IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-55552

RONALD D. ALLEN JR., et al.,

Plaintiffs-Appellants,

v.

ROBERT H. SMITH, et al.,

Defendants-Appellees.

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

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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Preliminary Statement

By this appeal, Plaintiffs-Appellants challenge the District Court's decision that it lacked jurisdiction over this tribal membership dispute. Plaintiffs were enrolled members of the Pala Band of Mission Indians ("Tribe" or "Pala"), collecting membership benefits from the Tribe for years. However, when the Tribe's governing body discovered that Plaintiffs based their claims to membership on a common ancestor who was not a full-blooded Pala Indian, it determined Plaintiffs did not satisfy the requirements for membership under the Tribe's law, and removed them from its membership rolls. Disappointed by the decision in the tribal forum, Plaintiffs sued these Tribal[1] officials, effectively asking the District Court to decide Pala is obligated to recognize Plaintiffs as among its members, and thereby, usurp one of an Indian tribal government's "most basic powers," namely "the authority to determine questions of its own membership." *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005).

As bedrock precedent has long held, absent congressional consent federal courts may not intrude upon these "delicate" internal tribal matters, which must be adjudicated by the sovereign government, with reference to its own laws. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 72 n.32 (1978). In the end,

[1] Defendants use the defined and capitalized term "Tribal" as an adjective meaning of or related to Pala.

settled law compels affirmance of the District Court's dismissal on several, independent grounds. First, the case constitutes an intratribal matter within an Indian tribe's exclusive jurisdiction. Second, the Tribe and its officials are immune from suit under the doctrine of sovereign immunity, separately depriving the federal courts of jurisdiction. Even assuming, arguendo, any individual defendants did not themselves possess immunity, dismissal would still be compelled because the Tribe is a necessary and indispensable party that cannot be joined. Finally, and not surprisingly, neither federal nor state law provides any claim for relief in connection with a person's allegedly injurious disenrollment from a sovereign tribal government.

Jurisdictional Statement

As detailed below, the District Court correctly decided it lacked subject matter jurisdiction over Plaintiffs' claims against Defendants.

While Plaintiffs' claims are styled as violations of generally applicable federal statutes, they attack an Indian tribe's membership determinations—decisions which necessarily turn on tribal (not federal) law, and which, as the U.S. Supreme Court and Ninth Circuit have long held, relate to a purely intramural matter as to which Congress has not granted federal courts jurisdiction. *See Santa Clara Pueblo*, 436 U.S. at 55, 72 n.32 ; *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1079-80 (9th Cir. 2001); *Donovan v. Coeur d'Alene Tribal Farm*

("*Coeur d'Alene*"), 751 F.2d 1113, 1116 (9th Cir. 1985). Because the District Court lacked jurisdiction over Plaintiffs' purported federal claims, it necessarily lacked jurisdiction over Plaintiffs' supplemental state law claims as well. 28 U.S.C. § 1367.

As the District Court correctly decided, the Tribe's sovereign immunity constitutes a separate jurisdictional bar. Plaintiffs' lawsuit challenges the action of a sovereign tribal government, which is the sole source of their alleged injuries. As this action is effectively one against the Tribe, its sovereign immunity deprives the District Court of power to decide Plaintiffs' suit. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

This Court has appellate jurisdiction to review the District Court's order granting Defendants' motion to dismiss under 28 U.S.C. § 1291 because the District Court entered a final judgment.

Statement of the Case

Plaintiffs sued Defendants-Appellees Robert H. Smith, Leroy Miranda, Jr., Kilma S. Lattin, Theresa J. Nieto, and Dion Perez on July 3, 2012. (E.R. 311-312.) The Complaint alleged two federal claims—under 42 U.S.C. §1985(3) and 42 U.S.C. § 1981—and various supplemental state law claims, all stemming from Plaintiffs' disenrollment from the Tribe. (E.R. 352-357.)

On August 29, 2012, Defendants moved to dismiss the Complaint on three distinct grounds: (1) lack of federal subject matter jurisdiction over intramural disputes; (2) tribal sovereign immunity; and (3) failure to state a claim upon which relief could be granted.[2] (S.E.R. 1-61.)

The District Court heard arguments on March 1, 2013 (E.R. 44-76), and dismissed the case on March 11, 2013. (E.R. 1-18.) The District Court held that, "[b]ased upon the 'essential nature and effect' of the injunctive and declaratory relief sought in the Complaint, . . . the Pala Tribe is the 'real, substantial party in interest' in this case" which renders the action "fundamentally one against the Pala Tribe" warranting dismissal based on sovereign immunity. (E.R. 16:12-20, 18:6-7.) Plaintiffs filed their Notice of Appeal on April 2, 2013. (E.R. 19-43.)

Statement of Facts

The Tribe is a federally recognized sovereign Indian tribe, maintaining a government-to-government relationship with the United States. (E.R. 300:19-21.) *See* 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012).

The Tribe formally organized in 1960, with the adoption of the Pala Articles of Association ("Articles"), which formerly served as the Tribe's primary governing document. (E.R. 318:16-18.) In 1994, the Tribe, in transition from the

[2] Defendants filed an amended memorandum of points and authorities in support of its motion to dismiss the next day, solely to correct to correct formatting errors in the original memorandum caused in PDF conversion.

era of federal oversight over Indian affairs to the modern era of tribal self-determination and self-governance, began the process of replacing and revising the Articles, by vote of its General Council (the Tribe's adult membership), which ultimately led to the adoption of the Constitution of the Pala Band of Mission Indians ("Pala Constitution"). (E.R. 319:25-320:3.) Development of the Pala Constitution was a process, rather than single event, as it was not until 1997 that the General Council voted to adopt the Pala Constitution, effectively superseding the Articles. (E.R. 320:1-3.)

The Pala Constitution significantly limited the involvement of the Bureau of Indian Affairs ("Bureau" or "BIA") in internal tribal matters. Specifically, it eliminated the requirement that the Commissioner of Indian Affairs approve amendments to the Tribe's primary governing document. (*Compare* E.R. 125 (Articles of Association, §§ 8, 11) (requiring that adoption of, and amendments to, the Articles were effective upon approval of the Commissioner of Indian Affairs) *with* E.R. 165 (Pala Constitution, Art. IX, § 2) (requiring only that amendments to the Constitution be approved by the Tribe's voting membership).)

As Plaintiffs admit, Defendants are current and former members of the Pala Executive Committee, the elected governing body of the Tribe. (E.R. 301:3-4, 311:11-312:3, 318:13-16.) Pursuant to the Pala Constitution, the Executive

Committee is charged with the following responsibilities relating to membership in the Tribe:

> The Executive Committee shall keep the membership roll current annually by striking therefrom the names of persons who have relinquished in writing their membership in the Band and of deceased members upon receipt of a death certificate or other evidence of death, and by adding the names of children born to members who meet the membership requirements.
>
> . . .
>
> The Executive Committee may from time to time amend and/or replace its existing Enrollment Ordinance with an Ordinance governing adoption, loss of membership, disenrollment, and future membership.

(E.R. 156-157) (emphasis in original).

Pursuant to this authority, and consistent with the changes embodied the Pala Constitution, the Executive Committee amended the Enrollment Ordinance in 2005, stripping the Bureau of previously delegated authority to hear disputes concerning, and make final decisions regarding, membership in the Tribe. (Opening Brief, pp. 8, 13; E.R. 324:19-26.) The Enrollment Ordinance was again revised in 2009. (Opening Brief, p. 13; E.R. 324:19-26.) Effective today, and when the disenrollment decisions were made, the Enrollment Ordinance restricts the Bureau's involvement in internal tribal membership matters, essentially providing that the federal agency may only issue a recommendation (akin to an

advisory opinion) in connection with enrollment-related disputes.[3] (E.R. 193-194.) As Plaintiffs admit (Opening Brief, pp. 13, 40-41; E.R. 323:2-324:15), it is the Executive Committee that is the final arbiter of enrollment-related disputes involving membership in the Tribe. (E.R. 194.)

