CASE NO. 11-17847

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAHTO TRIBE OF THE LAYTONVILLE RANCHERIA,

Plaintiff and Appellant,

v.

AMY DUTSCHKE, ACTING REGIONAL DIRECTOR FOR THE PACIFIC REGION, BUREAU OF INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

Defendants and Appellees.

On Appeal From The United States District Court,
Eastern District Of California, Case No. 2:10-Cv-01306, Hon.
Garland E. Burrell

BRIEF OF AMICUS CURIAE FOR THE SLOAN FAMILY IN SUPPORT OF AFFIRMANCE

ZUZANA S. IKELS (Cal. No. 208671)
COBLENTZ, PATCH, DUFFY & BASS LLP
One Ferry Building, Suite 200
San Francisco, California 94111-4213
Telephone: 415.391.4800

Attorneys for Amici Curiae Gene William Sloan, Bert U. Sloan, Melody Sloan, John Omar Sloan, Tasheena Sloan, Allen Sloan, Rachel Sloan, Linda Palomares, Godfrey Sloan, Jeff Sloan, Tonya Sloan Rodriguez, Tammy Sloan, Arturo Gonzalez, Jr., Arica Rene Lopez-Sloan, Mark Britton, Jr., Jose Ochoa, Gabriel Ochoa and Jennifer Sloan

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STATEMENT OF IDENTITY OF AMICI CURIAE

Amici curiae are the Sloan family[1] who were unlawfully disenrolled from membership of the Cahto Tribe by a faction of the Tribe. As a result of the improper disenrollment decision some or all of the Sloan Family have been denied: voting rights and participation in tribal matters, basic services, Tribal land assignments and access to communal Tribal resources, federal benefits and subsidies, including health benefits, and their per capita share of the Tribe's revenue-sharing funds. The outcome of this appeal, therefore, will have a direct effect on them.

The Sloans sought to intervene in the underlying action, but the District Court denied their request. That decision is currently on appeal. *Cahto Tribe of the Laytonville Rancheria v. Dale Risling*, No. 11-15104. The Sloan family filed an Amici Curiae brief in the District Court below. Its arguments persuaded the district Court to rule against Appellant.

RULE 29(A) STATEMENT

All parties consented to this filing, pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-1.

[1] The "Sloans" or "Sloan family" is comprised of Gene William Sloan, Bert U. Sloan, Melody Sloan, John Omar Sloan, Tasheena Sloan, Allen Sloan, Rachel Sloan, Linda Palomares, Godfrey Sloan, Jeff Sloan, Tonya Sloan Rodriguez, Tammy Sloan, Arturo Gonzalez, Jr., Arica Rene Lopez-Sloan, Mark Britton, Jr., Jose Ochoa, Gabriel Ochoa and Jennifer Sloan.

INTRODUCTION

Seventeen years ago, a faction of the Cahto Tribe (hereinafter "the Faction"), acting in concert with non-tribal individuals with a financial stake in the Tribe's casino, carried out an unlawful coup to disenroll the Sloan family and deprive them of the benefits of membership in their Tribe. Because the Sloans vigorously dispute that Plaintiff-Appellant speaks on behalf of the Tribe, should be afforded deference in its interpretation of the charter documents, or that its attempt to disenroll the Sloans was an authorized act of the Tribe, we will refer to Plaintiff-Appellant, as the "Faction" or "Appellant."

The Sloan family, some of whom were the Tribe's leaders, confronted the outside investors in the Tribal casino on suspicion that the outside investors were embezzling money and not properly distributing casino proceeds to the Tribe. In retaliation for the Sloans' efforts to investigate the suspected embezzlement, obtain an accounting, and safeguard the Tribe's rights, the outside investors persuaded the Faction to hold a sham election to remove the Sloan family tribal leaders, and to disenroll the entire Sloan family. The Sloan's absence from the Tribe is all the more poignant because the Tribe's full voting population is less than 100 adults. The effect of the decision was to eliminate almost one third of the Tribe from enjoying tribal benefits. The basis for the sham decision was the Sloans' receipt of a small payment from a class action settlement paid by the federal government.

The Faction's decision was not legally supportable – requisite notice was not provided, the Sloans were excluded from the meetings, and the Faction's decision was based on a patently frivolous interpretation of a federal statute. When the Sloans, including the deposed Tribal leaders, notified the BIA that the Faction's decision was procedurally and substantively invalid, the Faction itself sought ratification of the enrollment decision from the BIA. In other words, both the Sloans *and* the Faction understood that the adverse enrollment action was subject to BIA approval, in accordance with the Tribe's charter documents.

