

**In The Poarch Band of Creek Indians Tribal Supreme Court**

Gary Evans Colbert et al.  
Appellants

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v.

Case No. SC-16-02

Robert McGhee et al.,  
Appellees

Appeal from Poarch Creek Indians Tribal Court  
(CV-16-47)

Fletcher, C.J.

Introduction

On March 8, 2016, the Tribal Council proposed a constitutional amendment to revise Article I, Section 1. *See* Resolution 2016-026. Article IX, Section 1 of the Tribal Constitution provides, “Election to vote on proposed amendments to this Constitution shall be authorized by resolution of the Tribal Council.” The Tribal Council set August 6, 2016 as the election date.

Appellants sued to enjoin the election on various substantive and procedural grounds on July 19, 2016, four months after the Tribal Council’s resolution and about three weeks before the election date. The grounds for the injunction included:

- (1) violation of Article V, Section 2(I) of the Tribal Constitution due to the allegedly improper participation of a council member in the council deliberations [Petition for Injunction at 4-7];
- (2) violation of Article V, Section 2 of the Tribal Constitution due to the Tribal Council actions allegedly in violation of the Constitution encouraging and allowing supposedly “ineligible members” to vote in the election [Id. at 7-9]; and
- (3) an “abundance of confusion” on the interpretation of Article VIII, Section 2 of the Tribal Constitution, which requires “[a] vote by at least thirty (30) percent of the General Council” to constitute a proper election [Id. at 9-10].

The Tribal Council responded in writing and the trial court heard argument on July 27. Appellants at oral argument primarily sought to compel the Tribal Council to begin disenrollment proceedings against “470” people the Appellants apparently believe are the

“ineligible members” described in the Petition for Injunction. Oral Argument Transcript at 5-15. At oral argument, Appellants articulated an additional claim:

(4) violation of Article I, Section 2 of the Tribal Constitution by the Tribal Council for ordering an election to amend Article I, Section 1 [Oral Argument Transcript at 16].

On the same day, without written opinion, the court denied the motion for an injunction.

The Poarch Band held the election as scheduled on August 6. The amendment passed by a vote of 989 in favor to 420 against, a difference of 569 votes. On August 9, Appellants filed a notice of appeal.

Appellants’ opening brief raised numerous arguments in a sort of shotgun approach:

(1) violation of Article I, Section 1 of the Tribal Constitution in that the constitutional amendment altered the terms of Article I, Section 1 [Appellants’ Brief at 6-7];

(2) violation of Article I, Section 2 by the Tribal Council for ordering an election to amend Article I, Section 1 [Id. at 7-9];

(3) violation of Article IX by the Tribal Council for seeking an amendment that does not “actually amend the Constitution at all” [Id. at 9-11];

(4) violation of Article V, Section 2(I) of the Tribal Constitution due to the allegedly improper participation of a council member in the council deliberations [Id. at 11-12];

(5) violation of Poarch Band tribal code § 34-1-2 [Id. at 13-17];

(6) violation of Article VII, Section 5 of the Tribal Constitution [Id. at 17-19];

(7) violation of the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(2) [Id. at 19-22];

(8) violation of Article IX, Section 3 of the Tribal Constitution by the Tribal Council for allowing “ineligible members” to vote in the election [Id. at 22-23]; and

(9) violation of Poarch Band tribal code § 22-3-6 [Id. at 23].

As is apparent by comparing these two lists, there are several new arguments raised for the first time on appeal, most notably new allegations that the Tribal Council violated Article IX of the Tribal Constitution, the Indian Civil Rights Act, and two provisions in the tribal code.

We have reviewed the materials submitted and the lower court record and AFFIRM the denial of the motion for an injunction.