In addition to making final membership decisions, the Executive Committee is charged with maintaining the Tribe's membership roll, a duty expressly delegated by the Tribe's General Council and enumerated in the Pala Constitution. (E.R. 156-157, 304:10-12, 305:23-27, 320:4-6.) In May 2011, pursuant to this delegated authority, and acting in their capacity as Executive Committee members, Defendants reviewed the enrollment applications of certain individuals who descended from deceased Tribal member Margarita Britten. (E.R. 320:4-6, 322:18-323:7, 328:14.) Ultimately, the Executive Committee's investigation in response to the request for action boiled down to a single issue: the degree of Pala Indian blood of Margarita Britten, which had been a matter of controversy for many years. (E.R. 328:18-23.) In fact, it was the Bureau that first formally raised the issue of Ms. Britten's degree of Pala Indian blood when it earlier decided that several applicants seeking membership in the Tribe (all lineal descendants of

[3] The Enrollment Ordinance provides that appeals may be filed with the Bureau of Indian Affairs, Pacific Regional Director, and limits the Director's involvement to the issuance of a "recommendation" to the Executive Committee regarding the person's eligibility for enrollment in the Band. (E.R. 193-194.)

Margarita Brittain) did not possess the requisite 1/16 degree of Indian blood required by the Tribe's then-governing Articles of Association, as "[u]p until July 24, 1984, the BIA considered Margarita as a halfblood in determining the blood degree of her descendants."[4] (E.R. 144.)

In the end, the Executive Committee concluded Margarita Britten was not a full-blood Pala Indian. (E.R. 302:12-15, 328:18-20.) Accordingly, Defendants, carrying out their governmental responsibility to maintain the Tribe's membership roll, began reviewing the enrollment applications of Tribal members whose membership depended on lineal descent from Margarita Britten. (E.R. 320:4-6, 322:20-21, 327:19-24, 332:1-6.) Following this review and as a result of the Committee's determination that Margarita Britten was not a full-blood Pala Indian, the Committee, comprised of Defendants, then determined that Plaintiffs (along with other persons not part of this action) had been erroneously enrolled in the Tribe. (E.R. 8:9-12, 302:11-15.) Plaintiffs contend these actions by Defendants' as the Committee violated various laws of the Tribe, including the Pala Constitution, the Tribe's Enrollment Ordinance, and a Resolution of the Tribe's membership. (E.R. 334:21-24, 336:20-22.)

[4] Ultimately, on May 17, 1989, Donald Asbra, Acting Assistant Secretary—Indian Affairs, concluded the Bureau would treat Margarita Britten as a full-blood Indian, directing the agency to review and correct the degree of Indian blood of Margarita's descendants, accordingly. (E.R. 145, 148.)

Finally, as Plaintiffs admit, every purported harm they suffered directly and solely resulted from Defendants' official determination that Margarita Britten was not a full-blood Pala Indian, and consequent act of removing Plaintiffs from the Tribe's membership roll. (E.R. 300:5-16, 332:10-12, 352:8-12, 353:18-21, 354:11-13, 355:13-15, 356:1-5, 356:22-357:3.) Remedies Plaintiffs seek include orders (1) declaring Defendants' governmental actions invalid, (2) permanently enjoining Defendants from carrying out their governmental duties relating to enrollment in the Tribe, (3) requiring that Defendants allocate additional Tribal funds to "pay back" Plaintiffs for the benefits lost because of Defendants' determination that Plaintiffs are no longer eligible for membership in the Tribe, and (4) awarding compensatory and punitive damages against Defendants. (E.R. 357:21-26, 358:1-7.)

Standard of Review

This Court reviews a district court's order granting a motion to dismiss *de novo*. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.,* 540 F.3d 1049, 1061 (9th Cir. 2008). This Court may affirm the dismissal on any ground fairly supported in the record, even if the District Court did not reach the issue or relied on different grounds or reasoning. *Steckman v. Hart Brewing*, 143 F.3d 1293, 1295 (9th Cir. 1998). A plaintiff invoking the federal court's jurisdiction has the burden of

proving the existence of subject matter jurisdiction. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996) (per curiam).

This Court reviews a district court's refusal to grant leave to amend a complaint for abuse of discretion. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).

Summary of Argument

Although the District Court correctly ruled sovereign immunity forecloses a lawsuit challenging disenrollment from an Indian tribe, Plaintiffs' suit suffers from a "more fundamental" jurisdictional defect. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1011 (9th Cir. 2007). Quite simply, no federal civil right of action exists to challenge an Indian tribe's membership determinations, and the federal courts are powerless to create one. *Santa Clara Pueblo*, 436 U.S. at 55, 72 n.32. Plaintiffs rest their federal claims on generally applicable federal statutes, but none suggest Congress intended to apply them to Indians or tribal governments at all, let alone to "purely intramural matters such as conditions of tribal membership." *Karuk Tribe Housing Authority*, 260 F.3d at 1079-80 (citing *Coeur d'Alene*, 751 F.2d at 1116). The well established rule that generally applicable federal statutes do not apply to intramural tribal disputes necessarily means the District Court lacked federal subject matter jurisdiction to adjudicate Plaintiffs' membership claims. *Id.* at 1076-78. Indeed, the multitude of internal

tribal issues Plaintiffs advance only demonstrates why federal courts should not "intercede in these delicate matters" (*Santa Clara Pueblo*, 436 U.S. at 55, 72 n.32) and why Congress has wisely refused to authorize courts to intervene. Because Congress has not given the federal courts power to adjudicate Plaintiffs' federal claims, the entire suit is subject to dismissal for lack of federal subject matter jurisdiction. 28 USC § 1367; *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 664 (9th Cir. 2002).

California courts have likewise confirmed that no state law claims exist to challenge tribal membership determinations. *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1064 (2005); *Ackerman v. Edwards*, 121 Cal. App. 4th 946, 954 (2004). Although Congress gave states permission to adjudicate certain private disputes arising in Indian country and involving individual Indians, it did not authorize states to adopt laws purportedly applicable to tribal governments (*Santa Rosa Band of Mission Indians v. Kings County*, 532 F.2d 655, 662-63 (9th Cir. 1975)), let alone, to create claims challenging a tribal government's exercise of one of its "most basic powers," specifically, the sovereign's decision as to who qualifies for tribal citizenship. *Lamere*, 131 Cal. App. 4th at 1064. Of course, even if federal or state law somehow provided a basis for challenging a Tribe's internal membership decisions, Pala's immunity would bar Plaintiffs' claims, since

their alleged injury stems solely and exclusively from the action of a sovereign tribal government. *Imperial Granite Co.*, 940 F.2d at 1271.

Plaintiffs' attempt to circumvent the Tribe's immunity here by purporting to sue individual Tribal officials—to wit, Defendants—is futile. There is no question that the Tribe is the "real, substantial party in interest" (*Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008), as Plaintiffs' attack goes to the "heart of tribal sovereignty" (*Lamere*, 131 Cal. App. 4th at 1064) by seeking to reverse the decision of a sovereign tribal government in the exercise of one of its "most basic powers." *Bruce*, 394 F.3d at 1225. Furthermore, holding Defendants personally liable for their actions of governance would undeniably interfere with the administration of a tribal government that necessarily acts through its elected officials. *Shermoen v. U.S.*, 982 F.2d 1312, 1320 (9th Cir. 1992).