Appellant has attempted to use the doctrine of tribal immunity as a shield against administrative and judicial review of its unlawful membership decision, and it persists in asserting that position on appeal. This case is not, however, a situation where the government improperly interfered with a tribe's sovereign immunity, and it is not a case where the Faction, currently purporting to represent the Tribe, is owed any deference in its interpretation of Tribal documents. The *Tribe* unequivocally consented to the jurisdiction of the federal government to review and approve all enrollment decisions in accordance with federal law, and thereby waived tribal immunity and deference to tribal law as to enrollment decisions. The Tribe's charter documents are saturated with references to the oversight and approval of tribal membership decisions by the Bureau of Indian Affairs (the "BIA"). The Tribe's membership criteria was broad to ensure that all

Cahto Indians, who wanted to join the Tribe and were not members of another tribe, could become citizens. The Tribe also provided multiple layers of due process rights for anyone who sought to challenge an adverse decision. The importance *to the Tribe*, of affording all of its potential and actual members' full due process rights and federal administrative review, cannot be understated.

After many years of procedural wrangling and confusion regarding the legal effect of the BIA's informal suggestions, directives, and decisions, and an appeal by Appellant in the wrong forum (the Interior Board of Indian Appeals), the BIA issued its final decision in 2009. The BIA correctly concluded that the family's due process rights had been egregiously violated, under the Indian Civil Rights Act ("ICRA"), and it ordered the Faction to reinstate the Sloans. The District Court upheld the BIA's final order of reinstatement. Its judgment should now be affirmed so that the Sloans' 17-year odyssey will finally end and the Sloans may return to their Tribe.

STATEMENT OF FACTS[2]

I. THE SLOAN FAMILY AND THE CAHTO TRIBE.

The Sloans are a founding family of the Cahto Tribe. They have resided on the Laytonville Rancheria for all or most of their lives. AR 57, 60, 66, 68, 70, 72,

[2] Citations to the Index of Appellants' Excerpts of Record are referred to as "ER" and citations to the Administrative or Supplemental Administrative Record are referred to herein as "AR" and "SAR," respectively.

74, 448. Bert and Gene Sloan, brothers and elders of the Sloan family, are listed on the original 1944 census roll of the Cahto Tribe. AR 318-321 (Census Roll, AR 57, ¶ 2, AR 72, ¶1.

In 1967, Bert and Gene, along with nine other tribal members, voted to approve the Tribe's Articles of Association (the "Articles"). ER089-ER097; AR 59, ¶ 11, AR 447-48. Their great-grandfather was Bill Ray, the last of the traditional captains of the Cahto Tribe. AR 72. The brothers carried on the family's tradition of tribal leadership, Bert served as Chairman of the Tribe's Executive Committee for ten years, and Gene served as Chairman or Vice-Chairman for similar lengths. AR 57-59, ¶ 2, AR 72-73, ¶ 1. Other members of the Sloan family have served on the Executive Committee, and two served as Chairwoman and Vice-Chairwoman in September 1995 (the time of the first unlawful dis-enrollment of the Sloans). AR 58. The Tribe continues to use the census roll as the basis for establishing membership in the Tribe today. AR 286, Art. III, A(1).

II. The Charter Documents Governing Enrollment.

Two documents address membership eligibility and rights under the Tribe's charter: Article III – Membership (ER089-ER097) of the Articles, and the Tribe's first enacted ordinance: Ordinance No. 1 (the "Enrollment Ordinance") (ER083-ER088). The Enrollment Ordinance is the only ordinance governing membership

decisions. The Articles and Enrollment Ordinance are complementary and must be read together. On the one hand, Articles III and VII empower the General Council of the Tribe "to enact ordinances, consistent with the Articles of Association **and Federal Law** governing future membership, loss of membership…," and the Enrollment Ordinance reflects the actual procedures and decision-making power respecting enrollment decisions. AR 288-89; 280-83.

Article III provides that all persons listed on the Tribe's official census, and their descendants who have at least "one-fourth (1/4) degree California Indian blood," are eligible for membership. Article III, A.(1)-(3). There is no dispute that the Sloan family members, many of whom are listed on the original census and the rest of whom are direct descendants, are "eligible" members. AR 318-321, AR 57, ¶ 2, AR 72, ¶ 1. A person will be deemed ineligible for membership, if s/he was "affiliated with another tribe *and* is on the "formal membership roll," received an allotment or formal assignment of land, or is a "distributee or dependent of a reservation distribution plan" of another tribe. None of these ineligibility criteria applied to the Sloans. Under Article III, ¶ A, all determinations regarding membership had to be "established in accordance with procedures set forth in an enrollment ordinance approved by the Commissioner of Indian Affairs." AR 286-87. Article III, ¶ B requires that the "membership roll shall be brought up to date

annually in accordance with procedures established by an enrollment ordinance approved by the Commissioner of Indian Affairs." AR 287 (emphasis added).

The purpose of the Enrollment Ordinance states is to "[s]et forth requirements and procedures to govern the enrollment of persons whose names shall be placed on the membership roll of the Laytonville Rancheria." AR 280 (emphasis added). Appellant admits the Tribe waived its sovereign immunity under the Enrollment Ordinance, but only with respect to original applications for enrollment. This cannot be reconciled with its language. Among its procedures, "Section 6 – Appeals" provides that "a person disapproved for enrollment" shall be informed of the decision, in writing, and have the right to appeal the decision to the BIA. AR 282 (emphasis added). Section 8 requires the Executive Committee to keep the "roll current," including deleting, *inter alia*, "names of persons on the roll who were placed there erroneously, fraudulently, otherwise incorrectly… ." *Id*. Section 9 also requires the Secretary of the Interior's authorization when using the membership roll for distributing "tribal assets." And, finally, Section 7 requires that the final, updated membership roll must be submitted to the BIA Area Director for review, approval and "certification as to its correctness."[3]

[3] The Tribe amended the Enrollment Ordinance, in 1971, solely to remove enrollment decisions from the three-person Executive Committee and vest it in the General Council, thus requiring a majority vote of the Council – the adult population of the Tribe – as further protection for all potential and current members rights. AR 284-85. No such majority vote occurred here.

