federal law, it takes note of the fact that federal procedural due process protections vary depending on the strength of the claimed liberty and/or property interest, the likelihood that additional process will decrease the likelihood of an erroneous deprivation, and the strength of the government's interest in efficient operation. *See*

1 remanded to the Tribal Court to determine whether Wecogame and Jackson were deprived of
2 their due process rights under the Hualapai Bill of Rights.

3 IT IS SO ORDERED

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5 Dated: June 30, 2017

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11 CAROLE GOLDBERG

12 JUSTICE OF THE HUALAPAI COURT OF APPEALS
13

14 **Opinion of Justice WILLIAMS, Dissenting:**

15 The Majority Opinion finds a waiver of the Tribe's sovereign immunity providing the
16 Tribal Court with jurisdiction to hear cases against Tribal officials when a plaintiff alleges a
17 denial of rights guaranteed under the Hualapai Bill of Rights if the relief sought is solely
18 injunctive. The Majority Opinion examined the provisions of the Tribe's Constitution and Law
19 and Order Code, but did not find an express waiver of the Tribe's immunity from suit in either to
20 justify finding a waiver of sovereign immunity. Based on this, I respectfully dissent from the
21 Majority Opinion.

22 The Majority Opinion states that it is not finding a waiver of the Tribe's sovereign
23 immunity, but that is the exact effect of its decision. The Majority Opinion focuses on the case
24 being against Tribal officials who have "lost" their official capacity if they acted to deny
25 individual rights protected by the Hualapai Bill of Rights. However, the relief sought will not be
26 against these individuals, but will be against the Tribe. The Tribe will be required to take action

27
28 *Mathews v. Eldridge*, 424 U.S. 319 (1976); Erwin Chemerinsky, *Procedural Due Process Claims*, 16 Touro L. Rev. 871, 888-889 (2000).

1 under the injunction sought by the Plaintiffs. The only way the Tribal Court can have jurisdiction
2 to impose an injunction against the Tribe is if the Tribe's sovereign immunity has been waived.
3 This is the effect of the Court's holding.

4 One of the foundational pillars of Indian Law related to waivers of sovereign immunity is
5 that any waiver must be express and unequivocal, it cannot be implied. This foundational
6 principle was established by the United States Supreme Court in *Santa Clara Pueblo v. Martinez*,
7 436 U.S. 49, 58-59 (1978). While this Court is not obligated to follow United States Supreme
8 Court precedent when interpreting Hualapai law and in particular the Tribe's Constitution, Indian
9 tribes have arranged their affairs and laws upon this principle since the Supreme Court issued the
10 *Martinez* decision. It must be presumed that the Hualapai Tribe was completely and fully aware
11 of this principle when it enacted its Constitution in 1991. To do otherwise would assume the
12 Tribe undertook no research to determine the current state and development of basic Indian law
13 principles when it drafted and adopted its Constitution.

14 With this background, the Tribe wrote its Constitution to specifically state that the Tribe
15 and its employees are immune from suit.

16 The Hualapai Tribe hereby declares that, in exercising self-determination and
17 sovereignty to its fullest extent, the Tribe is immune from suit except to the extent
18 that the Tribal Council expressly waives sovereign immunity, or as provided by this
19 constitution. No tribal employee or Tribal Council member acting within the scope
20 of his duties or authority is subject to suit.
21 Hualapai Constitution Art. XVI, Sect. 1. This Constitutional provision states immunity is only
22 lost if (1) the Tribal Council expressly waives sovereign immunity, or (2) as provided by the
23 Tribe's Constitution. Neither of these apply here. Instead, the Majority Opinion focuses on the
24 last sentence that states an official is not subject to suit if acting within the scope of his duties.
25 The Majority Opinion holds that if an official is not acting within the scope of his authority then
26 the Tribal Court will have jurisdiction to impose injunctive relief against the Tribe, not simply
27 impose individual liability on the official. I do not believe this result was the intent of this
28 provision of the Constitution, else the Tribe would have stated so, expressly and unequivocally.

A review of the Tribe's Constitution reveals that it expressly and unequivocally waived
the Tribe's immunity for four very specific types of cases. The Majority Opinion recognizes
these types of cases in footnote 2, which states that the Constitution waived immunity by:

1 Article IV, Section 11 provides that if a Tribal Council member should be
2 removed from office by the Council, “The decision of the Tribal Council shall be
3 final and shall be appealable to the Tribal Court only if a claim is made that the tribal
4 constitution has been violated or due process rights not afforded.” Article VI,
5 Section 11(c) states that a Tribal Court judge who has been suspended, dismissed or
6 removed “may appeal directly to the Tribal Court of Appeals under Article VI,
7 Section 11(a) (1-7) which shall have jurisdiction over such matters.” Article VIII,
8 Section 13 allows tribal members to sue in Tribal Court to challenge election results.
9 And finally, Article XI, Section 4 requires a majority vote of the Tribe before the
10 Tribal Council may develop tribal natural resources “on a commercial or industrial
11 basis,” and further states, “Any tribal member may enforce this section in Tribal
12 Court which shall have jurisdiction over these matters.”

13 None of the four waivers expressly provided in the Constitution apply to this case.
14 Despite this, the Majority Opinion essentially finds an implied waiver of the Tribe’s immunity to
15 provide the Tribal Court with jurisdiction over this case.

16 I believe this decision destroys the Tribe’s sovereignty because the Tribe knew how to
17 waive its immunity from suit when it adopted its Constitution, but specifically did not include
18 such language in the Constitution’s Bill of Rights, or in Article XVI, Section 1. The sovereign
19 decision to not provide the Tribal Court with jurisdiction over these types of cases has now been
20 discarded and replaced with a system that the Tribe did not desire when it adopted its
21 Constitution. If the Tribe wanted the Tribal Court to have jurisdiction over cases involving the
22 denial of rights guaranteed under the Tribe’s Bill of Rights, then the Constitution would have
23 said so. The Tribe knew how to accomplish this as it did so for four other types of cases.
24 However, for cases based on the Tribe’s Bill of Rights, the Constitution does not expressly waive
25 the Tribe’s immunity. The Majority Opinion has to find a backdoor to create the Court’s
26 jurisdiction.

27 And, I fully understand that the Majority Opinion is based on similar United States
28 Supreme Court decisions such as *Ex parte Young*, 209 U.S. 123 (1908).¹⁵ But the Tribe is not

15 The Majority Opinion notes that *Ex parte Young* is referred to in *Santa Clara Pueblo v. Martinez*. The exact language in *Martinez* states: “As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe’s immunity from suit. See *Puyallup Tribe v. Washington Dept. of Game*, [433 U.S. 165] at 171-172; cf. *Ex parte Young*, 209 U.S. 123 (1908).” The first case cited (*Puyallup Tribe*) found that a state court has jurisdiction over

1 required to follow United States Supreme Court precedent when interpreting Tribal law. I
2 simply do not support following federal precedent to diminish the Tribe's sovereign immunity in
3 a manner the Tribe did not expressly and unequivocally make clear in its Constitution or any
4 other laws.

5 Based on the Majority Opinion's finding of an unintended implied waiver of the Tribe's
6 sovereign immunity, I respectfully dissent.

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26 individual tribal members who were not acting as tribal officials. I do not believe anyone
27 contests this holding, but this issue is not contested in this case. The *Martinez* court then refers
28 to *Ex parte Young* with a "cf" reference, meaning to "compare." I believe this type of reference
requires only a brief consideration, and definitely not anything more.