The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), is of no help to Plaintiffs. This is because Plaintiffs' disenrollment violates no federal law, and no federal law authorizes the injunctive relief Plaintiffs seek. Furthermore, in contravention of the law of this Circuit, injunctive relief restoring Plaintiffs' status would necessarily require affirmative action by a sovereign tribal government.

Apart from these dispositive jurisdictional defects, two more independent bases for affirmance exist on this record. First, the Tribe is a necessary and

indispensable party that cannot be joined by virtue of its immunity. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19; *Shermoen*, 982 F.2d at 1318-20. Second, Plaintiffs cannot state a claim under federal or state law, as no theory supports recovery for injuries they allegedly suffered disenrollment from an Indian tribe. *Santa Clara Pueblo*, 436 U.S. at 72 & n.32; *Lamere*, 131 Cal. App. 4th at 1067.

Argument

I. Congress Has Not Authorized Federal Courts To Adjudicate This Purely Intramural Tribal Dispute.

While the District Court correctly found Plaintiffs could not clear the jurisdictional hurdle posed by the Tribe's immunity, an even more basic bar to Plaintiffs' lawsuit is the absence of any federal claim in the first place. It is well settled that Indian tribes possess "exclusive rights of self-governance in purely intramural matters," a category necessarily including membership disputes. *Coeur d'Alene*, 751 F.2d at 1116. As a result, federal courts cannot intercede in such internal tribal disputes without Congress' explicit authorization. *Id.* No such authorization exists here.

Revealing Plaintiffs' grievance as a "purely intramural" tribal dispute over which the federal courts lack jurisdiction, Plaintiffs ask the District Court to interpret the Tribe's laws and governing documents, and find that Tribal officials violated them. (E.R. 319:21-320:3, 328:3-6, 341:21-342:5, 333:24-334:24, 336:12-17, 336:23-337:3, 338:25-339:3.) They go on to suggest, contrary to

precedent, that the federal court can, under the authority of generally applicable federal statutes, intercede to declare illegitimate the governing body of a federally recognized tribal government. (E.R. 352:1-2, 353:9-11; Opening Brief, p. 28.) However, in the end, the federal statutes Plaintiffs invoke simply contain no grant of federal jurisdiction over purely intramural claims about who a sovereign tribe must, and need not, recognize as members.

A. Generally Applicable Federal Statutes Do Not Apply To Intramural Tribal Disputes.

Absent express congressional authority, general statutes simply do not create federal jurisdiction over internal tribal disputes. *Coeur d'Alene*, 751 F.2d at 1116; *Karuk Tribe Housing Authority*, 260 F.3d at 1079-80. The U.S. Supreme Court has suggested that a "general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). This Court has interpreted the Supreme Court's statement to mean that, where Congress enacts a statute of general applicability, the statute generally extends to everyone within the jurisdiction of the United States, including Indian tribal governments. *Coeur d'Alene*, 751 F.2d at 1115-16.

However, this general rule is not without exception. A federal statute of general applicability that is silent on the issue of its reach to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely

intramural matters"; (2) the law's application to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." *Coeur d'Alene*, 751 F.2d at 1116 (citing *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981)).[5] "In any of these three situations, Congress must *expressly* apply a statute to Indians before [this Court] will hold that it reaches them." *Id*. (emphasis in original).[6]

Accordingly, federal courts lack jurisdiction over claims falling within any *one* of the *Coeur d'Alene* exceptions. *Karuk Tribe Housing Authority*, 260 F.3d at 1076-79 (holding tribe's argument that the Age Discrimination in Employment Act did not apply to an intramural tribal dispute was not simply a defense on the merits, but rather was "jurisdictional" (citing *Coeur d'Alene*, 751 F.2d at 1116)). Thus, where federal claims touch an Indian tribe's exclusive right of self-governance in an intramural tribal matter, the federal courts lack jurisdiction over such claims. As shown below, Plaintiffs' claims fall squarely within this exception.

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[5] Plaintiffs acknowledge the *Tuscarora* rule, but neglect to disclose it is subject to exceptions. (Opening Brief, p. 28.)

[6] Plaintiffs' citation to case law recognizing federal court jurisdiction over non-Indians' challenges to tribal court jurisdiction is not to the contrary (Opening Brief, p. 26), as such disputes are in no sense intramural. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985).

B. This Is An Intramural Dispute That Federal Courts Lack Power To Hear Under Any Federal Statute.

Plaintiffs asked the District Court to exercise control over three aspects of tribal self-governance, any one of which would bring their suit within *Coeur d'Alene*'s first exception. 751 F.2d at 1116. First and foremost, a dispute over whether Plaintiffs are entitled to be members of the Tribe is the quintessential intramural tribal dispute, as this Court stated in *Coeur d'Alene*, placing this suit squarely within the case's first exception. Of course, Plaintiffs' efforts to compel Defendants to comply with *Plaintiffs'* interpretation of the Tribe's laws only further reveals the purely intramural nature of this dispute. Furthermore, Plaintiff's challenge to Defendants' authority to serve on the Tribe's governing body independently brings Plaintiffs' claims within *Coeur d'Alene*'s first exception, since it touches upon the Tribe's exclusive right to govern itself without outside intrusion, and to pass its "own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Put simply, no federal court possesses power to intrude upon these "delicate matters" without Congress' explicit approval. *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

1. Challenges To Tribal Disenrollment Touch Exclusive Rights Of Self-Governance In Purely Intramural Matters.

This Court in *Coeur d'Alene* specifically identified tribal membership disputes as one area in which the federal courts should not intrude, stating that

"the tribal self-government exception is designed to except purely intramural matters *such as conditions of tribal membership*." 751 F.2d at 1116 (citing *Farris*, 624 F.2d at 893 (emphasis added)); *Farris*, 624 F.2d at 893 (recognizing "exclusive rights of self-governance in purely intramural matters" including "tribal membership" (citing *Santa Clara Pueblo*, 436 U.S. at 55-56)).[7]

a) Santa Clara Pueblo And Its Progeny Confirm A Membership Dispute Is A Purely Intramural Matter.

Coeur d'Alene's tribal self-governance exception, and its application to tribal membership, flows from the U.S. Supreme Court's holding that federal courts may only maintain challenges to tribal membership determinations with Congress' express authorization. *Santa Clara Pueblo*, 436 U.S. at 55-56, 71-72 & n.32; *see Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005) (citing *Coeur d'Alene*, 751 F.2d at 1116).

In *Santa Clara Pueblo*, a female tribal member challenged a sexually discriminatory tribal ordinance that denied membership to the children of women who married outside the tribe, while extending membership to the children of male members who did so. *Santa Clara Pueblo,* 436 U.S. at 51. The member filed suit,

[7] As an earlier panel of this Court recognized, what *Coeur d'Alene* casts as an "exception" might just as well be stated as the general rule: "Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation." *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 684 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

claiming the ordinance violated her "equal protection" rights under the federal Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303. The Supreme Court rejected her effort, reasoning that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government," and that, while "no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations.'" *Id.* at 55. Thus, the Court concluded federal courts may not "pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members." *Id.* at 51, 72.

In so holding, the Court recognized the "well-established federal 'policy of furthering Indian self-government,'" noting that "resolution in a foreign forum of intra tribal disputes . . . cannot help but unsettle a tribal government's ability to maintain authority." *Santa Clara Pueblo*, 436 U.S. at 59, 62 (internal quotations and citations omitted). The Court emphasized that relief under ICRA must be confined to the single remedy Congress expressly provided: a writ of habeas corpus to challenge detention by an Indian tribe. *Id.* at 72. The Court confirmed "[a] tribe's right to define its own membership for tribal purposes," and held that, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Id.* at 72 n.32.