III. Suspected Embezzlement By the Casino Operators, and The Illegal Vote To Dis-Enroll The Sloans.

In 1995, the Tribe opened a bingo and casino operation with outside investors, Jim Johnson and Dewayne Johnson, who also acted as casino managers. AR 218. Three Sloan family members, Tribal Chairwoman Carmen Ochoa and Vice-Chairwoman Yolanda Luque, and Gene Sloan suspected the Johnsons were embezzling funds, as they were not providing monthly financial statements or permitting audits. AR 58, 74, 218. After they found irregularities, including evidence of illegal payments to tribal and non-tribal casino management, the Sloans confronted the Johnsons and contacted law enforcement authorities. *Id*.

The Johnsons and their attorney, Terry Pechota, organized a faction of Tribal members to call an unsanctioned and unnoticed meeting, on September 8, 1995, aimed at deposing Chairwoman Ochoa and Vice-Chairwoman Luque from the Executive Committee. They grounded their actions on the frivolous assertion that the Sloans were members of the Yurok tribe, because the Sloans received a small settlement amount, pursuant to the Hoopa Yurok Settlement Act ("HYSA"), which, they contended, was the equivalent of a reservation distribution plan.[4] AR 484,

[4] S*ee also* AR 218 (Tribal Administrator, Margaret Hoaglen's letter to the National Indian Gaming Association describing her concerns that James Johnson and his son were embezzling funds and for the Sloan family's safety); *See also* AR 90 (The declaration of the Tribe's Pending Secretary and Treasurer in 2004, Cristy Taylor, describing how the outside investors and their attorneys fraudulently represented the HYSA).

SAR 479-80. Neither the Executive Committee nor the Sloan family was provided any notice of the meeting. AR 483-486; AR 58, ¶ 9, AR 61, ¶ 6, AR 70, ¶ 3, AR 72-73, AR 68 ¶ 2-6, AR 74-76, ¶ 1-2. At the meeting, the Johnsons and a small group of tribal members purported to recall Chairwoman Ochoa and Vice-Chairwoman Luque and install "interim" leadership. AR 484; SAR 479-82. The Faction forced open the Tribal Office, and provided check-writing authority on the casino's account to four new people of the Faction, including one of the Johnsons. SAR 479-80.

Members of the Faction brandished weapons in an attempt to intimidate any opposition. AR 379-80; SAR 560-64; 588. They exploited the controversy to call another illegitimate "General Membership" meeting on September 19, 1995, again without proper notice to the Executive Committee or the Sloan family. AR 221-224; AR 74-75; AR 90-91; AR 483-486; AR 58, ¶ 9, AR 61, ¶ 6, AR 70, ¶ 3, AR 72-73, AR 68 ¶ 2-6, AR 74-76, ¶ 1-2. Despite the absence of proper notice and a proper quorum, the Faction purported to dis-enroll one-third of their members, all 22 adult Sloans (the "1995 Vote"). *Id.*; SAR 411-412.

A. The Sloans Were Never Members of the Yurok Tribe.

The United States enacted the HYSA in 1988 to settle a class action and other related disputes, between the Hoopa Valley Tribe and the yet to be formed Yurok Tribe, over the proceeds of the natural resource development on the Hoopa

Valley Indian Reservation. 25 U.S.C. §§ 1300i, *et seq.* Because the Yurok Indians were not yet formally organized as a tribe, the HYSA prepared a "Settlement Roll" to include all persons who could possibly be considered Yurok. 25 U.S.C. § 1300i-4. To ensure finality and enforceability, the Settlement Roll purposefully cast a wide net to ensure that all potential persons were included in the settlement and release. It therefore included members of *other* tribes who, by their ancestry, potentially could meet future criteria for enrollment with the Yurok. This list was based upon the "Initial Yurok Voting List," which had been sent to the Tribe back in 1979. 44 Fed. Reg. 24536; SAR 178. The HYSA explained that the list was *not* a membership roll, as it required persons to elect membership of the Hoopa Tribe (Option 1), the Yurok Tribe, which was the default option unless one elected the other two options (Option 2), or take a lump sum payment and forgo membership in either the Yurok or Hoopa tribes (Option 3). 28 U.S.C. 1300i-5(b)–(d).[5]

Because Gene and Bert Sloan's paternal great-great-grandmother happened to be Yurok, the Settlement Roll included them, their siblings, and certain Sloan children. AR 74. The Sloans sought and received the government's confirmation regarding how to proceed to ensure that they retained their membership in the

[5] That it was not a Yurok membership roll is also obvious from Section 9(a)(1) of the HYSA, which establishes the actual Yurok membership roll, constituting only those people on the Settlement Roll choosing settlement Option 2. 28 U.S.C. § 1300i-8(a)(1). The Yurok Tribe later confirmed that the Sloans were never members and could not receive the benefits of tribal membership. SAR 355.

