CASE NO. 13-55552

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD D. ALLEN JR., RAYMOND BOZIGIAN, ALEXANDRA M. CASTOR, KEITH DENVER, MILTON DENVER, JESSICA FLOREZ, ANTHONY FREEMAN, MIKKI A. GRABER, MIKE HACKMAN, JOSEPH HARRIS, NIKKI D. HARRIS, GINA HOWARD, BEN JOHNSON, PAUL JOHNSON, BONNIE J. KING, BRITTNEY LUTTERS, CHERYL MAJEL, JULIEANNE MENDOZA, LUANNE MORO, KALCIE ONTIVEROS, KIRSTEN ONTIVEROS, VIKKI L. OXLEY, JOEY PINK, MATTHEW PINK, JOHN RANDOLPH, LILLIAN VANCE, and MARIA J. VIVANCO

Plaintiffs-Appellants

vs.

ROBERT H. SMITH, LEROY H. MIRANDA JR., KILMA S. LATTIN, THERESA J. NIETO, and DION PEREZ

Defendants-Appellees

APPELLANTS' OPENING BRIEF

Appeal from the United States District Court
for the Southern District of California
No. 3:12-cv-01668-WQH-KSC
(Honorable William Q. Hayes)

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I. JURISDICTION

Plaintiffs appeal the dismissal of their Complaint[1] alleging conspiracy to interfere with civil rights (in violation of 42 U.S.C. § 1985(3)), deprivation of equal rights under the law (in violation of 42 U.S.C. § 1981), and other common law causes of action. The District Court had jurisdiction over Plaintiffs' federal law claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a), and supplemental jurisdiction over Plaintiffs' common law claims pursuant to 28 U.S.C. § 1367. By order dated March 11, 2013, the District Court dismissed Plaintiffs' Complaint on the basis of tribal sovereign immunity. ER 1-18. Plaintiffs timely filed their Notice of Appeal on April 2, 2013. ER 19-43. This Court has jurisdiction to review the final decision of the District Court under 28 U.S.C. § 1291.

II. ISSUES PRESENTED

1. Does the district court have subject-matter jurisdiction in this case?

2. Does tribal sovereign immunity extend to Defendants who were incapable of acting in their official capacity because certain of them had criminal convictions and were barred by the tribal constitution from serving as tribal officials?

[1] "Complaint" refers to Plaintiffs' original complaint, filed on July 3, 2012.

3. Does tribal sovereign immunity extend to Defendants who acted outside the scope of their authority in order to retaliate and discriminate against Plaintiffs for personal reasons?

4. Is Plaintiffs' suit fundamentally one against the Indian tribe when the Indian tribe is not a named defendant and Plaintiffs seek damages from Defendants only?

5. Does the doctrine of *Ex parte Young* apply where Plaintiffs seek injunctive relief to prohibit Defendants from violating federal law?

6. Should Plaintiffs have been granted leave to amend the Complaint?

III. STATEMENT OF THE CASE

A. Nature of the Case

This case involves the egregious deprivation of Plaintiffs' rights and properties by Defendants, certain members on the Executive Committee of the Pala Band of Mission Indians ("Pala" or the "Tribe").[2] Defendants, under the guise of acting in their capacity as Executive Committee members, have disenrolled Plaintiffs and their relatives from Pala in order to retaliate against them for

[2] Defendants are Robert H. Smith (Chairman), Leroy H. Miranda, Jr. (Vice Chairman), Kilma S. Lattin (Secretary), Theresa J. Nieto (Treasurer), and Dion Perez (Council member). One of the members of the Executive Committee, Annalee Trujillo, is not a named defendant because she was excluded by the others from participating in the Executive Committee meetings regarding the disenrollments. ER 312¶55. Annalee Trujillo was subsequently disenrolled from the Tribe by the Defendants. ER 312¶55.

personal reasons. In doing so, Defendants caused Plaintiffs to lose monetary distributions; medical, welfare and educational benefits; as well as their culture, identity, and heritage.

Plaintiffs are Native American Indians of different ancestral lineage within Pala who posed a threat to Defendants because they constituted a large voting block of Cupeños within Pala and sought accountability and transparency from Defendants with respect to the Tribe's financial dealings and other matters. The friction between Plaintiffs and Defendants escalated after one of Plaintiffs' family members, King Freeman, circulated a petition for a special meeting to discuss the removal of one of the Defendants from office for engaging in criminal misconduct and violating his parole. Thereafter, in retaliation, Defendants disenrolled Freeman's three children and five of his other relatives, on the grounds that they did not have sufficient Pala Indian blood to be members of the Tribe because their ancestor, Margarita Britten, was not a full-blooded Pala Indian. Before disenrolling them, however, Defendants cleverly ensured that these disenrollees would not be able to seek recourse from tribal courts by withdrawing Pala from the Intertribal Court of Southern California. Six of the Plaintiffs are among these eight disenrollees.

After the disenrollments of these eight Pala members, a flyer was circulated within the Tribe warning Pala members about the Executive Committee turning the

Tribe into a dictatorship and questioning why only certain descendants of Margarita Britten were disenrolled but not others. Believing that the flyer was written by King Freeman, and in further retaliation, Defendants subsequently disenrolled 154 of Freeman's other relatives. Twenty-one of the Plaintiffs are among those who were disenrolled by Defendants in this second wave.

By disenrolling Freeman's relatives – the descendants of Margarita Britten – Defendants prevented them from petitioning and voting in Tribal elections, prevented them from exposing their corrupt practices, and retained their share of monetary distribution from the Tribe's casino operations for themselves and their own families.

Although Defendants purportedly took these actions in their capacity as Executive Committee officials, Defendants were in fact incapable of serving in such capacity because two of the members on the six-member Executive Committee were prohibited by Pala's Constitution from serving in their positions due to their criminal records. Additionally, Defendants had no authority to disenroll Plaintiffs on the basis of Margarita Britten's blood degree because Pala's General Council – the Tribe's main governing body – previously voted on and passed a resolution determining that she was a full-blooded Pala Indian. Further, in disenrolling Plaintiffs, Defendants violated a final decision by the U.S. Department of the Interior issued in 1989, in which it had concluded that Margarita

Britten had 4/4 degree Pala Indian blood and required that her descendants with at least 1/16th degree Pala Indian blood be enrolled as members. Because Defendants did not act in their official capacity or within the scope of their authority when they used the mask of blood quantum as an excuse to retaliate and discriminate against Plaintiffs, the district court has jurisdiction to adjudicate this action involving Defendants' personal violations of Plaintiffs' federal rights.

B. Course of Proceedings

On July 3, 2012, Plaintiffs filed their Complaint against Defendants Robert H. Smith, Leroy Miranda, Jr., Kilma S. Lattin, Theresa J. Nieto and Dion Perez alleging (1) conspiracy to interfere with civil rights, in violation of 42 U.S.C. § 1985(3); (2) deprivation of equal rights under the law, in violation of 42 U.S.C. § 1981; (3) conversion; (4) tortious interference with prospective economic advantage; (5) defamation; and (6) civil conspiracy. ER 352-57¶¶158-95.

On August 29, 2012, Defendants filed a motion to dismiss the Complaint.[3] Defendants' motion to dismiss included a "facial" challenge to subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). On October 15, 2012, Plaintiffs filed an opposition to Defendants' motion to dismiss. In support of their opposition, Plaintiffs also filed a request for judicial notice and a declaration. ER 89-296. On

[3] The next day, on August 30, 2012, Defendants filed an amended motion to dismiss to correct formatting errors in their motion to dismiss. Defendants' amended motion to dismiss will be referred herein simply as "motion to dismiss."

October 29, 2012, Defendants filed their reply to Plaintiffs' opposition, and Defendants also opposed Plaintiffs' request for judicial notice. ER 77-88.[4]

On March 1, 2013, the District Court held a hearing on Defendants' motion to dismiss. ER 44-76. On March 11, 2013, the District Court issued an order dismissing the case on the basis that Pala's tribal sovereign immunity shielded Defendants from Plaintiffs' lawsuit. ER 1-18. The District Court did not rule on Plaintiffs' request for judicial notice. ER 1-18.

IV. STATEMENT OF FACTS

A. Background to Pala

The Pala Band of Mission Indians is a Native American Indian tribe located in San Diego County. ER 318¶70. Pala was formed in the early 1900s, after U.S. officials forcibly removed the Cupeño Indians from their ancestral homeland onto the Pala Indian Reservation and insisted that the Cupeño tribe and the Luiseño tribe meld into one. ER 300¶2; 314¶61. Margarita Britten, a Cupeño, was one of the survivors of the forced march to the Pala Indian Reservation, also known as the

[4] On December 17, 2012, Plaintiffs also filed a notice of recent authorities in support of Plaintiffs' opposition to Defendants' motion to dismiss. On December 19, 2012, Defendants filed an opposition to Plaintiffs' notice of recent authorities. On February 19, 2013, Plaintiffs filed a notice of additional recent authorities. On February 22, 2013, Defendants also opposed Plaintiffs' notice of additional recent authorities.