Following *Santa Clara Pueblo*, the Ninth Circuit has repeatedly and consistently held that Congress' refusal to expressly create a federal forum for tribal membership disputes leaves such matters to the discretion of the tribe, to the exclusion of federal courts. *Lewis*, 424 F.3d at 960 (internal dispute over membership benefits "cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes"); *Alvarado*, 509 F.3d at 1011; *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) ("[U]nless limited by treaty or statute, a tribe has the power to determine tribal membership."); *see also Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1185 (E.D. Cal. 2009).

Other Circuits agree, even when membership claims are couched under general federal statutory claims. *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1463 (10th Cir. 1989) (rejecting challenge to tribal membership decision based on various federal statutes, including ICRA, and reasoning that "[a]pplying the statutory prohibitions against race discrimination to a tribe's designation of tribal members would in effect eviscerate the tribe's sovereign power to define itself, and thus would constitute an unacceptable interference 'with a tribe's ability to maintain itself as a culturally and politically distinct entity'"); *see also Ordinance 59 Ass'n v. United States Dept. of the Interior*, 163 F.3d 1150, 1157 (10th Cir. 1998) (a suit "asking this court to step in and tell a tribal government

what to do in a membership dispute" constitutes "exactly the kind of interference in tribal self-determination prohibited by *Santa Clara*"); *Smith v. Babbitt,* 100 F.3d 556, 559 (8th Cir. 1996), *cert. denied*, 522 U.S. 807.

In *Santa Clara Pueblo*, the Supreme Court foreclosed injunctive relief and damages to challenge membership determinations under ICRA, a statute expressly applicable to Indian tribal officials. 436 U.S. at 56-58, 72. It is hardly surprising, then, that courts following *Santa Clara Pueblo* have refused to permit such claims under statutes completely silent as to their application to Indians.

b) Plaintiffs' Lawsuit Is An Intramural Tribal Dispute Beyond The Reach of Federal Courts.

Plaintiffs' lawsuit is a garden-variety tribal membership dispute. The premise for each of Plaintiffs' claims is that Defendants, acting in their capacity of elected officials as the governing body of the Tribe (E.R. 311:11-312:6), removed Plaintiffs from the Tribe's membership rolls in violation of the Tribe's laws. (E.R. 352:8-12, 353:18-21, 354:11-13, 355:13-15, 356:1-5, 356:22-357:3.) Indeed, while Plaintiffs tried to disavow these jurisdictional defects at the hearing below, by denying this case is about membership, they ultimately conceded that Plaintiffs' "claim is that these individuals . . . had their membership taken away from them without . . . the Tribal process being appropriately followed." (E.R. 69:12-17.)

Consistent with that concession, Plaintiffs asked the District Court to "invalidate Defendants' wrongful disenrollment actions," to "[e]nter an order

declaring the wrongful disenrollment of Plaintiffs by Defendants to be null and void," and to award damages for "the money and lost benefits that were withheld and/or taken away from Plaintiffs while they were wrongfully disenrolled." (E.R. 357:21-358:2.) However, as shown here, the federal courts simply may not hear such claims, let alone, grant the requested relief, without Congress' express authorization (*Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Lewis*, 424 F.3d at 960-61; *Nero*, 892 F.2d at 1462-63) and none exists.

Plaintiffs work to sidestep this precedent, manufacturing distinctions without differences—for example, characterizing *Santa Clara Pueblo* as a case involving a tribe's basic sovereign "right to define its own membership" (*Santa Clara Pueblo*, 436 U.S. at 72 n.32), and not a case involving the tribal right to *disenroll* existing members. (Opening Brief, p.24.) The distinction is contrived. The argument is also contrary to precedent, from this Court and elsewhere, holding that *Santa Clara Pueblo* applies to "any appeal from the decision of an Indian tribe to *disenroll* one of its members." *Jeffredo v. Macarro*, 599 F.3d 913, 915 (9th Cir. 2010), *cert. denied* 130 S. Ct. 3327 (citing *Santa Clara Pueblo*, 436 U.S. at 72 n.32) (emphasis added); *see also Cahto Tribe of the Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1226 (9th Cir. 2013) (holding disenrollment dispute "touches on critical and sensitive issues of tribal membership that are generally beyond our review because '[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'" (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32)); *see Ordinance 59 Ass'n*, 163 F.3d at 1157 ("*Santa Clara* was not fact-specific. The Court . . . held, in the absence of express congressional directive or explicit tribal waiver of immunity, no federal jurisdiction lies in an action for declaratory or injunctive relief against a Tribe or its officers.").[8]

Plaintiffs also attempt to distinguish *Santa Clara Pueblo* by asserting in passing that, here, "the purported reason for Plaintiffs' disenrollments . . . was wholly invalid." (Opening Brief, p. 24.) Of course, this assertion simply goes to the merits of Plaintiffs' membership claims, which Congress has refused to dedicate to the federal courts. *See Lewis*, 424 F.3d at 960 (affirming dismissal of membership suit for lack of jurisdiction "*[a]lthough [plaintiffs'] claim to membership appears to be a strong one*" (citing *Santa Clara Pueblo*, 436 U.S. 49) (emphasis added)).

Plaintiffs' citations to cases involving challenges expressly dedicated to federal courts change nothing. (Opening Brief, pp. 24-25.) For example, *Poodry*

[8] Plaintiffs' reliance on *Cahto* is curious, since that case involved an Indian tribe's successful reversal of a BIA effort to reinstate disenrolled tribal members. *Id*. at 1229. Unlike here, the Cahto Tribe gave the BIA power to decide appeals about whether to *enroll* persons. *Id*. at 1229-30. While this Court suggested the Tribe's delegation meant a BIA appeal would lie from a Cahto Tribe *enrollment* decision, the Court rejected a BIA effort to overturn the Tribe's disenrollment action. *Id*. at 1230-31.

v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996), involved a claim for habeas corpus relief that is expressly authorized under ICRA, but that Plaintiffs do not attempt to advance here. *Id.* at 889. Nor could Plaintiffs bring such a claim, as they do not allege criminal banishment in conjunction with their disenrollment. *Compare id. with Jeffredo*, 599 F.3d at 919-20 (declining to "expand[] the scope of the writ of habeas corpus to cover" appeals of tribal enrollment decisions in the absence of criminal banishment proceeding). Indeed, the Second Circuit confirmed in *Poodry* that only Congress may limit Indian tribes' power to define their membership. *Poodry*, 85 F.3d at 888. And Congress has steadfastly refused to subject tribes' membership authority to federal claims for damages or injunctive relief. *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 277-79 (9th Cir. 1981).

2. Suits Purporting To Enforce Tribal Law Against Tribal Officials Necessarily Touch Exclusive Rights Of Self-Governance In Purely Intramural Matters.

Plaintiffs' federal suit also asks a federal court to interpret and enforce *tribal* law. However, without express congressional direction, federal courts simply cannot grant relief for civil claims predicated on the violation of tribal laws (*Boe*, 642 F.2d at 276-80), which implicate Indian tribes' "inherent and exclusive power over matters of internal tribal governance." *Timbisha Shoshone*, 687 F. Supp. 2d at 1184-85; *In re Sac & Fox Tribe of the Miss. in Iowa/Meskwaki Casino Litig.*, 340

F.3d 749, 763-64 (8th Cir. 2003) ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts."); *Runs After v. United States of America*, 766 F.2d 347, 352 (8th Cir. 1985) (plaintiffs' claims "necessarily require the district court to interpret the tribal constitution and tribal law is not within the jurisdiction of the district court"); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) ("[T]he district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute."); *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 (D. Minn. 1995), *aff'd* 100 F.3d 556 (8th Cir. 1996) (holding a dispute "involving questions of [a] tribal constitution and tribal law is not within the jurisdiction of the district court"); *Miccosukee Tribe of Indians v. Cypress*, No. 12-Civ-22439, 2013 U.S. Dist. LEXIS 144375, at *22 (S.D. Fla. Sept. 30, 2013) (finding lack of subject matter jurisdiction to intercede in intratribal RICO suit where, "at its core, this is a dispute involving the Miccosukee Tribe and the alleged abuse of power granted to its former chairman under its tribal constitution").