Cahto Tribe. AR 57-58, 301. The BIA provided a binding, nine-page instruction letter to the Sloans (AR-309-317), which advised that Option 3 was "not a termination provision. It has no effect on any ties you may have to Indian tribes other than Hoopa and Yurok. It does not change the Indian status of any person on the Settlement Roll." AR 58; 316, *and see* 28 U.S.C. § 1300i-5(a)(4)(B). In 1991, Gene, Bert and their siblings, selected the settlement payment under Option 3, secure in the knowledge that their election could not affect their membership in the Cahto Tribe.

B. The Tribe's Many And Conflicting Voices With Respect To The Effectiveness of the 1995 Vote.

Immediately following the 1995 Vote, Chairwoman Ochoa wrote to the BIA, informing it of the unlawful meetings and enrollment actions. SAR 411-12. Members of the Faction aligned with the Johnsons also wrote to the BIA, purportedly on behalf of the Tribe, seeking the BIA's blessing of its purported new membership roll, which removed the Sloan family. SAR 384. In other words, all parties understood that the BIA must review and approve membership decisions.

The Faction wrote two additional letters, threatening litigation if the BIA did not agree to recognize the unlawful actions against the Sloans. SAR 376, 214-16. In their letters, Appellant admitted that the Faction violated the Tribe's Articles by not petitioning the Executive Committee to call the September 8 and 19, 1995 meetings. SAR 214-16, 376. Despite Appellant's threats and demands, the BIA

did not certify the adverse enrollment action, and questioned the validity of the proceedings and vote. AR 219, 220; SAR 373. The BIA stated its preference that the Tribe resolve its conflict internally, but admonished the Tribe for failing to comply with its ordinances. AR 219, 220. Appellant never subsequently noticed or held a lawful General Council meeting. AR 379-80; SAR 560-64, SAR 588-602. Tribal members and leaders have come forward since then and provided unrefuted affidavits admitting to the improprieties of the 1995 Vote, the undue influence of the Johnsons and their attorney, that signatures were forged, members were bribed, and Mr. Pechota misrepresented the HYSA. AR 483-486 (Merle Stevenson's affidavit, who was the unlawfully appointed "interim Chairman" in September 1995, in which he recanted all of the decisions related to the 1995 Vote); SAR 411-412; SAR 266-69; AR 218; AR 90.

IV. Cahto Tribe Discord – Reluctant, but Required, Action By the BIA.

Years of discord followed the 1995 Vote. The Sloan family remained on the 1996 Tribal membership roll, and continued to participate in the political life of the Tribe. AR 216; SAR 573-75. The Faction, however, influenced by the outside investors, refused to call General Council meetings in accordance with the Articles, and ignored members' petitions to remove or replace the Faction. SAR 351-54; 568-571; 532; 534; 568-571; 573-575; 576; 587-88. The Faction also continued to deny the Sloans' right to vote. AR 382; SAR 534; SAR 585-602.

By Spring 1999, the BIA expressed concerns about the dysfunctional nature of the tribal government. SAR 537-38; 320. In the face of those concerns, Appellant effectively admitted that the 1995 Vote was invalid, and sought to substantiate the 1995 Vote. This effort shared the same disdain for Tribal procedure that the Faction had displayed in 1995. By a vote of 14-3, again without the Sloans' participation and without the required 29 members to make quorum (87 adult voting members of the Tribe as of December 1998, AR 212), Resolution 99-6-03 purportedly "adopted" the same false pretext that the HYSA rendered the Sloans ineligible for membership (the "1999 Resolution"). AR 198-200. The Faction had been supplied with ample evidence that the Sloans were never members of the Yurok Tribe. *See* SAR 171-179. Members of the Tribe again requested a General Council meeting to address the procedural problems, and they were again thwarted by the then-"Executive Committee," which improperly refused to call the requested meeting. SAR 313-314; 276-77; 243-247. Once again evidencing its consent to the jurisdiction of the BIA, Appellant submitted the 1999 Resolution to the BIA for its approval. SAR 322-324.

A. The Sloan Family Timely Appealed the Enrollment Decision to the BIA.

The Sloan family has continually appealed the adverse membership decision to the BIA, urging it to reverse the unlawful 1995 Vote and 1999 Resolution. AR 411-412, 484-86, SAR 560-62 563; 564. The Sloans filed timely appeals to

the BIA, on May 13, June 24, July 16 and August 2, 1999. AR 179-81; 202-03; SAR 267-69; 543-45. The BIA responded, on July 29, 1999, and instructed Appellant that its legal interpretation of HYSA was incorrect. AR 182-83. The BIA also requested that the Executive Committee call a General Council meeting to reject the invocation of the HYSA as a basis for exclusion, and include the Sloan family in the meeting. The Executive Committee ignored this request.[6]

In 2000, the Superintendent of the Central/California Agency and the Pacific Regional Director, both concluded that the BIA could not recognize the Tribe's decision to disenroll the Sloan family, and ordered that the family be reinstated (the "2000 BIA Decision"). ER073-ER075; ER076-ER077.