"Cupeño Trail of Tears." ER 314¶61. Margarita Britten had seven children and she became a revered elder at Pala. ER 300¶2.[5]

In 1960, Pala formally organized by adopting its Articles of Association. ER 318¶72; 125. Under Pala's Articles of Association, its General Council – consisting of all adult Pala members eighteen years and older – was the main governing body of the Tribe. ER 301¶3; 120. The General Council would elect a six-member Executive Committee (including a chairman, vice chairman, treasurer, secretary and two council persons) with certain administrative powers and duties. ER 318¶71; 120, 122-23.

Pala's Articles of Association defined Pala members, in relevant part, as (1) "those persons whose names appear on the Pala Allotment Rolls as approved by the Secretary of Interior on … November 3, 1913," and (2) "[a]ll living descendants of persons on [these] Allotment Rolls … provided that such descendants have one-sixteenth (1/16) or more degree of Indian blood of the Band."[6] ER 318-19¶72; 119. As one of the original Pala members, Margarita Britten's name appears on the November 3, 1913 Pala Allotment Rolls, where she is identified as a "4/4" degree (or a full-blooded) Pala Indian. ER 301¶3.

[5] Margarita Britten's last name has also been spelled "Brittain." ER 300¶1.

[6] "Indian blood of the Band" refers to the blood of the Cupeños, Luiseños and others who originally formed the Pala Band. ER 301¶3. "Indian blood of the Band" shall be referred to as "Pala Indian Blood" herein.

Consequently, her descendants with at least 1/16th degree of Pala Indian Blood were entitled to be Pala members.

Under Pala's Articles of Association, any ordinance regarding tribal membership must be enacted by the General Council. ER 122. In 1961, Pala's General Council adopted an enrollment ordinance regarding the enrollment of members into the Tribe. Under this original enrollment ordinance, any person whose application for Pala membership was rejected by Pala's Executive Committee[7] could appeal to the U.S. Secretary of the Interior, whose decision on appeal shall be "final and conclusive." ER 319¶74; 140.

In 1984, after it was discovered that certain unauthorized handwritten changes had been made to Margarita Britten's blood degree in the Allotment Rolls, Pala's General Council voted on and approved a resolution to correct Margarita Britten's blood degree to 4/4 Pala Indian. ER 304-05¶11; 334¶112.

Further, in 1989, in connection with the denial of Pala membership to certain descendants of Margarita Britten, the Department of the Interior, pursuant to its authority under federal law and Pala's original enrollment ordinance, issued a "final" decision in which it determined that Margarita Britten was a full-blooded Indian. ER 304-05¶11; 145. In reaching this final decision, the Department of the Interior conducted an extensive investigation into Margarita Britten's blood

[7] Pala did not have a separate Enrollment Committee.

degree, including reviewing sworn statements, government records, family history cards, and other evidence. ER 334-35¶114; 143-48. Pala did not challenge or appeal the Department's decision. ER 335¶116.

Consistent with Pala's tribal resolution and the Department of the Interior's decision, Pala has confirmed that Margarita Britten was a full-blooded Indian. For example, in response to an October 1995 request for verification of blood quantum by the Vice Chairperson of the Agua Caliente Band of Cahuilla Indians, Pala's then-Secretary, Stanley McGarr, confirmed that Margarita Britten had "4/4 Degree Indian Blood (PAR)" and that "[t]he Pala Allotment Roll (PAR) approved by the Secretary of Interior November 3, 1913 and the Pala Census (PC) for the year 1919 are acknowledge by the Pala Band of Mission Indian Tribe to be true and the Tribe agrees with the Degree of Indian Blood in these records." ER 336¶118; 151-52. In a letter dated November 15, 1995 to Agua Caliente's Vice Chairperson, Defendant/Chairman Smith also acknowledged that Margarita Britten was a full-blooded Indian by confirming that her daughter, Casilda Welmas, possessed 1/2 degree Indian blood (since Margarita Britten, a full-blooded Indian, married a non-Indian, her daughter necessarily had 1/2 degree Indian blood). ER 335-36¶117; 153.

B. Pala's Governance and Its Participation in Indian Gaming

In 1997, Pala's Articles of Association were replaced with a Constitution ("Constitution"). Consistent with the requirements of the Indian Reorganization Act of 1934, Pala's Constitution, on its face, required that it be approved by "a majority vote of the voters voting in a duly-called elections [sic]" to be valid. ER 320¶79, 165. However, Pala's Constitution was approved by a mere 27 votes in a special meeting of the General Council, when at least 300 votes by adult Pala members at an election were required. ER 320-21¶80.

Pala's Constitution, like its Articles of Association, provided that its General Council was the governing body of the Tribe and adopted the same membership definition. ER 156; 318-19¶72. The Constitution also provided that "[a]ll enactments of the Tribe adopted before the effective date of th[e] constitution shall continue in effect." ER 164. The Constitution further required Pala to provide "all persons with due process and equal protection of the law required by the Indian Civil Rights Act." ER 305¶14; 164. The Constitution additionally provided that, although the Executive Committee may from time to time amend and/or replace its existing Enrollment Ordinance, such ordinance must be in compliance with the Constitution. ER 305¶14; 157. In particular, the Constitution specified that procedures for disenrollment, if any, "shall provide that the member receives due

process and equal protection as required by the Indian Civil Rights Act." ER 305-06¶14; 156.[8]

In 2001, as Pala constructed a casino and became wealthy thereby, Chairman/Defendant Robert Smith ("Smith") sought to secure his leadership position, control Pala members, and limit the oversight of his conduct. ER 315¶64. During the 2001 Pala elections, King Freeman ("Freeman"), a Britten Descendant who was a former Pala Chairman and a personal opponent of Defendant Smith, was elected Vice Chairman; however, Smith disallowed a handful of votes and declared Defendant Leroy Miranda ("Miranda") the winner. ER 322¶84. Although Miranda was not qualified to serve on the Executive Committee pursuant to Pala's Constitution because he had a criminal record, Miranda nonetheless became Pala's Vice Chairman as a result of Smith's conduct. ER 339-40¶¶127-28. That year, Defendant Theresa J. Nieto ("Nieto") also became Pala's Treasurer, and Defendant Dion Perez ("Perez") became a Council Member. ER 322¶84. In 2005, Defendant Kilma Lattin ("Lattin") also became Secretary. ER 322¶84.

Miranda, Nieto, Lattin and Perez were each beholden to and controlled by Chairman/Defendant Smith. Not only did Smith secure Miranda's position as Vice

[8] The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304, substantially tracks the precise language of the Bill of Rights portion of the U.S. Constitution, thereby acting as a conduit to transmit federal constitutional protections to Indians. Section 1302(8) of the Indian Civil Rights Act provides, in part, that Indian tribes shall not deprive any person of liberty or property without due process. *See Randall v. Yakima Nation Tribal Court*, 841 F.3d 897, 899-900 (9th Cir. 1988).

Chairman, but when several Pala members in 2010 raised the fact that Secretary Lattin should not have been allowed to run for office because he had a felony criminal record, Smith banished them from tribal meetings and withheld their per capita distributions for a year. ER 313¶59. These members later sought relief from the Intertribal Court of Southern California ("Intertribal Court"), of which Pala was a participant tribe. ER 229-233. Furthermore, Chairman Smith had so much control over Treasurer Nieto that, even though Smith is evidently not a blood relative of Treasurer Nieto, public records indicate that he apparently used her last name as an alias, going by "Robert Nieto, Bob Nieto, and Rob Nieto." ER 313¶59. Due to his control and influence, Smith was able to cause the other Defendants to comply with his wishes. ER 313¶59.

As Pala Executive Committee members, Smith and the other Defendants sought to dominate the Tribe and control the wealth it derived from the Pala Casino. ER 322¶¶83-4. In allowing tribes to engage in Indian gaming, Congress expressly wanted "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." ER 315¶66. To that end, Pala had to submit a plan for allocating its gaming revenue to the Bureau of Indian Affairs ("BIA"), an agency within the Department of the Interior responsible for the administration and management of Indian affairs. ER 315¶66. Under Pala's allocation plan, 60% of the Tribe's gaming revenue was required to be distributed to individual members

as "per capita" payments, and 15% to medical, educational and other benefits for Pala members' general welfare. ER 315¶66. Because Pala's casino money was required to be distributed to its members, the fewer the members, the more money the remaining members will receive. ER 313¶57; 315-16¶67.

To ensure their dominance over the Tribe, Defendants unilaterally revised Pala's original enrollment ordinance in 2005 and in 2009 to make themselves the sole arbiter of enrollment decisions. ER 324¶88. Whereas the Department of the Interior previously had the "final and conclusive" decision regarding Pala enrollments under Pala's original enrollment ordinance, Defendants revised Pala's enrollment ordinance so that the BIA could only make a "recommendation" to the Executive Committee to uphold or change its enrollment decision but could not mandate it to do so. ER 323¶86. This change to Pala's original enrollment ordinance was important to Defendants because, as the wealth of the Tribe began to breed greed and corruption, Pala members – particularly the Britten Descendants – began questioning Defendants' conduct. ER 301¶4. The Britten Descendants, who constituted a large voting block of Cupeños within the General Council, had raised questions concerning Defendants' transactions on behalf of the Tribe, Defendants' personal use of Tribal assets, and the propriety of Tribal elections (including whether Smith had allowed non-members to vote in Tribal elections, paid for votes, and changed or destroyed ballots). ER 301¶4. In 2003, some

Britten Descendants also petitioned for a General Council meeting to discuss certain inappropriate conduct by Smith at the Pala Casino; however, Smith cancelled the meeting, declaring the petition to be illegal. ER 301¶4; 178.