Of course here, Plaintiffs' case necessarily turns on tribal, not federal, law, as they theorize that Defendants violated Pala's laws when disenrolling them. (*See, e.g.*, E.R. 300:2-8, 303:12-21.) To that end, Plaintiffs ask the Court to interpret a variety of Tribal laws, including the Tribe's 1960 Articles of

Association (E.R. 301:1-11), the Tribe's Constitution and the resolution adopting it (E.R. 303:19-304:7, 320:4-7), the Tribe's Original and Revised Enrollment Ordinances (E.R. 303:19-21, 328:3-6, 348:25-27), the Tribe's Gaming Ordinance (E.R. 321:15-26), and a General Council petition (E.R. 349:10-13). They further ask the Court to evaluate the substance of the Tribe's General Council meetings (E.R. 305:13-15), Executive Committee meetings (E.R. 312:4-10), and Enrollment Committee meetings (E.R. 312:12-313:2).

Among the many issues Plaintiffs raise and that require interpretation of the Tribe's laws are:

- whether the Tribe validly adopted its Constitution of November 19, 1997 (E.R. 319:25-320:7);[9]
- whether the Tribe's Constitution or the Tribe's Original or Revised Enrollment Ordinances guaranteed Plaintiffs due process or equal protection rights that the Tribe violated (E.R. 328:3-6, 341:21-342:11);
- whether, under the Tribe's Constitution and Ordinances, a vote by the

[9] Plaintiffs' argument that the Indian Reorganization Act governed the Tribe's adoption of its constitution is strange (Opening Brief, pp. 38-39), as Plaintiffs nowhere allege Pala organized under the IRA. 25 U.S.C. § 476 (a)(1), (c), (d). (*See* E.R. 301:1-11.) Nor could Plaintiffs so allege, as the Tribe rejected organization under the IRA, and so is not subject to its provisions. *See* United States Indian Service, *Ten Years of Tribal Government Under IRA*, at 14, http://www.doi.gov/library/internet/subject/upload/Haas-TenYears.pdf (reflecting Pala's vote rejecting the terms of the IRA).

Tribe's General Council foreclosed the Tribe's Executive Committee from revisiting the issue of whether Margarita Britten's was a full-blooded Indian (E.R. 333:24-334:24, 336:12-17);

- whether the Tribe's Constitution authorized the Tribe's Executive Committee to enact the Revised Enrollment Ordinances (E.R. 336:23-337:17); and
- whether the Tribe's Executive Committee violated the Revised Enrollment Ordinances by allegedly disenrolling members who did not misrepresent or omit facts in an enrollment application (E.R. 338:25-339:3).

Indeed, Plaintiffs' Opening Brief asks this Court to delve into many of these same issues, before even reaching the merits, simply to evaluate whether the Tribe's sovereign immunity bars their claims. For instance, Plaintiffs contend certain Defendants were serving on Pala's Executive Committee in violation of Pala law, meaning they could not have acted in their official capacity when disenrolling Plaintiffs. (Opening Brief, pp. 29-33.) Plaintiffs further assert the Tribe's Constitution and membership laws are invalid, positing that Defendants lack immunity to claims alleging violations of the Tribe's laws. (*Id.*, pp. 34-44.)

Plaintiffs' contentions below and before this Court thus confirm their claims rest squarely on alleged violations of tribal law bearing on an intramural tribal

dispute, which Congress has refused to dedicate to the federal courts. *Boe*, 642 F.2d at 276-78; *Timbisha Shoshone*, 687 F. Supp. 2d at 1184-85; *In re Sac & Fox Tribe,* 340 F.3d at 763-64.

3. Tribal Leadership Disputes Also Touch Exclusive Rights Of Self-Governance In Purely Intramural Matters.

To establish their claim to membership, Plaintiffs also ask this Court to answer whether, as a matter of tribal law, the Tribe's governing body that disenrolled them (to wit, the body comprised of Defendants) was properly constituted. (E.R. 305:8-12, 339:13-341:19.) Of course, a dispute about the legitimacy of a tribe's governing body is also an internal tribal matter that a federal court may not resolve without express congressional direction. *Boe*, 642 F.2d at 276-78 (holding federal court lacks power to resolve plaintiffs' claims that tribal government officials violated the tribe's constitution, bylaws, and ordinances in certifying tribal election involving ineligible candidate); *Timbisha Shoshone*, 687 F. Supp. 2d at 1184-85; *County of Charles Mix v. U.S. Dept. of the Interior*, 674 F.3d 898, 903 (8th Cir. 2012); *Goodface*, 708 F.2d at 339.

In sum, Plaintiffs' assertion that Defendants' acts of governance were *ultra vires—i.e.,* that those acts somehow exceeded or were inconsistent with their authority under the Tribe's law—simply reveals this case for what it is, an effort to intrude upon the Tribe's exclusive and sovereign exercise of self-governance in a purely intramural matter.

C. Congress Has Not Expressly Authorized Federal Court Jurisdiction Over Plaintiffs' Claims Challenging Tribal Governance.

The federal statutes upon which Plaintiffs predicate their claims in no way express Congress' intent to authorize civil claims challenging tribal self-governance or membership determinations. *Coeur d'Alene*, 751 F.2d at 1116. Nor can Plaintiffs manufacture federal jurisdiction by purporting to challenge a twenty-four year old administrative decision in an entirely different membership dispute where Congress has provided them no federal forum.

1. Plaintiffs Seek Relief Under Generally Applicable Statutes Silent As To Their Application To Indian Tribes.

Plaintiffs purport to plead just two claims arising under federal law: (1) a claim for conspiracy to interfere with civil rights under 42 U.S.C. § 1985(3) and (2) a claim alleging violation of equal rights under the law under 42 U.S.C. § 1981. Congress has not "*expressly* appl[ied]" either statute to Indians, let alone provided federal relief from a tribal government's membership decisions. *Coeur d'Alene*, 751 F.2d at 1116 (emphasis in original). Accordingly, neither statute supplies the express congressional authorization required for federal jurisdiction over this intramural dispute. *Karuk Tribe Housing Authority*, 260 F.3d at 1076-79 (citing *Coeur d'Alene*, 751 F.2d at 1116).

By their terms, 42 U.S.C. § 1985(3) and § 1981 are generally applicable federal statutes completely silent as to whether they reach Indians or tribal

disputes. Indeed, §1985(3) simply applies to "persons." 42 U.S.C. § 1985(3) (prohibiting "two or more persons in any State or Territory [to] conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"); *Nero*, 892 F.2d at 1462 (holding that § 1985(3), even when read with ICRA, did not express Congress' intent to permit suit challenging tribal self-government). Likewise, § 1981 is a generally applicable statute simply codifying certain rights of "[a]ll persons." *Nero*, 892 F.2d at 1463 (holding § 1981 may not be invoked in an intramural tribal membership dispute because it is not "expressly applicable to Indian tribes").

Although Plaintiffs do not purport to invoke ICRA's habeas corpus remedy (25 U.S.C. § 1303), they rely on ICRA to support their federal tort claims. (E.R. 352:8-12, 353:14-17.) This reliance is misplaced. ICRA in no way authorizes federal jurisdiction over claims for injunctive relief and damages in an intramural dispute. *Santa Clara Pueblo*, 436 U.S. at 55, 72; *Boe*, 642 F.2d at 277-79; *Jeffredo*, 599 F.3d at 920 (declining to "expand[] the scope of the writ of habeas corpus to cover" appeals of tribal enrollment decisions); *Nero*, 892 F.2d at 1462 (applying *Santa Clara Pueblo* to hold "ICRA does not provide an independent basis for suit under sections 1985(3) and 1986").