B. The Tribe Appealed the 2000 BIA Decision to the Wrong Forum.

The Faction filed an appeal of the 2000 BIA Decision in the wrong forum – the Interior Board of Indian Appeals (IBIA). On December 19, 2002, the IBIA issued a convoluted decision that held it was not reaching the merits, and that it was not the proper entity to address appeals as to membership decisions, including the Sloan family's appeals, but, after hypothesizing as to the bases for which the

[6] AR 177; SAR 192, AR 194. After noticing the meeting, per the BIA's request, the Tribal Chairwoman arrived over an hour late, after many people had departed rather than wait outside in the dead of winter. SAR 500-502; 585-86. Once she arrived, she refused to designate it an official General Council meeting, because, she claimed, a quorum of the Executive Committee was not present, and as a consequence, no business could be conducted, which was untrue. SAR 585-602. She also requested that the Sloan family not participate, directly contrary to the point of the meeting.

BIA *might* assert jurisdiction, it vacated the 2000 BIA Decision because the BIA did not provide the basis upon which it exercised its jurisdiction. *Cahto Tribe of the Laytonville Rancheria v. Pac. Reg'l Dir.*, 38 IBIA 244 (2002); AR 323-329.

The IBIA decision was not a model of clarity – neither side seemed to understand the impact or effect of the decision. The Sloan family continued to attempt to organize and fight the disenrollment at the tribal level, while the Tribe unsuccessfully attempted, in 2006, to amend the charter documents to remove any reference to the BIA.[7]

On December 18, 2008, the Sloan family sued the BIA, observing that the IBIA had no jurisdiction to "vacate" the 2000 BIA Decision, and seeking a declaration from the Court to order the BIA to act on the Sloans' appeals of the 1995 Vote. *Gene Sloan et al v. U.S. Dept. of the Interior and Bureau of Indian Affairs*, Case No. 2:08-CV-03070-GEB-GGH (E.D. Cal. Dec. 18, 2008). The BIA

[7] The Articles were not legally amended in 2006. The Sloan family appealed the BIA's certification of the amendments to the IBIA in 2008, given the Sloan family was not allowed to vote or participate in the election. AR 454. In 2010, after directing the Tribe to place the Sloan family back on its membership roll, the BIA asked the IBIA to vacate the decision certifying the new Articles of Association and remand the matter to the BIA for further consideration. *Sloan et al. v. Acting Pac. Reg'l Dir.*, 51 IBIA 302, 303 (June 11, 2010 Order Dismissing Appeal Without Prejudice). Instead of vacating the certification, the IBIA ordered that the BIA must first "issue a new decision at the appropriate time" regarding the validity of the election adopting the new Articles. *Id*. at 304. To date, the BIA has not issued a new decision on this matter. Appellant makes no reference to the 2006 botched amendment, and Appellant has, therefore, abandoned reliance on the 2006 Articles on appeal.

then took up the merits of the Sloan family's appeals and issued a final order, ruling that the disenrollment of the Sloan family was unreasonable, unjustifiable and violated the family's due process rights. ER037-ER041.

V. The Tribe's Actions Have Had a Devastating Effect on the Family.

As a result of the disenrollment the Sloans have been:

- Disenfranchised and unable to participate in Tribal meetings, votes and actions. AR 60, 66, 76, SAR 560-62, 564-55, 596-97, 586.
- Deprived of tribal land assignments without notice or hearing. AR 70; 75.
- Excluded from basic services, federally subsidized Cahto Housing, and from funds of the Tribe for assistance in paying utilities, home repairs and school services, all of which are otherwise available to the rest of the Cahto Tribe. AR 66; 70; 72; 75.
- Denied governmental health benefits afforded all California Indians from the Indian Health Services initiative. AR 75-76.
- Denied tribal employment and tribal resources. AR 73-75.
- Informed that (a) younger members of the Sloan family, who are clearly eligible for tribal membership through other family lineage, cannot become members because they have "Sloan" blood, or have been told that the membership rolls are "closed" (AR 66; 70-71); and (b) others have only

been offered "non-voting" second class membership status (AR 60-61; 69); and

- Harassed by others in the tribe, which led one member to have a mental breakdown. AR 75.