C. Defendants Disenrolled Plaintiffs Without Basis

In March 2011, the friction between Defendants and the Britten Descendants reached a boiling point after King Freeman ("Freeman"), a Britten Descendant, petitioned for a special meeting to discuss the recall of Vice Chairman Miranda, after he learned that Miranda had been convicted of soliciting a male prostitute and violated his parole. ER 326¶93. However, Defendants prevented any General Council meeting from being held on the issue, claiming that many of those who signed the petition subsequently requested that their names be removed from the petition. ER 327¶97; ER 235. Nonetheless, Freeman's efforts to challenge the Executive Committee greatly upset Pala's Chairman, Defendant Smith. During a heated General Council meeting, Smith said to Freeman, "your kids are off the rolls." ER 327¶98.

Shortly after Freeman's petition attempt and confrontation with Smith, Freeman's three children and five other relatives were disenrolled by Defendants on June 1, 2011, under the guise that they did not have sufficient Pala Indian blood to be members because their ancestor, Margarita Britten, was not a full-blooded Indian. ER 302¶5. The Defendants' disenrollment of these members terminated

their right to petition and vote in Tribal elections, cut off their right to Tribal monetary distributions and benefits, and stripped them of their culture and heritage. ER 300¶1; 327¶100. Although Pala's Constitution requires that members be afforded due process under the Indian Civil Rights Act in connection with any disenrollments, they received no notice that they were being considered for disenrollment and no opportunity to present evidence or be heard. Instead, they were summarily and capriciously disenrolled. Although Defendants attempted to legitimize their action by telling other General Council members that these disenrollees had received due process, Defendants knew that no due process was given and that any appeal was only illusory because Defendants had relegated the BIA to an advisory role. ER 305¶14; 306¶15. Further, to ensure that the disenrollees would have no recourse from tribal courts, Defendants hastily withdrew Pala from the Intertribal Court of Southern California shortly before they began the disenrollments. ER 306¶15.[9]

After the disenrollment of the eight members from the Tribe, a flyer condemning Defendants' unjustified actions was circulated. The flyer warned Tribal members that the Executive Committee told "outright lies" about the disenrollments, that no one was safe from disenrollments, and that

[9] Some of the disenrollees, including some of the Plaintiffs in this case, have also sought relief from the Department of the Interior. However, on June 12, 2013, Kevin K. Washburn, Assistant Secretary-Indian Affairs, concluded that the Department of the Interior had no authority to determine the disenrollment issue.

Chairman/Defendant Smith had "turned this 'General Council' tribe into a dictatorship." ER 329¶103; 237. The flyer further questioned why the Executive Committee disenrolled only eight of the descendants of Margarita Britten but not the rest of the family who were 1/16th descendants. ER 329¶103; 237. Angered by the flyer, which Smith believed was written by King Freeman, Smith issued a letter on September 30, 2011 to all adult members of the General Council threatening: "[King Freeman] wants the rest of his family who are 1/l6 descendants, disenrolled!!! Don't take my word for it, see his flyer!!!" ER 330-31¶104; 239.

On February 1, 2012, Defendants carried out Smith's threat to disenroll other descendants of Margarita Britten by removing 154 more members from the Tribe for failing to meet the blood quantum requirement. ER 332¶106. In doing so, Defendants disenrolled approximately 15% of the Tribe. ER 332¶106. Plaintiffs are some of the members who were disenrolled by Defendants on June 1, 2011, and February 1, 2012.

D. Defendants Ignored the BIA's Recommendations and Prevented Pala's General Council from Considering the Disenrollment Issue

Soon after these disenrollments, a petition was circulated among members of Pala's General Council for a special meeting to discuss Defendants' disenrollment of Plaintiffs and other descendants of Margarita Britten. ER 333¶109; 250-58. In

response, Chairman/Defendant Smith issued a letter to Tribal members claiming that the "petition is circulating under misleading pretenses" and that "[t]he merits of this petition are false." ER 333¶110; 248. Although the petition garnered enough support for a special meeting, Defendants nonetheless rejected the petition and refused to call a meeting, claiming that "it violates the Pala Constitution and Enrollment Ordinance." ER 333¶110; 262.

On February 24, 2012, after the first eight Britten Descendants who were disenrolled on June 1, 2012 had appealed to the BIA, the BIA recommended to Defendants that these individuals remain enrolled in the Tribe because "***it has been proven that [they] possess the required degree of Indian blood***." ER 343¶136; 243. On June 7, 2012, pursuant to an appeal filed by 53 of the 154 Britten Descendants who were disenrolled on February 1, 2012, the BIA also recommended that they remain enrolled with the Band, as "***there was no evidence provided to support the disenrollment of these individuals***." ER 344¶138; 245. Nonetheless, and despite the fact that Pala's 2009 revised enrollment ordinance required Defendants to issue a final decision only after receiving the BIA's recommendation, Defendants had already proclaimed these disenrollments to be "final." ER 344¶139.

Defendants' disenrollment of Plaintiffs and other Britten Descendants benefited themselves personally. Defendants stood to gain monetarily since a

reduction in Pala's membership meant that more money would be distributed to themselves and their families. ER 313¶57. In addition, Defendants would be able to continue their control over the Tribe and to enter into questionable financial transactions without challenge to their authority or scrutiny by the Britten Descendants. ER 313¶57. Further, by disenrolling Plaintiffs and other Britten Descendants, Defendants eliminated a significant number of Cupeños from Pala, thus settling century old scores between the Cupeños and Luiseños, whom they believed should have complete control over the tribal lands because they were there first. ER 313¶58. Tellingly, although Pala's Executive Committee was asked to inquire into blood degrees of other Pala members, including the blood degree of an ancestor of Vice Chairman Miranda, whose grandfather was 4/4 Yaqui (which is not considered Pala blood), the Executive Committee has ignored the request, demonstrating that the Britten Descendants were singled out for disenrollment. ER347¶146.

Because of the tyrannical, unjust and illegal actions of Defendants, Plaintiffs and other Britten Descendants who have been disenrolled have ceased receiving their per capita distributions from the Tribe, have lost or are at risk of losing their homes, have lost their health insurance and medical care, and are no longer eligible for scholarships and tuition assistance programs. ER 300¶1. Trust accounts for Plaintiffs' minor children, many of which contain over half a million dollars per

account, are believed to be extinguished. ER 300¶1. Plaintiffs will also suffer the intangible but significant loss of cultural identity, heritage, and Indian citizenship through this paper "genocide" committed by Defendants. ER 300¶1. Moreover, Plaintiffs can no longer be buried with their ancestors and family in the Pala cemetery. The profound and devastating impact of the disenrollments financially, psychologically, and socially cannot be underemphasized. ER 300¶1. Due to the Defendants' wrongful conduct, the Cupeños' Trail of Tears continues. ER 308¶19.

V. STANDARD OF REVIEW

A district court's determination that it lacks subject matter jurisdiction due to tribal sovereign immunity is reviewed *de novo*. *See Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1082 (9th Cir. 2013). In reviewing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Court must accept the allegations in the Plaintiffs' Complaint as true and draw all reasonable inferences in Plaintiffs' favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). In addition, the Court can consider the full text of materials incorporated into the Complaint, relied on in the Complaint, contents of which are included in the Complaint, or that pertain to matters of public record. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

VI. SUMMARY OF ARGUMENT

This case concerns individuals who, under the guise of acting in their capacity as tribal officials, maliciously disenrolled Plaintiffs from the tribe to which they are biologically, culturally and spiritually connected, and who deprived Plaintiffs of certain rights and properties thereby. Pala, the Indian tribe, is not a named defendant in this case. Only certain individuals on Pala's Executive Committee who directly caused injury to Plaintiffs for personal reasons are named defendants.

As alleged in the Complaint, although Defendants masked their conduct as official action pertaining to tribal membership, Defendants' acts against Plaintiffs were in actuality not at all about who should be a Pala member. Rather, Defendants' acts arose from their desire to stay in power, greed, their desire to prevent any investigation into their financial dealings, and personal retaliatory and racial animus against Plaintiffs – Cupeños from another family line who posed a threat to Defendants' authority and who sought transparency from them regarding their financial transactions.

Although Indian tribes are protected from suit based on sovereign immunity, *Maxwell*, 708 F.3d at 1086, "officials and agents of an Indian tribe do not have the same immunity as the tribe itself." *Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989). Instead, tribal officials receive the protection of the tribe's sovereign

immunity only when they "act[] in their representative capacity and within the scope of their authority." *Id.*; *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981) (same); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1270 (9th Cir. 1991) ("When [tribal] officials act beyond their authority, they lose their entitlement to the immunity of the sovereign"). *See also Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1051 (11th Cir. 1995) (individual tribal officials were subject to suit given allegation that they acted beyond their authority).