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## I

We begin by holding that the Poarch Band judiciary has no jurisdiction over the Appellants' claims that the Tribal Council violated Article I, Section 2 by invoking its power under Article IX, Section 1. Article IX, Section 1 grants discretionary authority to the Tribal Council to seek amendment of the Tribal Constitution by referendum vote by enacting a resolution stating as such. Whether the Tribal Council should or should not do so, or what the contents of that resolution should be, are purely political questions best reserved to the Tribal Council alone.

Article I, Section 2 of the Poarch Band of Creek Indians Tribal Constitution provides,

The Poarch Band Indian Tribal Council shall have the sole authority to determine membership of the Poarch Band of Creek Indians. No decree of any Court purporting to determine membership in the Poarch Band of Creek Indians, paternity, or degree of Creek Indian or other blood shall be recognized as determination of membership in the Poarch Band of Creek Indians.

As a general matter, this constitutional command places exclusive decisionmaking authority over tribal membership matters in the hands of the Tribal Council. Tribal membership decisions are therefore political questions that the constitution expressly bars tribal court jurisdiction. Other tribal courts have recognized the political question doctrine as a limit on tribal court authority. *E.g., Kempf v. Snoqualmie Indian Tribe*, 14 NICS App. 1, 12 (Snoqualmie Tribal Court of Appeals 2016) (applying the political question doctrine to “issues where the Snoqualmie people have constitutionally committed the resolution to the unreviewable discretion of the Tribal Council or General Council”). The tribal judiciary has no jurisdiction to review the Tribal Council's decisions under Section 2 whatsoever. Article I, Section 1 provides detailed membership criteria for the Tribal Council to consider in making its membership criteria. Section 2 conclusively bars the tribal judiciary from reviewing those decisions.

Appellants claim that any amendment to the tribe's membership criteria is affirmatively barred by Article I, Section 2, which reserved tribal membership determinations to the Tribal Council. We disagree. Article I, Section 2 certainly grants “sole authority to determine membership” to the Tribal Council. We hold that Section 2 provides that the Tribal Council has exclusive authority to apply the Section 1 membership eligibility criteria in individual cases involving claims to membership. Article IX, Section 1 is a different source of discretionary Tribal Council power to, for example, seek an amendment to the tribal membership eligibility criteria. These two constitutional provisions are not mutually exclusive, as they would have to be in order for Appellants to prevail in this matter.

If the Appellants' theory was correct, that the Tribal Council's exclusive membership determination power is so broad as to preempt the Council's Article IX, Section 1 power, the result would be absurdity, and perhaps even tragedy. Under this expansive theory, the Tribal

Council could enact without review a resolution unilaterally altering the Section 1 tribal membership eligibility criteria to exclude all persons who were born in the month of January or some other similarly unlawful rule. It is certain the Tribal Council has exclusive jurisdiction to make individual membership determinations under Article I, Section 2, but the Tribal Council has no power to alter the eligibility criteria established by Section 1. In fact, the only way to change the eligibility criteria is through the constitutional amendment process initiated under Article IX.

We hold that the Tribal Council was well within its unreviewable discretion to seek an amendment to the membership eligibility criteria.

## II

Appellants' claim that individual members of the Tribal Council violated Article V, Section 2(I) by improperly voting on Resolution 2016-026 likely is not cognizable by the judiciary as a political question. We more directly hold that Appellants have failed to establish a live controversy to assert Section 2(I) violations.