ARGUMENT

I. THE TRIBE CONSENTED TO BIA JURISDICTION TO CONSIDER AND APPROVE MEMBERSHIP DECISIONS.

A. A Tribe May Consent to the Jurisdiction of Administrative Review.

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (U.S. 1978) is considered the landmark case defining the application of Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (the "ICRA") to a tribe's adverse membership decision that violated 25 U.S.C. § 476. The Supreme Court concluded that an individual enrollment decision by the Santa Clara Pueblo tribe was protected by tribal immunity absent congressional abrogation, or waiver by the tribe. The Supreme Court first evaluated whether In the ICRA implicitly waived a tribe's immunity, after concluding it did not, it then evaluated whether the tribe's by-laws authorized administrative review of enrollment decisions. It held that the by-laws made no reference to administrative review. "Many tribal constitutions adopted pursuant to 25 U.S.C. § 476, *though not that of the Santa Clara Pueblo*, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. (Citation omitted.) In these instances, persons

aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior." *Santa Clara Pueblo*, 436 U.S. at 66, n. 22 (emphasis added). The latter situation is presented in this case.

Over the course of the years, and as the economic and political power of the Native American tribes have substantially improved through Indian gaming, the jurisprudence related to tribal immunity has evolved. Courts do not require any "magic words" to waive immunity. The Supreme Court more recently held a tribe had waived its sovereign immunity by entering into a contract that contained arbitration and choice of law provisions. In *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla*., 532 U.S. 411, 414, 420 (U.S. 2001), the tribe entered into a construction contract with a private contractor to install a roof on a building owned by the tribe. The tribe consented to arbitration and agreed that the contract was to be "governed by the law of the place where the Project is located," in that case outside tribal boundaries within the state of Oklahoma. *Id*. at 415 (quoted authority omitted). The Supreme Court unanimously found this language was sufficient to constitute a waiver of immunity, based upon federal law, and with no deference afforded to the Tribe's interpretation of the contract. *Id*. at 414, *and see* 419 (holding the tribe had consented to arbitration and choice-of-law clause, which had the effect of waiving immunity), 417-23 (*citing Rosebud Sioux Tribe v. Val-U Constr. Co*., 50 F.3d 560, 562-63 (8th Cir. 1995)(explaining that no "magic

words" are required to effect an express waiver of tribal sovereign immunity); *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc*., 86 F.3d 656, 661 (1996 7th Cir.) (clause requiring arbitration of contractual disputes and authorizing entry of judgment upon arbitral award "in any court having jurisdiction thereof" expressly waived Tribe's immunity); *see also Sanderlin v. Seminole Tribe of Florida* (11th Cir. 2001) 243 F.3d 1282, 1286, (refusing to apply tribal law, or defer to a tribe's interpretation, and instead holding federal law must be followed in interpreting the scope of waiver by a sovereign); *Linneen v. Gila River Indian Community* (9th Cir. 2002) 276 F.3d 489, 492-493 (holding, pursuant to federal law, that a tribe's corporate charter contained a "sue and be sued" clause, which waived immunity with respect to a tribe's corporate activities).

B. The Tribe's Charter Documents Contemplate the BIA's Involvement In Every Aspect of Membership Eligibility.

The determination that the Tribe clearly and unambiguously consented to the BIA's review and approval of membership decisions, fully accords with the principles articulated in *Santa Clara Pueblo* and *C & L Enterprises*. The Tribe's charter documents are replete with references to the BIA and requires its approval before any enrollment decision is effective. The Articles, among other things, expressly require that the Tribe's enrollment ordinance, all related decisions of enrollment, and the "membership roll" be approved by the BIA. AR 286-87 (Article III, A and B (the only two sections under Article III governing

membership)). Moreover, the Articles state that all ordinances must be "consistent with these Articles of Association and **Federal Law** governing future membership [and] loss of membership. . . ." AR 289, Article VII, ¶A. 4 (emphasis added).

To the extent there is any doubt or ambiguity as to the scope and jurisdiction of the BIA's approval and review powers over membership decisions, the Enrollment Ordinance eliminates it. The Ordinance specifies that federal administrative review must occur at each step of the process regarding membership eligibility procedures and decisions. The BIA is to: (1) bless the procedures before they are effective, (2) hear any individual appeals of an adverse membership decision, (3) review and approve the membership rolls after membership eligibility decisions have been finalized, and (4) review and approve the membership roll before any tribal assets are distributed to the members. ER083-ER085. The Tribe clearly removed enrollment decisions from the realm of purely internal tribal matters and invited federal agency review. It is hard to imagine a tribe more clearly waiving its immunity as to membership decisions.

In an attempt to avoid the plain meaning and will and intent of the Tribe's charter documents, Appellant argues that the Tribe only waived its immunity as to "applications" for enrollment, not dis-enrollment. The Faction's proposed reading of the Articles and Enrollment Ordinance is overly parsed and incomplete. Appellant argues that the BIA's review powers solely related to "applications" by

new members, not decisions to revoke membership. Opening Brief, p. 17-20. It is far from clear that the Tribe contemplated that it could *ever* dis-enroll its people. What is clear, however, is that the Tribe conscientiously and deliberately sought to provide significant due process rights to appeal an adverse membership decision to the BIA. This is the pivotal distinction between the facts here and all of the cases cited by Appellant in support of its argument that a tribe has exclusive authority over enrollment decisions. [8]

The Tribe's unstable analysis falls apart when one tries to harmonize its interpretation with Article III, Article VII and the Enrollment Ordinance, collectively. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 1504, 103 L. Ed. 2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006) (noting statutes "should not be read as a series of unrelated and isolated provisions"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) (rejecting statutory interpretation that would render superfluous other

[8] For example, *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007) involved non-members of a restored tribe who sued the BIA for the Tribe's failure to include them in the membership roll. The BIA in *Williams* was not involved in the membership roll, and there was no mention that it had review power under the governing charter documents. Here, by contrast, the charter documents require the integral involvement of the BIA in every step of the membership eligibility process.

provisions); *see also Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351, 1359 amended, 132 F.3d 1258 (9th Cir. 1997) ("The usual rule of interpretation of contracts is to read provisions so that they harmonize with each other, not contradict each other. That task of construction is for the court.").