Here, Defendants were incapable of acting in their official capacity with respect to Plaintiffs' disenrollments because the Executive Committee was not properly constituted. Specifically, two of the members on the Executive Committee were prohibited by Pala's Constitution from serving as tribal officials due to their criminal records. In addition, Defendants had no authority to disenroll Plaintiffs because Pala had passed a resolution in 1984 determining that Margarita Britten was a full-blooded Indian, and the Department of the Interior had issued a "final" decision in 1989 in which it also concluded that Margarita Britten was a 4/4 Pala Indian. Further, in disenrolling Plaintiffs, Defendants not only failed to provide Plaintiffs with the due process required under Pala's Constitution, but they failed to even follow the proper disenrollment procedures.

Moreover, demonstrating that Defendants' conduct had nothing to do with the legitimate exercise of their authority as tribal officials, Defendants hastily caused Pala to withdraw from the Intertribal Court shortly before beginning their disenrollments to prevent any oversight of their wrongful conduct. Defendants also misrepresented facts to Pala's General Council regarding Plaintiffs' disenrollments, and they refused to allow Pala's General Council to hold a meeting to discuss the disenrollments, even though a petition with enough signatures calling for the meeting was obtained.

Accordingly, Defendants did not act in their official capacity or within the scope of their authority regarding Plaintiffs' disenrollments. Defendants are therefore subject to personal liability with respect to their conduct violating Plaintiffs' rights under applicable federal law.

VII. ARGUMENT

A. The District Court Has Subject-Matter Jurisdiction Over This Case Concerning Defendants' Personal Violations of Plaintiffs' Federal Rights

The district court has subject-matter jurisdiction over this case because the crux of this case is about Defendants' personal infringement of Plaintiffs' federal rights. Although Defendants attempted to hide under the cover of sovereign immunity by masking their wrongful conduct as one involving tribal membership, this case in actuality is ***not*** about Pala's right to define its membership. As set

forth more fully in the Complaint, Pala had defined its membership. Plaintiffs were included within Pala's membership definition and were rightfully enrolled. There is no question that Plaintiffs' ancestor, Margarita Britten, was a full-blooded Indian because the Tribe itself, as well as the U.S. Department of the Interior, previously concluded that she was a full-blooded Indian. However, in deliberate disregard of all laws, Defendants unilaterally proclaimed that Margarita Britten was not a full-blooded Indian in order to disenroll Plaintiffs and other Britten Descendants from the Tribe. In a cruel twist of irony, Defendants now contend that the Tribe's sovereign immunity shields them from being held liable in this case, even though their actions were unauthorized by the Tribe and they had in fact subverted the will of the Tribe by taking actions contrary to a resolution it had passed.

The facts here are easily distinguished from those in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). In *Santa Clara Pueblo,* a female member of the Santa Clara Pueblo tribe and her daughter brought an action claiming that an ordinance of the tribe denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe, was discriminatory and constituted a violation the Indian Civil Rights Act. *Id*. at 111. There, plaintiffs sought enrollment ***into*** the tribe by challenging the tribe's

ordinance defining its membership criteria. In addressing the tribe's right to define its membership, the Supreme Court stated that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," and it held that sovereign immunity applied to the tribe. *Id*. at 72.

Unlike *Santa Clara Pueblo*, this case is not about Pala's right to define its membership. Indeed, Pala's membership definition has not changed since it adopted its Articles of Association in 1960, and Plaintiffs were enrolled as Pala members. Contrary to *Santa Clara Pueblo*, which involved a ***prospective*** member seeking enrollment into an Indian tribe, this case involves disenrollment of ***existing*** members, which is different. *See Cahto Tribe of the Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1230 (9th Cir. 2013) (noting that enrollment and disenrollment are different; whereas the word "enroll" means "to insert, register, enter in a list, catalog, or roll," the word "disenroll" means "to release … from membership in an organization"). Moreover, the purported reason for Plaintiffs' disenrollments – that their ancestor, Margarita Britten, was not a full-blooded Indian – was wholly invalid, as this issue had long been settled by both Pala and the U.S. government. *See* ER 304-35¶11.[10]

[10] In addition, *Santa Clara Pueblo*'s concern that sovereign immunity was necessary to protect "'financially disadvantaged'" Indian tribes from lawsuits has no relevance here. 436 U.S. at 64. Since *Santa Clara Pueblo*, the proliferation of

In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), *cert. denied*, 519 U.S. 1041 (1996), where plaintiffs were removed from tribal rolls and banished from the Indian reservation, the Second Circuit reversed the district court's dismissal for lack of jurisdiction, noting: "[W]e decline … to equate the membership ordinance of the Santa Clara Pueblo, which had general, ***prospective*** application, with action taken by members of the Tonawanda Band Council of Chiefs . . .." *Id.* at 888 (emphasis added). Indeed, *Poodry* stated that the argument that an Indian tribe possesses complete and absolute authority to determine all questions of its membership "simply goes too far," since the question of whether federal law imposes limits on tribal authority to determine issues of membership was not resolved by *Santa Clara Pueblo*. *Id.* Because *Santa Clara Pueblo* only pertains to enrollments – not disenrollments – it is inapplicable to this case.[11]

Additionally, unlike *Santa Clara Pueblo*, this case does not involve purely internal tribal matter because the U.S. Department of the Interior ("Department"), pursuant to its federal powers, had issued a final decision in 1989 regarding the

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Indian casinos has enabled tribes to accumulate vast amounts of wealth and power, creating an incentive for corrupt tribal leaders to disenroll rightful members. Indeed, it is no coincidence that Indian disenrollment is a fairly recent phenomenon that has largely occurred in tribes involved in the casino business. ER 350-51¶156.

[11] Other cases, like *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005), are also inapposite because they involve plaintiffs who were seeking to become members in an Indian tribe.

blood quantum of Margarita Britten ("1989 Decision") and had ordered that her descendants with at least 1/16th degree Pala Indian Blood be enrolled in the Tribe. ER 334-35¶114. Because the disenrollment of the Plaintiffs based on Margarita Britten's blood degree involves a violation of the Department's 1989 Decision, this matter is inherently one arising under federal law and requires adjudication by a federal court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 850, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985) (to invoke a federal court's jurisdiction, it is not essential that plaintiffs base their claim on a federal statute or provision of the constitution, as long as they assert a claim "arising under" federal law).

Ultimately, this case does not fit under the *Santa Clara Pueblo* framework because the case is inherently not about tribal membership. Instead, it is about certain individuals who, under the ***guise*** of acting in their official capacity, used disenrollment as an excuse to retaliate and discriminate against Plaintiffs and other Britten Descendants – Cupeños who posed a threat to their power. Rather than, for example, burning up their automobiles to avenge their personal vendetta, Defendants purported to act in their official capacity and used a different method –

disenrollment – in order to evade liability through the mechanism of sovereign immunity.[12]

The timing of Defendants' actions and the factual circumstances surrounding their conduct in this case plainly demonstrate that Defendants acted in their individual capacity with respect to the disenrollment of the Plaintiffs. *See, e.g.*, *Burrell v. Armijo*, 456 F.3d 1159, 1162-63, 1174 (10th Cir. 2006), *cert. denied*, 549 U.S. 1167 (2007) (holding that tribal officials who discriminated against plaintiffs had acted outside their authority and were not entitled to sovereign immunity). Even assuming that Defendants were acting in their official capacity, *Santa Clara Pueblo* recognizes that sovereign immunity protects only the tribe, not tribal officials. *Id.* at 59 ("As an officer of Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit."). To the extent that *Santa Clara Pueblo* requires the Court to uphold a Tribe's right to define its membership, the Court must void the Defendants' wrongful conduct, because Pala has already addressed this issue by voting on and passing a resolution in February 1984 deeming Margarita Britten a full-blooded Pala Indian.

[12] Notably, the Supreme Court has stated that "there are reasons to doubt the wisdom of perpetuating the tribal sovereign immunity doctrine," which "developed almost by accident." *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 986-87, 53 U.S. 751, 756-57, 140 L. Ed. 2d 981 (1998).

As further discussed below, Defendants cannot properly don an "official capacity" mask here because the Executive Committee was not properly constituted and they acted outside the scope of their authority. As such, this case is inherently a private legal dispute involving federal claims, over which the district court has jurisdiction. Indeed, Defendants and Plaintiffs, as Native American Indians, are also U.S. citizens[13] and are therefore subject to U.S. laws. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960) ("a general statute in terms applying to all persons includes Indians and their property interests"); *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) ("federal laws generally applicable throughout the United States apply with equal force to Indians on reservations").[14] Accordingly, the district court can exercise jurisdiction over Defendants for infringing on Plaintiffs' federal rights. *See, e.g.*, *Evans*, 869 F.2d at 1345, 1348 (reversing dismissal of civil rights claims against defendants because the district court erroneously concluded that defendants were acting in their official capacities); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006),

[13] *See, e.g.*, 8 U.S.C. § 1401(b) (extending U.S. citizenship to Indians).