American tribal courts generally, but not always, hold that violations of tribal council procedures by tribal council members are non-cognizable political questions. *E.g.*, *Delgado v. Oneida Business Committee*, 2000 WL 35782584 (Oneida Appeals Commission Trial Court 2000) (holding "a challenge to a vote count made by [the council] in a meeting is a political question on an intra-parliamentary nature"); *Benjamin v. Weyaus*, 2008 WL 6807014 (Mille Lacs Band of Chippewa Indians Court of Appeals 2008); *Leech Lake Band of Ojibwe v. LaRose*, 2007 WL 7561598 (Leech Lake Band of Ojibwe Indians Tribal Court 2007); *Chapman v. Little River Band of Ottawa Indians*, 2008 WL 6928159 (Little River Band of Ottawa Indians Tribal Court 2008). *Contra Nelson v. Initiative Committee to Reduce Navajo Nation Council*, 8 Am. Tribal Law 407, 422-23 (Navajo Nation Supreme Court 2010) (addressing legality of tribal council appropriation). Principles of separation of powers strongly suggest that disciplinary proceedings against tribal council members are "are primarily within the province of the legislative and executive branches of government to conduct unless there is a constitutional delegation of authority to the judicial branch of government." *Benjamin*, 2008 WL 6807014, at \*7. We note that the Tribal Constitution provides a mechanism for the impeachment of sitting Tribal Council members, see Article V, Section 2(K), but no express tribal judiciary authority to enforce Section 2. We also note that there no express provision *barring* tribal court jurisdiction over claims of violations of Section 2, either. While we doubt tribal court jurisdiction over Section 2 claims, we need not resolve this question here and leave this question open for the proper vehicle at a later time.

We instead hold that Appellants have failed to establish that a live controversy exists in alleging violations of Article V, Section 2. The lack of a live controversy necessarily strips the

judiciary of subject matter jurisdiction. The tribal judiciary is a court of limited jurisdiction. The tribal judiciary is independent, but the tribal court's jurisdiction is a creature of the Tribal Council under Article IV, Section 4(K). We parsed through the contours of the tribal judiciary's independence in the *White v. Poarch Band of Creek Indians* trilogy of cases.

Once the Tribal Council has established tribal court jurisdiction, the judicial independence of the judiciary is assured, but there must first be jurisdiction. There is no inherent tribal judicial authority vested in a tribal court provided for in the Tribal Constitution, and jurisdiction exists only through the positive enactments of tribal law created by the Tribal Council: "The courts described in this Title and established or approved by the Tribal Council shall have all authority provided by Tribal law." Poarch Band of Creek Indians Tribal Code § 3-1-3(b). See also § 3-1-3(a) ("The judicial power of the Poarch Band of Creek Indians is vested exclusively in [the] judicial system . . ."). The Tribal Council has broadly granted tribal court jurisdiction over persons, § 4-1-1 (civil) and § 4-1-2 (criminal); property, § 4-1-3, and subject matter, § 4-1-4.

Like virtually every court with limited jurisdiction, the Poarch Band judiciary cannot exercise the judicial power absent either express jurisdictional authority or live controversies, or what the Poarch Band code calls "civil actions." See § 4-1-4 (authorizing jurisdiction over "civil actions"); cf. § 3-1-3(a) (vesting "judicial power" in the judiciary). We find no positive tribal statute authorizing the judiciary to act absent a live controversy, for example, to issue advisory opinions. We therefore hold that plaintiffs must establish that civil actions present a live controversy that is justiciable under tribal law. A civil action that does not constitute a live controversy is either unripe (not yet ready for adjudication) or moot (a live controversy has abated).

Appellants' claim that certain Tribal Council members improperly participated in the legislative process leading up to the August 6 election does not present a live controversy. We note first that the election is concluded. The Tribal Council cites to an Alabama Supreme Court decision, *Water Works and Sewer Board of the City of Birmingham v. Petitioners Alliance*, 824 So.2d 705 (2001), and a Cheyenne River Sioux Tribe appellate court decision, *Ducheneaux v. Cheyenne River Sioux Tribal Election Board*, 2 Am. Tribal Laws 39 (1999). Both cases stand for the proposition that legal challenges to elections are moot once the election is concluded. But tribal courts are not unanimous that an election challenge is moot once the election is concluded. E.g., *Davison v. Mohegan Tribe Election Committee*, 7 Am. Tribal Law 349 (Mohegan Tribal Court 2008). As such, we cannot hold here that all claims of council member improprieties are nonjusticiable.