Plaintiffs' Opening Brief apparently abandons arguments advanced below that pre-*Santa Clara Pueblo* authorities somehow support § 1985(3)'s application to intratribal disputes. The cases (*Dry Creek Lodge v. United States*, 515 F.2d 926 (10th Cir. 1975), and *McCurdy v. Steel*, 353 F. Supp. 629 (D. Utah 1973)) not only predated *Santa Clara Pueblo*, but *Dry Creek Lodge* involved completely different issues, and in particular, claims by a non-Indian entity against the Secretary of the Interior and tribal officials. 515 F.2d at 933. The district court in *McCurdy* opined, alongside its long-repudiated suggestion that federal court jurisdiction under ICRA reached beyond habeas corpus relief, that § 1985(3) could apply to a purely intramural tribal dispute. 353 F. Supp. at 635-36, 638-39. However, this reasoning does not survive the intervening precedent, from the U.S. Supreme Court and this Court, prohibiting federal court involvement in purely intramural disputes absent express statutory authorization. *Santa Clara Pueblo*, 436 U.S. at 56; *Coeur d'Alene*, 751 F.2d at 1116.

Plaintiffs' reliance on *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006), is equally misplaced. That case was in no way intramural, as it involved a non-Indian plaintiff, and the Court expressly disclaimed any opinion of the procedural or substantive merits of § 1981 or § 1985 claims, remanding to simply permit plaintiff to amend his "difficult to decipher" *pro se* pleadings to attempt to "assert these two claims intelligibly." *Id.* at 1048.

2. Congress Also Did Not Authorize Tort Claims Arising Out Of Tribal Membership Actions That Depart From DOI Decisions Or Recommendations.

Plaintiffs suggest this dispute is something other than an internal membership dispute based on their claim that a 1989 U.S. Department of the Interior ("DOI") decision supports their view of the Tribe's law. (Opening Brief, pp. 25-26.) Not so.

The DOI's decades-old decision changes nothing, as Plaintiffs identify no federal right of action permitting them to force tribal officials to make membership decisions consistent with any prior federal agency decision. Indeed, no such right exists. *Jeffredo*, 599 F.3d at 917-918 ("federal courts lack jurisdiction to consider an appeal from the decision of an Indian Tribe to disenroll one of its members" unless collaterally challenged via writ of habeas corpus). Absent express congressional authorization, the District Court simply lacked jurisdiction to intercede in this tribal dispute. *Coeur d'Alene*, 751 F.2d at 1116. Thus, whether or not the DOI decision amounts to "federal law" as Plaintiffs contend (Opening Brief, p. 26), it simply does not supply *congressional* authorization permitting federal intervention.

Importantly, the DOI made the 1989 decision pursuant to former authority the Tribe has since withdrawn. At that time, the Tribe's Executive Committee had granted the DOI the authority to decide membership appeals in enactment of

"Ordinance No. 1." (E.R. 140.) Because the Tribe repealed such authority in 2005, through "Revised Ordinance No. 1" (E.R. 180-185), the DOI lost any authority over the Tribe's enrollment decisions. The Tribe's Constitution now only authorizes the DOI to provide membership *recommendations*. (E.R. 193-194.)

Indeed, when certain Plaintiffs asked the DOI to reverse the disenrollment decision at issue here, the DOI declined, noting the Tribe's law deprived the agency of any authority to overrule the Tribe's decisions.[10] (E.R. 245; *see also* E.R. 242; *see* Opening Brief, p. 15 n.9 (conceding DOI has confirmed it lacks authority here).)

In sum, regardless of the role given DOI nearly 24 years ago, the Tribe has since, in a quintessential exercise of self-governance, reestablished its governing body as the sole and final arbiter over one of the Tribe's most basic powers, the power to decide its own membership. The decades-old DOI decision upon which Plaintiffs rely simply lacks legal force or relevance, and in no way authorizes federal court jurisdiction.

[10] Certain disenrollees filed an unsuccessful APA challenge to the DOI's refusal to hear the appeal. *Aguayo v. Salazar*, No. 12-cv-0551-WQH-KSC, 2012 U.S. Dist. LEXIS 186873, at **34-35 (S.D. Cal. Nov. 19, 2012).

II. Congress Has Not Granted States The Power To Adjudicate Intramural Tribal Disputes, Either.

As shown below, Congress has not authorized any state law claim over which a federal court could theoretically assume supplemental jurisdiction.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history" (*Rice v. Olson*, 324 U.S. 786, 789 (1945)), and courts have steadfastly held that, as a general rule, state law has no role to play in Indian country. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 168 (1973). Indeed, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). Consequently, state laws may be applied in Indian country only where Congress has expressly provided. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987).

With the enactment of Public Law 280 (or "P.L. 280") (18 U.S.C. § 1162; 28 U.S.C. § 1360), Congress expressly granted certain states, including California, jurisdiction "over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country. . . ." 28 U.S.C. § 1360(a). As the Supreme Court explained, "the consistent and exclusive use of the terms 'civil causes of action,' 'aris[ing] on,' 'civil laws . . . of general application to private

persons or private property,' and 'adjudicat[ion],' in both the Act and its legislative history virtually compels our conclusion that the primary intent of [28 U.S.C. § 1360] was to grant jurisdiction over *private civil litigation* involving reservation Indians in state court." *Bryan v. Itasca County*, 426 U.S. 373, 385(1976) (emphasis added); *Cabazon Band of Mission Indians*, 480 U.S. at 208 (noting 28 U.S.C. § 1360 "grant[s] States jurisdiction over private civil litigation involving reservation Indians in state court").

Importantly, the *Bryan* Court clarified that "nothing in [P.L. 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of . . . tribal governments . . . and a conversion of the affected tribes into little more than 'private, voluntary organization.'" 426 U.S. at 388. In that vein, the Court noted "[t]he Act itself refutes such an inference" as "there is notably absent any conferral of state jurisdiction over the tribes themselves, and [28 U.S.C. § 1360(c)], providing for the 'full force and effect' of any tribal ordinance or customs 'heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State . . . .'" *Id.* at 388-89.

Consistent with that admonition, California case law excludes internal tribal matters from the realm of "private legal dispute[s]" that P.L. 280 covers. *Lamere*, 131 Cal. App. 4th at 1064-67. *Lamere* involved a suit by disenrolled tribal

members against their tribal enrollment committee, alleging their disenrollment violated tribal and federal law. *Id*. at 1062. The disenrollees argued the state court had jurisdiction under P.L. 280's grant of civil jurisdiction to California. *Id*. The California appellate court disagreed, stating "Public Law 280 cannot be viewed as a general grant of jurisdiction to state courts to determine intratribal disputes," and reasoning that disputes regarding tribal enrollment are not "'private legal dispute[s] between reservation Indians,' but rather go[] to the heart of tribal sovereignty." *Id*. at 1064; *see also Ackerman*, 121 Cal. App. 4th at 951 (rejecting California petition for writ of mandate against tribal council members in membership dispute, holding "the purpose of Public Law 280 was not to resolve disputes that affect the tribe and its ability to govern itself").