[14] *See also United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992) ("Tribal immunity does not extend to the individual members of the tribe"); *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 173, 97 S. Ct. 2616, 53 L. Ed. 667 (1977) ("the successful assertion of tribal sovereign immunity … does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction").

cert. denied, 549 U.S. 1231 (2007) (finding district court erred in dismissing 42 U.S.C. § 1985 and § 1981 claims against individual defendants in lawsuit brought by Indian casino employee for retaliatory termination); *Burrell*, 456 F.3d 1159 (remanding claims to district court for consideration on merits of plaintiffs' § 1985 and § 1981 claims against tribal officers).

B. Defendants Are Not Protected by Pala's Sovereign Immunity Because They Failed to Act in Their Official Capacity.

The District Court held that Defendants had acted in their official capacity, and were thus protected by Pala's sovereign immunity because "the Complaint alleges that the Committee, acting as a governing body, disenrolled Plaintiffs." ER 16. However, that is not what the Complaint alleges. Instead, the Complaint alleges that Defendants, although ***purporting*** to act in their official capacity as members of Pala's Executive Committee, were in fact incapable of doing so because Pala's Executive Committee was not properly constituted. Accordingly, Defendants' actions against Plaintiffs could not be an act of the tribal government.

Importantly, Pala's Constitution prohibits a person who has been convicted of a crime or who engages in gross misconduct from serving on its Executive Committee, as follows:

ARTICLE V – EXECUTIVE COMMITTEE

* * *

Section 2. QUALIFICATIONS

B. Before the names of a person who has been nominated can be put on that ballot, that person must complete a form provided by the Executive Committee and ***certify under penalty of perjury that he/she has not been convicted of a felony or any other criminal offense*** included above. The Executive Committee will verify that there has been no such conviction(s). The General Council may make an exception for vehicle related felony traffic offenses or for offenses which occurred more than ten years earlier.

* * *

Section 5. VACANCIES

If an officer shall … be found guilty of a felony in any State or Federal court … a vacancy in the office shall be automatically created. . . .

* * *

Section 7. REMOVAL

A. Failure to attend three (3) consecutive meetings without valid excuse, including regular, emergency and special meetings; Provided that the member has received notice of the meetings;

B. ***Gross misconduct in office***;

C. Incapacity from physical or mental disability, to the extent that he/she is incapable of exercising judgment

about or attending to the business of the Executive Committee;

D. ***Conviction of a crime under Federal, State or Tribal Law while holding office***.

ER 339-40¶127 (emphasis added). Here, two of the Defendants had felony criminal records and were thus prohibited from serving on Pala's Executive Committee under Pala's Constitution. ER 340¶128. Specifically, on December 25, 2006, Defendant/Secretary Lattin was cited for "assault with firearm on person" and for "threaten[ing] crime with intent to terrorize." ER 341¶129. Lattin was charged with a "serious felony," and he pled guilty to the crime in July 2007. ER 341¶129. Although in September 2010 the superior court granted Lattin's request to reduce the charge to a misdemeanor after he had served three years of probation, the court specifically provided that "[t]his order does not permit a person prohibited from holding public office as a result of the conviction to hold public office." ER 341¶129. Because Lattin was prohibited from serving on Pala's Executive Committee, he was incapable of acting in an official capacity when he and the other Defendants disenrolled the Plaintiffs.

Even though Lattin was not allowed to serve on Pala's Executive Committee due to his criminal conviction, Defendants deliberately disregarded the dictates of Pala's Constitution by allowing him to serve. In fact, in June 2010, when several tribal members raised the fact that Lattin should not have been allowed to run for

Secretary because of his criminal record, Defendants retaliated against them by banishing them from General Council meetings and withholding their per capita distributions for a year. ER 313-14¶59. These members later turned to the Intertribal Court for recourse.[15] ER 229-233.

Likewise, Defendant/Vice Chairman Miranda was prohibited from serving on Pala's Executive Committee because of his criminal convictions. In August 2003, while serving on the Executive Committee, Miranda was charged with felony assault with a deadly weapon, as well as two misdemeanor charges. ER 340¶128. He pled guilty, was convicted of all charges, and later violated parole. ER 340¶128. On November 6, 2009, Miranda was again arrested – this time for soliciting a male prostitute in an adult bookstore, a misdemeanor. ER 340¶128. He also pled guilty to this charge, was convicted, and violated parole. ER 340¶128. Due to these convictions, Miranda should have been barred by Pala's Constitution from serving on the Executive Committee. ER 340¶128.

In March 2011, after learning about Miranda's conviction for lewd conduct and his failure to complete parole, King Freeman – a descendant of Margarita Britten – circulated a petition to have Pala's General Council discuss the recall of

[15] Defendants have often retaliated against those who spoke up against them. For example, certain employees of the Pala Casino, headed by Chairman Smith, were terminated from their employment when they complained to management about illegal accounting irregularities that were in violation of National Indian Gaming Commission rules. ER 345-46¶143.

Miranda. Rather than holding a General Council meeting to consider this matter, however, Defendants instead retaliated against Freeman by disenrolling Freeman's three children and five other relatives on July 1, 2011. ER 302¶5. Subsequently, Defendants disenrolled 154 other Britten Descendants in further retaliation against Freeman after a flyer believed to be written by him condemning Defendants' disenrollment of the eight members was circulated in the Tribe. ER 303¶7. This time, however, to prevent these Pala members from obtaining relief through the Intertribal Court, Defendants caused Pala to withdraw its participation from the Intertribal Court shortly before they began the disenrollments. ER 306-07¶15.[16]

Because two of the six members on the Executive Committee had felony criminal records and were barred from serving on the Executive Committee, and another member – Annalee Trujillo, a Britten Descendant who was a Council member – was excluded from participating in the meetings regarding the disenrollments, Pala's Executive Committee was incapable of acting as a governing body. As such, Defendants were unable to act in their official capacity when they disenrolled the Plaintiffs.

[16] The fact that Defendants protected each other from being removed from office not only demonstrates Defendants' disregard of Pala's laws, but also suggests extensive corruption within Pala's leadership. *See, e.g., Granite Valley Hotel Ltd. Pshp. v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 150-51 (Minn. Ct. App. 1997) (noting that the nonfeasance of tribal executive committee to the conviction of other committee members reveals a pervasive political ethic of criminality within the tribal leadership).

C. Defendants Are Not Protected by Tribal Sovereign Immunity Because They Acted Outside the Scope of Their Authority

1. Defendants Acted Contrary to a Tribal Resolution Regarding Margarita Britten's Blood Degree in Disenrolling Plaintiffs.

In addition to Defendants' inability to act as a governing body due to criminal records of certain of the Defendants, Defendants are also not protected by Pala's sovereign immunity because they acted outside the scope of their authority regarding Plaintiffs' disenrollments. *See Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989) (a tribe's sovereign immunity extends to tribal officials only if they act in their official capacity and within the scope of their authority).

Under both Pala's original Articles of Association and Pala's Constitution, Pala's General Council is the Tribe's main governing body, whereas its Executive Committee is only given certain limited powers and duties. ER 334¶113. One of the Executive Committee's duties is to "cause the effectuation of all ordinances, resolutions or other enactments of the General Council …." ER 334¶113.

On February 22, 1984, Pala's General Council voted on and passed a resolution to correct Margarita Britten's blood degree to "4/4" Pala Indian, after it was discovered that unauthorized handwritten changes had been made to her blood degree on the Rolls. ER 334¶112; 144. However, decades later, ignoring the resolution previously passed by Pala's General Council, Defendants unilaterally

proclaimed that Margarita Britten was not a full-blooded Pala Indian in order use that as an excuse to disenroll her descendants for personal reasons. Because Defendants took actions that were directly contrary to the 1984 resolution voted on and approved by Pala's General Council, Defendants acted outside the scope of their authority and the Tribe's sovereign immunity offers them no protection. *See Burrell*, 456 F.3d at 1162-63, 1174 (plaintiffs sufficiently pled that individual tribal officials acted outside their official authority and thus were not entitled to sovereign immunity by alleging that the officials failed to comply with the tribal council's resolution).

Indeed, up until 2011 and 2012, when Plaintiffs were disenrolled by Defendants, Pala and its officials had confirmed that Margarita Britten was a full-blooded Pala Indian. For example, in 1995, in letters to the Vice Chairman of the Agua Caliente Band of Cahuilla Indians regarding the blood degree of the children of Margarita Britten, Chairman/Defendant Smith and Stanley McGarr (Pala's then-Secretary) confirmed that Margarita Britten had 4/4 degree Pala Indian blood and that her children had 1/2 degree Pala Indian blood. ER 1515. Notably, Stanley McGarr's letter to the Vice Chairman of the Agua Caliente Band specifically states that Margarita Britten was "4/4 Degree Indian Blood (PAR)" and that "[t]he Pala Allotment Roll (PAR) approved by the Secretary of Interior November 3, 1913 and the Pala Census (PC) for the year 1919 are acknowledge by the Pala Band of

Mission Indian Tribe to be true and ***the Tribe agrees with the Degree of Indian Blood in these records***." ER 336¶118; 151-52 (emphasis added).[17]

By disenrolling Plaintiffs and other descendants of Margarita Britten, Defendants not only failed to effectuate the will of the Tribe, but acted against it. By arbitrarily lowering Margarita Britten's blood degree and disenrolling Plaintiffs on that basis, Defendants flagrantly violated the resolution passed by Pala's General Council and thus subverted the will of the sovereign. Under these circumstances, extending Pala's immunity to Defendants would, in fact, undermine Pala and turn the concept of sovereign immunity on its head.