However, there are other reasons to hold in favor of the Tribal Council. The Tribal Council argues the vote on Resolution 2016-026 would have been the same even if council members who allegedly voted improperly were excluded. The Tribal Council further argues the council members who allegedly acted improperly have been referred to the Ethics Board.

Appellants offer no response. The first fact demonstrates, at least plausibly, the alleged improprieties did no injury to Appellants. The second fact demonstrates the Tribal Council has already exercised its constitutionally delegated authority to respond to any improprieties, likely mooting this issue.

We hold that the claims alleging violations of Article V, Section 2(I) are no longer live controversies and therefore nonjusticiable.

### III

Appellants' claims that the Tribal Council violated Article V, Section 2 and Article IX, Section 3 of the Tribal Constitution by allowing and encouraging tribal members the Appellants claim are "ineligible members" are nonjusticiable political questions. Alternatively, the claims fail to allege a live controversy redressable by the court.

At bottom, Appellants' claim here is that 470 duly enrolled tribal citizens should not have been allowed to vote in the August election. Article VII, Section 1 of the Tribal Constitution guarantees to all tribal members age 18 and over the right to vote in all tribal elections. Appellants' legal claim amounts to the demand that this court disenfranchise currently eligible voters based upon this mere allegation. This we cannot do. As far as this court can discern, the only way to disenfranchise a tribal member is to strip that member of citizenship. As we have already held, the Tribal Council's power to determine tribal membership under Article I, Section 2 is exclusive and not to be exercised by the judiciary at all. As such, this court does not possess the authority to grant the relief requested by Appellants.

### IV

We decline to address claims raised by the Appellants below in the Petition for Injunction or in the Appellants' brief that have not been properly preserved for appeal. We have previously held that appellants who fail to present evidence to support claims before the trial court waive their right to raise those claims again before the appellate court. *McGhee v. Poarch Band of Creek Indians Housing Authority*, No. SC 10-04, at 2 (Poarch Band of Creek Indians Supreme Court 2011). *See also* Poarch Band Tribal Code § 14-1-4 (notice of appeal must contain grounds for appeal).

We hold that all other claims raised by the Appellants not addressed in this opinion have not been adequately preserved for appeal, or are new arguments. They are dismissed.

### Conclusion

At the hearing before Judge Brogden, Appellants stated that their primary goal in initiating this litigation was to force the Tribal Council to initiate review of the “470” so-called “ineligible members,” effectively stopping the election. We agree wholeheartedly with Judge Brogden’s comments during the hearing noting the judiciary can no more instruct the Tribal Council on which political act to pursue than the Governor of Alabama can instruct the state legislature on which laws to enact. *Cf. In re Menefee*, 1999 WL 34986335, at \*2 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court 1999) (“Tribal membership is primarily a political question. Good government remembers that the Court does not involve itself in the political arena. The court does not answer political questions and must limit itself to resolving legal disputes. Political questions should only be answered by the Tribal Council, which is the popularly-elected representative body of the community, or by the tribal members themselves.”). Appellants apparently disagree with the road taken by the Tribal Council, but that is a political disagreement, not a legal one cognizable by the judiciary.

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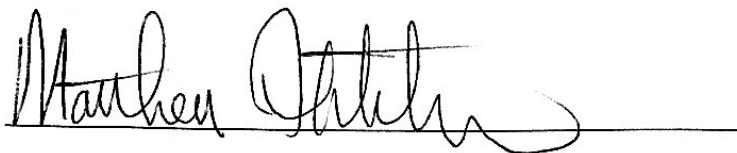
Chief Justice Matthew L.M. Fletcher, for the Court.

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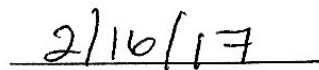
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Justices Clint Daughtrey and Trent Crable concur.

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Chief Justice Matthew L.M. Fletcher, for the Court.

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Date

Justices Clint Daughtrey and Trent Crable concur.