Appellant argues that it exercised its power to disenroll the family based upon Article III, A., 3, not under the Enrollment Ordinance. But Appellant skips the introductory sentence, which states membership eligibility may only be "established in accordance with an enrollment ordinance approved by the Commissioner of Indian Affairs." [9] There is only one Enrollment Ordinance governing membership eligibility, and it contemplates the appeal procedure for any adverse enrollment decision. Even assuming *arguendo* that Appellant's position is plausible, the Tribe treated the Sloans' appeals and petitions following the 1995 Vote as if they were applications (see chronology set forth in the 1999 Resolution). AR 411-412, 484-86, SAR 560-62 563; 564; SAR 327-328; AR 179-81; 202-03; SAR 267-69; 543-45. Appellant's contemporaneous actions also bely its argument, as the Faction requested the BIA's approval of the enrollment decisions, and

[9] Appellant does not contend, in its Opening Brief, that its removal of the Sloan family in 1995 was proper based upon an alleged quorum vote of the Tribe's General Council, and it makes no attempt to refute the evidence from a number of declarants that the roll count was fraudulent. *See* SAR 156-170 (Meeting Minutes and Exhibits attempting to establish a quorum of 30% of the adult population to legitimize the vote; AR 483-86; AR 90-92.

unsuccessfully attempted to amend its charter documents to remove references to the BIA. AR 376, 214; SAR 384; SAR 326.

II. NO DEFERENCE IS OWED TO THE FACTION'S PROPOSED INTERPRETATION OF TRIBAL LAW BECAUSE IT DOES NOT REPRESENT THE INTERPRETATION OF THE *TRIBE*.

Appellant attempts to shore up its fatally flawed interpretation of the Tribe's charter documents by citing the doctrine that a tribe's interpretation of its own laws is entitled to deference by the courts, and a narrow construction. Opening Brief, p. 14-17, 20-22. However, no deference is owed here, where Appellant's interpretation is not the interpretation of the Tribe as a whole, but rather is the self-serving interpretation of the Faction used to disenfranchise nearly a third of its members.

The D.C. Circuit has noted that the BIA is empowered to look behind the adoption of tribal constitutions to ascertain whether those who adopted them actually represent the *will* of the tribal people.

> [A] cornerstone of [the government's trust] obligation is to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits. … [T]he Secretary 'has the responsibility to insure that a [tribe's] representatives with who [she] must conduct government-to-government relations, are valid representatives of the tribe *as a whole*.'

California Valley Miwok Tribe v. United States, 515 F.3d 1262 (D.C. Cir. 2008) (*quoting Seminole Nation v. Norton*, 223 F. Supp.2d 122, 140 D.D.C. 2002).

Here, Appellant's interpretation of the Enrollment Ordinance does not represent the interpretation of the Tribe as a whole. Two elder members of the Sloan family were among the eleven founding members that *executed* the Tribe's charter documents. The interpretation of those charter documents presented in this Amici brief reflects the competing, and only rational, *tribal interpretation* of the charter documents by the original founders of the Tribe. AR 59.

Moreover, Appellant can only claim to speak for "the Tribe" because it disenfranchised the Sloan family through unlawful and unauthorized means. Courts have often looked behind claims of sovereignty made by foreign countries, federal agencies, and tribes, where there is doubt that the challenged act was official and authorized. *See, e.g.*, *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989) (the party asserting the applicability of the act of state doctrine bears the burden of proof, to show, at a minimum, that a party offer some evidence that the government acted in its sovereign capacity and some indication of the depth and nature of the government's interest."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (Under 5 U.S.C. § 706, a court must set aside agency action that is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-480 (9th Cir. 1985) (citations omitted) (tribal immunity extends

to individual tribal officials, only when they are "acting in their representative capacity and within the scope of their authority.")

Appellant has not cited to any evidence in its Opening Brief that the meetings and votes purporting to dis-enroll the Sloan family were proper and adequate. Rather, the record reflects that neither the procedural or substantive due process rights ingrained in the charter documents were followed. *See* Statement of Facts Sections III-IV, *supra*. Even the interim chairman appointed to disenroll the Sloans has now disavowed the legitimacy of the 1995 Vote and 1999 Resolution. AR 483-486; AR 90. Given Appellant's questionable authenticity as the entity charged with providing "the Tribe's" interpretation of its charter documents, this Court need not defer to that interpretation.