In addition, in 1989, the Department of the Interior, pursuant to its federal authority, had determined that Margarita Britten was a full-blooded Indian. The Department's 1989 Decision was binding on Pala, which did not attempt to appeal or challenge it. Thus, Pala was prohibited from making a contrary decision with regard to her blood degree. "If a sovereign's powers are limited, then so too must the immunity of that sovereign's officials be limited." *Wisconsin v. Baker*, 698 F.2d 1323, 1333 (7th Cir. 1983). Since Pala was bound by the 1989 Decision,

[17] The arbitrary and capricious decision made by Defendants regarding Margarita Britten's blood degree may also affect the Agua Caliente Indian tribe, which apparently relied on Pala's confirmation that Margarita Britten was a full-blooded Indian in making its own membership determinations.

Defendants had no authority to change Margarita Britten's blood degree to fulfill their own personal agenda.[18]

2. Defendants Lacked Authority Under Governing Laws to Disenroll Plaintiffs.

Defendants are also not entitled to the protection of Pala's sovereign immunity because they lacked authority under governing laws to disenroll Plaintiffs and the other Britten Descendants.

As an initial matter, Defendants purported to derive their power to disenroll Plaintiffs based on the revised enrollment ordinances they themselves had enacted. The Defendants purported to derive their authority to revise the enrollment

[18] The facts here are easily distinguishable from those in other cases where the Court has extended sovereign immunity to tribal officials. For example, in *Hardin v. White Mtn. Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), plaintiff Hardin brought suit against the White Mountain Apache Tribe, its tribal court, its tribal council, and various tribal officials for excluding him permanently from the Apache reservation after he was convicted of concealing stolen federal property. There, the Ninth Circuit found that sovereign immunity properly extended to individual tribal officials because they had acted within the scope of their authority. *Id.* at 479-80. Likewise, in *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991), where plaintiff filed suit against the Pala Tribe, certain Tribal officials, and all members of the Tribe for refusing to allow plaintiff to use a road that crossed tribal land that provided the only access to its property, the Ninth Circuit found that Pala officials were entitled to share the immunity of the Tribe because "[t]he complaint alleges no individual actions by any of the tribal officials named as defendants" and there was "no ground stated in the complaint for finding that the tribal official defendants acted beyond the scope of their lawful authority." *Id*. at 1271-72. Here, in stark contrast, Plaintiffs allege in the Complaint – and have even provided confirmatory documents (*see* ER 89-296) – that Defendants failed to act in their official capacity and that they acted beyond the scope of their authority. The outrageous facts in this case are simply not present in any case that has been before the Court.

ordinance from Pala's Constitution. The Complaint, however, alleges that Pala's Constitution was not validly enacted because it was not ratified by a majority of Pala voters in a duly called election.

Under the Indian Reorganization Act ("IRA"), a majority vote by adult tribal members at a special election authorized and called by the Secretary of the Interior was required for the adoption of a tribal constitution. *See* 25 U.S.C. § 476(a).[19] Pursuant to the IRA, tribal actions must "reflect the will of a majority of the tribal community – whether or not they choose to organize under the IRA procedures," since "[t]he fair and full participation of tribal members is critical to the legitimacy of any constitutional reform." *Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 202 (D.D.C. 2006), *aff'd*, 515 F.3d 1262 (D.C. Cir. 2008). An election to adopt or amend a tribe's constitution "is a federal election" because

[19] The Indian Reorganization Act provides, in relevant part, at 25 U.S.C. § 476(a), that:

> Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when –
>
> (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
>
> (2) approved by the Secretary pursuant to subsection (d) of this section.

"[t]he right to vote in this election is a federal right protected by the Federal Constitution and the results of this election may fundamentally affect federal rights guaranteed to federally recognized tribal 'members.'" *Shakoppe Mdewakanton Sioux Cmty. v. Babbitt*, 906 F. Supp. 513, 515-16, 520 (D. Minn. 1995). *See also Ransom v. Babbitt*, 69 F. Supp. 2d 141 (D.D.C. 1999) (finding that a tribe's constitution was not validly ratified because approval by 50.93% of the tribal members did not meet the threshold 51% vote requirement).

Here, the Complaint alleges that Pala's Constitution was not properly ratified because it was approved by only 27 votes in a special meeting, when over 300 votes by adult Pala members in an election duly called by the Secretary of the Interior were required. Indeed, the BIA has no documents demonstrating that the required election was held. ER 320-21¶80; 169-70. Moreover, Elsie Lucero, a former enrollment specialist with the BIA, has attested that no election was ever held to ratify Pala's Constitution. ER 174-75. Because Pala's Constitution is invalid, the Tribe is still governed by its Articles of Association and, consequently, its original enrollment ordinance.[20]

[20] There are other facts indicating that Pala's Constitution is not valid. For example, Pala's Tribal Gaming Ordinance, enacted on February 14, 2000, states that the Tribe is governed by its Articles of Association, instead of its Constitution. ER 321¶81. Further, as recently as February 2012, Pala's website stated that "The Tribe is organized under Articles of Association," rather than governed by its Constitution. ER 322¶82.

Even assuming the validity of Pala's Constitution, its Constitution states that the Executive Committee can only amend Pala's enrollment ordinance "provided that such ordinance are [sic] in compliance with this Constitution." ER 187-88¶14.[21] Specifically, Pala's Constitution requires that any "[p]rocedures for disenrollment … shall provide that the member receives due process and equal protection as required by the Indian Civil Rights Act," thereby incorporating by reference the guarantees of the U.S. Bill of Rights to Pala members. ER 305-06¶14.[22]

However, in revising Pala's original enrollment ordinance, Defendants failed to provide Pala members with the required due process and equal protection under the Indian Civil Rights Act. Among other things, Defendants' revised enrollment ordinance failed to provide any notice or hearing in connection with disenrollments. *See* ER 187-196. Moreover, the revised enrollment ordinance failed to include any true appeals regarding disenrollments by relegating the Department of the Interior, which previously was the final arbiter regarding Pala membership issues, to an advisory role such that it could not cause Pala's

[21] Notably, Pala's Constitution contains numerous typos, grammatical errors, and random underlining of words and sentences, which suggest that it was a draft instead of a final document that was properly ratified. ER 155-66.

[22] The Indian Civil Rights Act was enacted by Congress in 1968 to prevent abuses that many tribal members had endured from protect tribal members from the "sometimes corrupt, incompetent, or tyrannical tribal officials." ER 305-06¶14.

Executive Committee to reverse or change its decisions. ER 323-24¶86; 193-94. Since Defendants failed to provide Plaintiffs with any due process, and any appeal was merely illusory, Defendants had no authority to disenroll them. *See Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988) (where tribal procedures parallel those found in "Anglo-Saxon society," federal constitutional standards are employed in determining due process); *Sweet v. Hinzman*, No. C08-844JLR, 2009 U.S. Dist. LEXIS 36716, at *22 (W.D. Wash. Apr. 30, 2009) (concluding that plaintiffs who were banished and removed from tribal membership rolls demonstrated a violation of their due process by tribal officials and that "[d]ue process requires that a party affected by government action be given 'the opportunity to be heard at a meaningful time and in a meaningful manner'") (citation omitted); *Bird v. Glacier Elec. Coop.*, 255 F.3d 1136 (9th Cir. 2001) (declining to give comity to tribal court proceedings where the proceedings deprived appellants of due process). In fact, here, not only did Defendants fail to provide Plaintiffs with due process, but they actively took steps to ensure that no recourse would be available to Plaintiffs by withdrawing Pala from the Intertribal Court shortly before they began their disenrollments. ER 306-07¶15.[23]

[23] The facts here are distinguishable from those in *Boe v. Ft. Belknap Indian Cmty. of Ft. Belknap Reservation*, 642 F.2d 276 (9th Cir. 1981). In *Boe*, plaintiffs were elected tribal council members who brought suit in federal court alleging violations of the Indian Civil Rights Act and the Indian Reorganization Act on the basis that a tribal court's decision to void a tribal election violated tribal and local

Further, Defendants did not have the authority to disenroll Plaintiffs even under the revised enrollment ordinance they unilaterally enacted.[24] First, Pala's July 22, 2009 revised enrollment ordinance (the one purportedly in effect at the time of Plaintiffs' disenrollments) plainly states that it is "[a]n ordinance to establish regulations and procedures governing enrollment of members ***into*** the Band and to maintain the roll on a current basis." ER 338¶124. Moreover, it specifically provides that "the Executive Committee of the Pala Band, by adoption of this revised ordinance, ***does not intend to alter or change the membership status of individuals whose membership has already been approved and who are currently listed on the membership roll of the Pala Band of Mission Indians*** …." ER 338¶124. As such, Defendants had no authority to disenroll members who were already enrolled in the Tribe. Indeed, Annalee Trujillo, who served on the Executive Committee before being disenrolled by Defendants, declared that she

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ordinances. *Boe* was dismissed on jurisdictional grounds because "it [was] these alleged violations of tribal law that form the basis of the plaintiffs' two alternative theories of federal jurisdiction." *Id.* at 278. Here, in contrast, the alleged violations of Pala laws are not the basis of Plaintiffs' claims against Defendants. Instead, Plaintiffs allege such violations only insofar as they establish that Defendants did not act within the scope of their authority, such that they cannot be shielded by the Tribe's sovereign immunity. Moreover, *Boe* is inapposite because the tribal governing document there, unlike here, did not specifically incorporate the protections of the Indian Civil Rights Act, a federal statute, to tribal members.