Because P.L. 280 does not permit state courts to exercise jurisdiction over intratribal disputes such as this one (let alone claims like Plaintiffs' that challenge tribal government action (*see infra* Section III.A.1)), it provides no vehicle through which federal courts can exercise supplemental jurisdiction over state law claims. *Promisel v. First American Artificial Flowers, Inc*., 943 F.2d 251, 257 (2nd Cir. 1991) ("If a state would not recognize a plaintiff's right to bring a state claim in state court, a federal court exercising [supplemental] jurisdiction . . . must follow the state's jurisdictional determination and not allow that claim to be appended to a federal law claim in federal court."); *Kauffman v. Anglo-American School of Sofia*,

28 F.3d 1223, 1225 (D.C. Cir. 1994). Accordingly, Plaintiffs cannot escape the jurisdictional barriers to intratribal claims by styling them as state law civil causes of action. *See, e.g., In re Sac & Fox Tribe*, 340 F.3d at 763-64 (refusing to hear state law trespass claim seeking federal court to resolve internal tribal leadership dispute); *Timbisha Shoshone*, 687 F. Supp. 2d at 1181, 1184-85.

III. Even If Federal Or State Claims Exist Here, Sovereign Immunity Bars Plaintiffs' Claims Challenging The Tribe's Decision To Disenroll Them.

Although the absence of a federal right of action disposes of this lawsuit, the Tribe's sovereign immunity separately bars Plaintiffs' claims. Plaintiffs' action rests solely on Defendants' acts of tribal governance, and it necessarily seeks the kind of relief only the Tribal government can provide. Accordingly, as the District Court correctly concluded, Plaintiffs' suit is effectively one against the Tribe, and its sovereign immunity deprived the federal court of any power to adjudicate the case.

As the District Court also correctly found, Plaintiffs cannot skirt this immunity through artful pleading, by simply suing tribal officials to vindicate injuries allegedly caused by the action of the tribal government. *Imperial Granite Co.,* 940 F.2d at 1271. While Plaintiffs purport to seek damages directly from Defendants for their acts of governance, the Tribe itself is the real party in interest here, as Plaintiffs' claims attack one of a sovereign Tribe's "most basic powers" of self-governance. *Bruce*, 394 F. 3d at 1225. The Tribe has never relinquished that

immunity; nor has Congress abrogated it, let alone created a federal right of action for Plaintiffs' intramural suit. In sum, the Tribe's sovereign immunity constitutes a separate and independent basis to affirm dismissal of Plaintiffs' suit for lack of jurisdiction.

A. Tribal Sovereign Immunity Bars Claims Challenging Disenrollment By An Indian Tribe.

As "'distinct, independent political communities' with sovereign powers that have never been extinguished, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. Indeed, the Supreme Court has long recognized that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers v. Arkansas*, 61 U.S. 527, 529 (1858); *see generally* William Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587, 1610-1612, 1640-54 (2013) (tracing roots of tribal immunity doctrine from fourteenth century principles of English common law to its recognition in nineteenth century American case law).

Because preserving tribal resources and autonomy are matters of vital importance, tribes enjoy broad sovereign immunity extending to both governmental and commercial activities on or off the tribe's reservation. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.,* 523 U.S. 751, 760 (1998). Tribal

immunity, like all aspects of tribal sovereignty, "is subject to the superior and plenary control of Congress" (*Santa Clara Pueblo*, 436 U.S. at 58), and "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma*, 523 U.S. at 754. No such waiver or congressional authorization exists here, and Plaintiffs' claims, however characterized, cannot proceed in the face of the Tribe's immunity.

1. Plaintiffs' Suit Alleging Tribal Government Action Injured Them Is Effectively A Suit Against The Tribe Barred By Its Immunity.

Because a Tribe necessarily acts through its elected officials, tribal sovereign immunity extends to those officials in their acts of governance, *i.e.*, when acting in their official capacity and within the scope of their authority. *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Imperial Granite Co.,* 940 F.2d at 1271. Accordingly, a plaintiff cannot avoid tribal immunity through "a mere pleading device," such as by simply naming individual tribal officials in place of the tribe itself. *Cook*, 548 F.3d at 727; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984) .

This Court's analysis in *Imperial Granite* is dispositive. There, the plaintiff sued tribal officials who voted to bar plaintiff's access to property surrounded by the tribe's reservation. 940 F.2d at 1270-71 Finding the officials immune from suit, the Court reasoned the plaintiff's grievance was effectively with the tribal government, whose only action "was to vote as members of the [Tribe]'s governing body against permitting Imperial to use the road." *Id.* Because it was the tribe's government, not the individual members, who controlled the tribe's property, the lawsuit against the individuals was not "anything other than a suit against the [Tribe]." *Id.* at 1271. Reasoning that "[t]he votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury," this Court held that the individual defendants "share . . . the sovereign immunity of the Band" and affirmed dismissal on that basis. *Id.* at 1272.

The same is true here. Plaintiffs claim injury from their disenrollment (E.R. 352:8-12, 353:18-21, 354:11-13, 355:13-15, 356:1-5, 356:22-357:3; *see* E.R. 69:12-17)—a result Defendants effected only by casting official votes as elected members of the Tribe's governing body. Indeed, Plaintiffs' Complaint concedes Defendants necessarily acted within their authority "as members of Pala's Executive Committee, . . . in positions of power and control over members of the Tribe" and as "members of Pala's Enrollment Committee." (E.R. 312:4-13; *see*

also E.R. 327:14-328:2.) Plaintiffs seek "a permanent injunction to invalidate Defendants' wrongful disenrollment actions," which, in the end, could only be effected by an official act of the Tribe, adding Plaintiffs to its membership rolls. (E.R. 357:23-24.)

Plaintiffs work to distinguish *Imperial Granite*, suggesting it does not bar suit where tribal officials allegedly "acted beyond the scope of their lawful authority" (e.g., by violating tribal law). (Opening Brief, p. 37 n.18.) But they misread *Imperial Granite*. In that case, this Court evaluated whether the officials were alleged to have acted beyond the scope of their lawful authority only as to an action they could have taken personally to injure plaintiff, namely, "if the complaint [were] liberally construed to allege the tribal *officials themselves* 'blocked' the road." *Id.* at 1271 (emphasis added). No such individual action is alleged, or even possible, here: Defendants simply cannot "themselves" individually disenroll members—only the Tribe can.

Indeed, Plaintiffs' contention that "Defendants were unable to act in their official capacity when they disenrolled the Plaintiffs" is an oxymoron. (Opening Brief, p. 33.) It is *because* Defendants were acting in their official capacity that the Tribe disenrolled Plaintiffs.[11]

[11] Although Plaintiffs contend the Tribe had a basis under its laws to remove certain Defendants from their government offices, Plaintiffs nowhere contend the Tribe at any time actually took any such action. (Opening Brief, pp. 29-33.)

To be sure, Plaintiffs concede only the Tribe's government has the power to determine membership. (E.R. 306:20-307:2, 336:20-22, 349:20.) Because the right to decide tribal membership is vested in the sovereign tribe itself (*Santa Clara Pueblo*, 436 U.S. at 72 n.32)—constituting one of its "most basic powers" (*Bruce*, 394 F.3d at 1225)—Plaintiffs' grievance is necessarily against the Tribe itself, and their claims against Defendants no more than an impermissible "attempted end run around tribal sovereign immunity." *Dawavendewa*, 276 F.3d at 1160.

2. Plaintiffs Cannot Circumvent Tribal Immunity To Their Membership Claims By Simply Alleging Violations of Tribal Law.

Even if the source of Plaintiffs' alleged injury—the Tribe's disenrollment—were not the end of the inquiry, Plaintiffs' proffered violations of tribal law cannot strip Defendants of their immunity. Plaintiffs' lengthy explanation of why they disagree with the manner in which Defendants governed the Tribe (Opening Brief, pp. 29-44) misses the point: Plaintiffs cannot circumvent the Tribe's immunity in this intratribal suit by advancing the very issues of tribal self governance Congress has refused to dedicate to the federal courts. *Lewis*, 424 F.3d at 961 ("[T]ribal immunity bars suits to *force tribes to comply with their membership provisions*, as well as suits to force tribes to change their membership provisions." (emphasis added)); *Boe*, 642 F.2d at 276-77.