III. THE FACTION'S BASIS FOR DISENROLLMENT WAS NOT REASONABLE, LET ALONE LEGALLY SUPPORTABLE.

Because the Tribe authorized and consented to the BIA's administrative review of any membership decisions, the BIA is empowered under 25 C.F.R. § 62.2 to assess whether an adverse membership decision violates the ICRA. The ICRA provides that "[no] Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." ICRA, 25 U.S.C. § 1302(8). The propriety of the 1995 Vote turned on the interpretation of a federal statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (the courts "must give effect to the

unambiguously expressed intent of Congress," regardless of a federal agency or tribe's interpretation…our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'")(citations omitted.)

Even assuming the Court could defer to Appellant's decision for disenrollment, the BIA and the District Court properly held that there was no reasonable or rational basis for concluding that the HYSA rendered the Sloans ineligible Cahto members. *Id*. at 844. Moreover, even if the HYSA could be deemed ambiguous, deference as to its interpretation must *favor the Sloans*, the beneficiaries of the HYSA, not the Tribe. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. N.M. 2011)(where a statute affecting Native Americans is ambiguous, if said Native Americans offer a reasonable interpretation, their construction must be followed).

As Appellees' Brief point out, the HYSA Option 3 was a "lump sum payment" from the "Settlement Fund," *in lieu of* membership in the Hoopa or Yurok Tribes. 25 U.S.C. § 1300i-5(d)(1).[10] It was not a "reservation distribution

[10] To ensure each person electing this option understood the effect, the subsection required "a sworn affidavit certifying that he or she has been afforded the opportunity to participate in counseling which the Secretary, . . .[to obtain] a comprehensive explanation of the effects of such election on the individual making such election, and on the tribal enrollment rights of that persons children and descendants who would otherwise be eligible for membership in either the Hoopa or Yurok Tribe." 25 U.S.C. § 1300i-5(d)(1). Indeed, the BIA provided written and

plan." Contrary to Appellants' argument (Opening Brief, p. 23, n. 6), a reservation distribution plan *is* a legally defined term that had only one meaning at the time the Articles were enacted. It was "An Act to provide for the distribution of the land and assets of certain Indian rancherias and reservations in California, and for other purposes" that was passed, in 1958, by Congress to provide for the termination of the trust over certain California Indian reservations (none of which are relevant here) in order to privatize the land and distribute the proceeds to the formal tribal members. *See* 85 P.L. 671; *see also* 25 USCS. § 1679(a)(4) (identifying California Indians who participated in a reservation distribution plan).

The chronology of the relevant events proves that the Faction's reliance on the HYSA was a pretext for an illegal attempt to dis-enroll the family. There was a twenty-six year gap between when the Tribe received information about the HYSA, and the 1995 Vote. 44 Fed. Reg. 24536, SAR 178, 174. There was a seven year gap between when the HYSA was enacted in 1988, and the 1995 Vote against the Sloans. 25 U.S.C. § 1300i, *et seq.* But, only a few weeks elapsed between when the Tribal leaders and Gene Sloan discovered and publicized accounting irregularities at the casino on the part of non-tribal casino managers,

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verbal assurances that the Sloans' status in the Cahto Tribe would be unaffected by the HYSA lump sum payment. AR 309-317; AR 057.

and the 1995 Vote. AR 058, 483-84. That the disenrollment decision was retaliatory is beyond question.

IV. THE IBIA DECISION IS NEITHER RELEVANT, NOR BINDING.

As set forth in Appellees' Answering Brief, the Faction's contention that the 2002 IBIA Decision was final and binding, and in accordance with the doctrine of *res judicata*, bars the 2009 Decision, is frivolous. The only thing clear about the largely impenetrable 2002 IBIA Decision is what it did not do: it did not reach the merits, and it did not have jurisdiction to address enrollment action appeals or the reasons that the BIA might have jurisdiction. Given the IBIA's lack of jurisdiction to consider the matter at all (*see* 43 CFR § 4.330(b)(1) (the IBIA "shall not adjudicate (1) Tribal enrollment disputes")), the effect or scope of its order is unclear, and based upon the 2009 BIA Decision, meaningless. Appellant concedes the point as it appealed the 2009 Decision *in the United States District Court*, not with the IBIA.

CONCLUSION

There is no doubt that the Appellant's disenrollment of the Sloan family was a grave and unjust decision. The District Court's Order reinstating the Sloan family must be affirmed.

STATEMENT PURSUANT TO CIRCUIT RULE 29(c)(5)

Neither a party nor a party's counsel authored this brief in whole or in part, nor has any party or any party's counsel, or any other person, contributed money intended to fund the preparation or submission of this brief. This brief was prepared on a *pro bono* basis by counsel for amici.

By: *s/ Zuzana S. Ikels*
Zuzana S. Ikels
As Amicus Curiae

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

I HEREBY CERTIFY that the enclosed principal brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B). The brief has a typeface of 14 points or more and contains 6,776 words as indicated by the word count of the word-processing system used to prepare the brief.

By: *s/ Zuzana S. Ikels*
Zuzana S. Ikels
As Amicus Curiae