[24] This assumes that Defendants had the authority to make the revision to its original enrollment ordinance, despite that several of the Defendants were actually incapable of serving on the Executive Committee due to their criminal records.

had voted to approve the Defendants' revised enrollment ordinance because she understood it was not intended to change the membership status of enrolled members and believed that "no one already approved on the roll would be taken off the official federally approved membership roll." ER 338¶124; 199.

Additionally, under the revised enrollment ordinance, other than when a member voluntarily relinquishes membership or dies, the only other way a member could be disenrolled is if he/she "misrepresented or omitted fact that might have made him/her ineligible for enrollment" in the enrollment application. ER 339¶126; 192. Here, Plaintiffs did not make any misrepresentations or omissions regarding Margarita Britten's blood degree because (a) Pala's General Council had previously affirmed in a Tribal resolution that Margarita Britten was a full-blooded Indian, and (b) the Department of the Interior had also previously conducted a thorough investigation and concluded, in a final decision binding on Pala, that Margarita Britten was a full-blooded Pala Indian. ER 304-05¶11. Accordingly, Defendants had no authority to disenroll them.

Moreover, Defendants had no authority to disenroll the Plaintiffs unless certain procedures were followed. To disenroll a Pala member, Defendants were required to reevaluate his/her application "in accordance with the procedure for processing an original application." ER 339¶126; 191-93. To process an original application, the Executive Committee was required to make an initial

determination and then send it to the BIA for its review and recommendation. ER 339¶126; 191. Only "[a]fter a response is received from the Bureau of Indian Affairs," could the Executive Committee approve or disapprove the application. ER 339¶126; 192. Here, however, Defendants did not send Plaintiffs' original applications to the BIA for its review and recommendation or wait for its response before making their decision to disenroll Plaintiffs. Rather, Defendants simply summarily disenrolled them.

After they were disenrolled, certain of the Plaintiffs and other disenrollees appealed to the BIA in a timely manner. ER 329¶¶102-03. On February 24, 2012, pursuant to the appeal by the first eight Britten Descendants who were disenrolled by Defendants on June 1, 2012, the BIA recommended that Defendants change their disenrollment decision because "it has been proven that [these eight members] possess the required degree of Indian blood." ER 343¶136; 243. On June 7, 2012, upon the appeal by 53 of the 154 Britten Descendants who were disenrolled by Defendants on February 1, 2012, the BIA also recommended that these individuals remain enrolled with the Tribe because "there was no evidence provided to support the disenrollment of these individuals." ER 344¶138; 245. However, in violation of Pala's revised enrollment ordinance, Defendants had already announced the disenrollments as "final," even before they received the BIA's recommendation. ER 344¶139.

3. Defendants Disenrolled Plaintiffs for Personal Reasons.

In *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012) (en banc), the Ninth Circuit found that a state prosecutor was not entitled to immunity where his primary intent was to silence plaintiffs' speech criticizing public officials. In finding that the state prosecutor was motivated by retaliatory animus, the Ninth Circuit noted that the defendant caused plaintiffs to be arrested shortly after their activities, the defendant acted ultra vires by issuing subpoenas without proper approval, and the defendant did not wait for official approval before authorizing the arrest of plaintiffs. *Id*. at 912-925.

Because there is "no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles," *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013), Defendants here, as in *Lacey*, are similarly not entitled to sovereign immunity. Like the state prosecutor in *Lacey*, Defendants' wrongful conduct against Plaintiffs and other Britten Descendants was also motivated by retaliatory animus. Here, Defendants disenrolled King Freeman's three children and five other family members from Pala shortly after he petitioned for a special meeting to discuss the removal of Vice Chairman/Defendant Miranda from the Executive Committee. ER 302¶5. Later, when a flyer believed to be written by Freeman was circulated criticizing

Defendants' conduct and questioning why only eight Britten Descendants were disenrolled but not others, Smith responded with a letter threatening: "[King Freeman] wants the rest of his family who are 1/16 descendants disenrolled! Don't take my word for it, see his flyer!!!" ER 330-31¶104; 332¶106. Soon thereafter, Defendants disenrolled 154 more Britten Descendants.

As in *Lacey*, in their eagerness to disenroll the Britten Descendants, Defendants did not even wait for the BIA's recommendation before announcing the disenrollments to be "final." ER 339¶126. Further, Defendants actively took steps to prevent the disenrollees from seeking relief from their wrongful conduct. Indeed, shortly before starting the disenrollments, Defendants caused Pala to withdraw from the Intertribal Court. After the disenrollments had occurred, when a petition was circulated to have a General Council meeting about the disenrollments, Defendants told General Council members that the petition was circulated under false pretenses. ER 333¶110. Even after the required signatures were obtained for the petition, Defendants refused to hold a General Council meeting to discuss the disenrollments, claiming that it was "unconstitutional." ER 345-46¶143.

Moreover, in an attempt to legitimize their conduct, Defendants misrepresented facts to Pala's General Council members. For example, Chairman Smith informed Pala's General Council that the disenrolles received due process in

connection with their disenrollments, when no such due process was provided. ER 330-31¶104. He also told Pala's General Council members that the disenrollees failed to timely file their appeal with the BIA, when it was not true. ER 329-30¶103. These facts plainly demonstrate that Plaintiffs' disenrollments by the Defendants were not about Defendants' legitimate exercise of their official duties, but were personal in nature. Defendants, therefore, can be held personally liable for their individual conduct that caused injury to Plaintiffs.

D. Pala Is Not the Real, Substantial Party in Interest

Despite the well-pled allegations in the Complaint, the District Court dismissed Plaintiffs' action on the grounds that Defendants were entitled to tribal sovereignty based upon the "'essential nature and effect'" of the relief sought. ER 16; 17-18. According to the District Court, since only Pala could satisfy the relief sought in the Complaint, *i.e.*, reinstatement of Plaintiffs as Pala members, Pala was the "real, substantial party in interest" in this case. ER 16. The District Court erred.

As set forth in the Complaint, this case is fundamentally one against individuals who had wrongfully deprived others of their rights and properties in violation of federal law. Although Defendants purported to act in their capacity as tribal officials, their actions against Plaintiffs were in fact done for personal, retaliatory reasons. Accordingly, Plaintiffs sued Defendants individually for their

wrongful conduct, and sought money damages from Defendants only – not from Pala. *See* Hearing Transcript, at ER 68 ("with respect to the monetary reward that we're seeking, that is from the defendant's [sic] individually.")

In *Maxwell*, 708 F.3d 1075, the Ninth Circuit similarly concluded that paramedics from the Viejas Band of Kumeyaay Indians Tribal Fire Department were not entitled to tribal immunity because plaintiffs were seeking money damages from the paramedics personally. The Ninth Circuit determined that, due to the essential nature and effect of the relief sought, the sovereign was not "the real, substantial party in interest." *Id.* at 1088 In reaching its decision, the Ninth Circuit recognized that "individual capacity suits related to an officer's official duties are generally permissible." *Id.* at 1088. It further explained that "'[t]he general bar against official-capacity claims … does not mean that tribal officials are immunized from individual-capacity suits ***arising out*** of actions they took in their official capacities . . . . Rather, it means that tribal officials are immunized from suits brought against them ***because of*** their official capacities – that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." *Id.* at 1088 (citing *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008)) (emphasis in original).

Here, Defendants are not being sued by Plaintiffs merely because they possess the power to reinstate the Plaintiffs as tribal members. Indeed, not all of the Defendants are still on Pala's Executive Committee.[25] Rather, Plaintiffs are suing Defendants because they took personal retaliatory and discriminatory actions against Plaintiffs that expose them to individual liability for money damages. Because "individual officers are liable when sued in their individual capacities," sovereign immunity does not apply to Defendants here. *Maxwell*, 708 F.3d at 1089. *See also Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 686, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949) ("If those actions are such as to create a personal liability . . . the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him.")

Although Plaintiffs have also requested injunctive relief to void Defendants' misconduct, this does not render Pala the real, substantial party in interest. In *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), the Supreme Court recognized that an action against a state official was not barred by sovereign immunity where plaintiff sought prospective relief against the official who had violated federal law. The *Ex parte Young* doctrine is based upon the reasoning that "since the state cannot authorize its officers to violate federal law, such officers are

[25] As of the date of the filing of this brief, Defendants Kilma Lattin and Leroy Miranda are no longer on Pala's Executive Committee.

'stripped of [their] official representative character and [are] subjected in [their] person to the consequences of [their] individual conduct.'" *Goldberg v. Ellett* (*In re Ellett*), 254 F.3d 1135, 1138 (9th Cir. 2001) (citing *Ex parte Young*, 209 U.S. at 160). The *Ex parte Young* doctrine applies not only to state officials, but also to tribal officials. *See Salt River Project Agric. Improvement & Power Dist. v. Lee*, No. 10-17895, 2012 U.S. App. LEXIS 10862, at *14 (9th Cir. May 29, 2012) ("[Ex parte Young] doctrine permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or Tribe."). In addition, "*Ex parte Young* is not limited to claims that officials are violating the federal Constitution or federal statute; it applies to federal common law as well." *Id.*

Here, *Ex parte Young* applies to Plaintiffs' request for injunctive relief because Defendants violated federal law. Pursuant to federal law, the Secretary of the Interior had the authority to decide Pala's membership in accordance with Pala's original enrollment ordinance. *See* 25 C.F.R. § 62.2 and 25 C.F.R. § 62.4. In 1989, based on his authority under federal law, the then-Acting Assistant Secretary of Indian Affairs issued a "final" decision for the Department of Interior (the "1989 Decision"), in which he concluded that Margarita Britten was a full-blooded Indian and ordered that her descendants with at least 1/16th degree Pala

Indian blood be enrolled in the Tribe.[26] *See* ER 143-148. The 1989 Decision was binding on Pala, which did not attempt to appeal or otherwise challenge the Decision. As such, Pala is estopped from reopening the issue of Margarita Britten's blood degree, and any violation of the 1989 Decision constitutes a violation of federal law. *See Astoria Fed. Sav. & Loan v. Solimino*, 501 U.S. 104, 107, 115 L. Ed. 2d 96, 111 S. Ct. 2166 (1991) (doctrine of collateral estoppel extends to final determinations of administrative agencies); *Oyeniran v. Holder*, Nos. 09-73683, 10-70689, 2012 U.S. App. LEXIS 9116, at *11 (9th Cir. May 3, 2012) ("It is beyond dispute that the doctrine of collateral estoppel (or issue preclusion) applies to an administrative agency's determination of certain issues of law or fact"); *Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir. 1988), *cert. denied*, 488 U.S. 819 (1988) ("Federal courts must give preclusive effect … to unreviewed administrative findings under federal common law rules of preclusion") (citation omitted). *Cf. Goldberg*, 254 F.3d at 1138-45 (state officials' violation of a bankruptcy discharge order binding on the State sufficiently constituted violation of federal law under *Ex parte Young*); *Salt River*, 2012 U.S. App. LEXIS 10862, at *15 (tribal officials who violated a federal statutory right of way may be held liable under *Ex parte Young*). Accordingly, when Defendants used Margarita Britten's

[26] Significantly, the Department's 1989 Decision specifically required that King Freeman's three children – Cheryl Majel, Anthony Freeman and Luann Moro (each of whom are Plaintiffs in this case) – be enrolled as Pala members. ER 334¶114; 148. Nonetheless, they have been disenrolled by Defendants.

blood degree as a ruse to disenroll her descendants, Defendants violated the Department's 1989 Decision and are therefore stripped of their official or representative character and must face the consequence of their individual conduct. *See Baker*, 698 F.2d at 1332-33 (a sovereign official's immunity is removed where the official exercised a power that his or her sovereign was powerless to convey).

Vann v. United States Dep't of Interior, 701 F.3d 927 (D.C. Cir. 2012), is instructive. In *Vann*, the Cherokee Nation decided that former Cherokee slaves who were granted right to tribal membership and the right to vote in tribal elections through a Treaty, were no longer members and could no longer vote. There, in allowing the case by the former Indian slaves to proceed against the Principal Chief of the Cherokee Nation without the presence of the Cherokee Nation as a party, the D.C. Court of Appeals applied the *Ex parte Young* doctrine. In doing so, the D.C. Court of Appeals noted that there is no basis for distinguishing a case involving an American Indian tribe from a run-of-the-mill *Ex parte Young* action. *Id*. at 930. It reasoned that because the claim was that the Principal Chief – and through him, the sovereign tribe – was violating federal law, "this case presents a typical *Ex parte Young* scenario." *Id*.

Similarly, the *Ex parte Young* doctrine should be applied here. Plaintiffs are not seeking an award of money damages from the Tribe. *See* ER 357-58. Rather, Plaintiffs are seeking an injunction to invalidate Defendants' wrongful actions that

violate the Department of the Interior's 1989 Decision. *See* ER 357. To the extent that invalidating Defendants' wrongful actions equates to reinstatement of Plaintiffs' membership, reinstatement is prospective relief for which an official can be held liable. As such this situation falls squarely within the *Ex parte Young* doctrine. *See Hibbs v. HDM Dep't of Human Res.*, 273 F.3d 844, 871 (9th Cir. 2001), *aff'd*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) ("reinstatement is the sort of prospective relief for which a state officer can be held liable [under Ex parte Young]"); *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964-65 (6th Cir. 2013) ("the Eleventh Amendment does not bar suits for equitable, prospective relief, such as reinstatement, against state officials in their official capacity"); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) ("The injunctive relief requested here, reinstatement and expungement of personnel records, is clearly prospective in effect and thus falls outside the prohibitions of the Eleventh Amendment"); *Dwyer v. Regan*, 777 F.2d 825, 836 (2d Cir. 1985), *modified on other grounds*, *reh'g denied*, 793 F.2d 456 (1986) ("Reinstatement is purely prospective injunctive relief"); *Nelson v. Univ. of Tex.*, 535 F.3d 318, 322 (5th Cir. 2008) ("the great weight of case authority clearly supports treating reinstatement as an acceptable form of prospective relief that may be sought through *Ex parte Young*.")

In addition, Defendants here acted ultra vires because their disenrollment actions were unauthorized by Pala, which had specifically passed a resolution concerning Margarita Britten's blood degree. Since Defendants' actions were ultra vires, they are not the conduct of the sovereign and may be voided without implicating the sovereign. *See Vann v. Kempthorne*, 534 F.3d 741, 750-51 (D.D.C. 2008) (when an officer acts beyond the limitations of his powers, his actions "are considered individual and not sovereign actions … His actions are ultra vires his authority and therefore may be made the object of specific relief"); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984) ("The conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign"); *United States v. Wildcat*, 244 U.S. 111, 125 (1917) (an attempt of the Secretary of the Interior to set aside the enrollment and allotment of a deceased Indian by striking his name from the rolls without notice to his heirs was ultra vires and void); *In re J.M.*, 718 P.2d 150, 154 (Alaska 1986) (unilateral action by tribal chief was void as an ultra vires act where he was not empowered to act by the tribal constitution). Accordingly, Plaintiffs' request for injunctive relief does not make Pala the "real, substantial party in interest" in this case.

E. Plaintiffs Should Have Been Allowed to Amend the Complaint

Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment. *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). To the extent the District Court found that it did not have jurisdiction because Plaintiffs had sought injunctive relief that operated against the Tribe, the District Court should have at least allowed Plaintiffs leave to amend to exclude this prayer for relief. The District Court's dismissal of Plaintiffs' Complaint, which had not been subject to prior amendments, was improper.

VIII. CONCLUSION

Extending sovereign immunity to Defendants under the outrageous facts in this case would not only result in grave travesty of justice, but is fraught with other dangers, including unrestrained abuse and corruption by Indian officials. Where, as here, (i) two of the Defendants were barred from serving as tribal officials under Pala's Constitution because of their criminal records, (ii) Defendants' actions against Plaintiffs were contrary to a resolution passed by the Tribe and violates a final decision issued by the Department of the Interior, (iii) the Defendants' motives for their actions against Plaintiffs were plainly retaliatory and personal in nature, (iv) Defendants acted outside of their authority in disenrolling Plaintiffs, and (v) Defendants deliberately took steps to preclude any oversight of their

conduct, including causing Pala to withdraw from the Intertribal Court and preventing Pala's General Council from holding a meeting to consider the disenrollment issue – extending sovereign immunity to Defendants under these circumstances would not be upholding Pala's sovereignty, but would undermine it. Accordingly, Plaintiffs respectfully request that the District Court's order of dismissal on the basis of tribal sovereign immunity be vacated.

IX. RELATED CASES

Plaintiff's counsel is not aware of any related cases pending before this Court.

DATED: August 9, 2013

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FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared using a 14-point proportionally spaced font and that, based on word processing software, this brief contains 13,028 words.

DATED: August 9, 2013

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CERTIFICATE OF SERVICE

I certify that on August 9, 2013, I served the foregoing Brief by electronically filing the brief with the Court. As all counsel of record are registered with the Court's Electronic Case Filing System, the electronic filing of this brief constitutes service upon them.

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