Indeed, the Supreme Court's admonition that federal courts may not "intrude on" an Indian tribe's right to define its membership would ring hollow indeed if aggrieved individuals could obtain federal court intervention by simply suing tribal officials for alleged violations of tribal law. *See Santa Clara Pueblo*, 436 U.S. at 72 & n.32 (holding ICRA "does not impliedly authorize actions for declaratory or injunctive relief against either the tribe *or its officers*" (emphasis added)). It is hardly surprising, therefore, that sovereign immunity cannot be so easily avoided through the "mere pleading device" of suing tribal officials instead of the Tribe itself. *Cook*, 548 F.3d at 727.

Not surprisingly, Plaintiffs cite no authority suggesting otherwise. Plaintiffs' citations (Opening Brief, pp. 34-36) at most hold (1) that tribal officials lack immunity when they act in concert with state officials, under color of state law, and in violation of the United States Constitution (*Evans v. McKay*, 869 F.2d 1341, 1348 n.9 (9th Cir. 1989) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1907))); (2) that tribal officials may be enjoined from exercising tribal sovereignty over nonmembers in violation of federal law (*Wisconsin v. Baker*, 698 F.2d 1323, 1332-33 (7th Cir. 1983)); and (3) that, consistent with this Court's holding in *Imperial Granite*, tribal officials lack immunity to claims that their personal conduct, as opposed to an official action of the Tribe, caused injury. *Burrell v. Armijo*, 456 F.3d 1159, 1162-63, 1174 (10th Cir. 2006). None of these

circumstances exists where, as here, a suit alleges tribal officials violated tribal law in effecting disenrollment from the tribe. (E.R. 352:8-12, 353:14-21, 354:11-13, 355:13-15, 356:1-5, 356:22-357:3; *see* E.R. 69:12-17.)

Plaintiffs rely heavily on the Tenth Circuit's decision in *Burrell* (Opening Brief, pp. 27, 29, 35), even though it is in harmony with this Court's rule that immunity bars suit for injuries caused by tribal government action. 456 F.3d at 1162-63, 1174. In *Burrell*, non-Indian plaintiffs sued tribal officers, alleging defendants injured them through individual actions and not as governing officials of the tribe. *Id.* Specifically, the defendants, acting individually, "hired others to bale the [plaintiffs'] hay crop," "stole their crops," and "intentionally ran [plaintiffs] off their farm."[12] *Id.* at 1163. The Tenth Circuit observed that individual tribal officials lack immunity as to claims they "have acted outside the amount of authority that the *sovereign is capable of bestowing*." *Id.* at 1174 (quoting *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984)) (emphasis added). The court "express[ed] no opinion as to the merits of the [Plaintiffs'] § 1981 and § 1985 claims" and remanded them to the district court. *Id.* at 1174.

[12] The plaintiffs in *Burrell* also appealed dismissal of breach of lease claims, which the Tenth Circuit affirmed based on plaintiffs' failure to exhaust administrative remedies. *Id.*

Burrell at most permits suit for tribal officers' actions causing injury apart from action of the tribe. In contrast to the *Burrell* defendants' personal acts of theft and harassment, Defendants here could not possibly personally remove Plaintiffs from the Tribe's membership rolls on their own, since such is necessarily an official act of the Tribe. *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Bruce*, 394 F.3d at 1225. (*See* E.R. 306:20-307:2, 336:20-22, 349:20.)

Nor does *Burrell* suggest tribal officials' actions are outside their official capacity or beyond their authority simply because they allegedly violate tribal law. Indeed, the decision confirms that federal law, not tribal law, defines the scope of the "authority that the sovereign is capable of bestowing" for purposes of tribal official immunity. In so ruling, the Tenth Circuit relied on its decision in *Tenneco Oil* (*Burrell*, 456 F.3d at 1174), which defined the "authority that the sovereign is capable of bestowing" with reference to the established rule that tribes retain the powers "necessary to protect tribal self-government or to control internal relations." *Tenneco Oil Co*., 725 F.2d at 575 (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)).

In sum, neither *Burrell*, nor any authorities Plaintiffs cite, strip immunity from tribal officials in a suit challenging tribal government action on the theory that they violated tribal law. Where, as here, tribal officials exercise an Indian tribe's fundamental power of self governance—defining the tribe's membership—

they act squarely within the scope of "authority that the sovereign is capable of bestowing." *Tenneco Oil Co*., 725 F.2d at 575 (citing *Montana*, 450 U.S. at 564).

3. The Motives For Defendants' Acts Of Tribal Governance Are Irrelevant To The Immunity Analysis.

Plaintiffs argue they can defeat Defendants' immunity by alleging they caused the Tribe to disenroll Plaintiffs out of "retaliatory animus." (Opening Brief, pp. 45-47.) This is wrong.

Notably, Plaintiffs present no authority for the argument that a tribal official's alleged motives are relevant to whether sovereign immunity protects his or her actions governing the tribe. Instead, Plaintiffs rely on a case involving qualified immunity, not sovereign immunity. In *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012), this Court explained a public official does not possess *qualified* immunity where "the facts alleged show" defendant "violated a constitutional right" that was "clearly established." *Id.* at 915 (citing *Saucier v. Katz*, 533 U.S. 194, 201-02). There, defendants' motives were relevant to the merits of plaintiff's constitutional tort claims, and thus relevant to whether defendants lost qualified immunity by violating a clearly established constitutional right. *See, e.g.*, *id.* at 917 (element of plaintiff's First Amendment claim was "retaliatory animus as the cause of injury").

Unlike qualified immunity, tribal sovereign immunity bars all suits, without regard to the potential merits. *Kiowa Tribe of Oklahoma,* 523 U.S. at 759-60.

Thus, the Tribe's immunity prevents suits challenging tribal officials' actions of governance, regardless of the suits' merits or the officials' motives.

B. Plaintiffs Cannot Defeat Tribal Immunity By Simply Suing Individual Officials Instead Of The Tribe Itself.

Plaintiffs offer a number of theories as to why their case can survive dismissal despite the Tribe's immunity to suit. All fail.

1. The Tribe Is The Real Party In Interest Because Plaintiffs' Claims Challenging The Government's Membership Decisions Attack The Very Core Of Tribal Sovereignty.

Plaintiffs claim "this case is fundamentally one against individuals," not the Tribe, because Plaintiffs seek, in part, "money damages from Defendants only—not from Pala." (Opening Brief, p. 47-49). Plaintiffs are mistaken.

"Where a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, [courts] ask whether the sovereign 'is the real, substantial party in interest.'" *Native American Distributing*, 546 F.3d at 1296 (citing *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)). "[T]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' (*Land v. Dollar*, 330 U.S. 731, 738 (1945)) or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act." *Shermoen*, 982 F.2d at 1320 (citing *Larson v. Domestic & Foreign Corp*, 337 U.S. 682, 704 (1949)); *see also Cook*, 548 F.3d at 727 (in cases where tribal

officials are sued when acting in their official capacity and within the scope of their authority, "the sovereign entity is the 'real, substantial party in interest'").

To support their argument that the Tribe is not the "real, substantial party in interest," Plaintiffs cite *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), where this Court concluded that paramedics employed by a tribal fire department did not enjoy the tribe's immunity from suit when sued in their individual capacities for injury caused while providing emergency medical services on non-tribal lands. *Id*. at 1087-88. Plaintiffs' reliance is misplaced. As this Court recognized in *Maxwell*, claims for damages against tribal officials exercising their governmental duties "attack[] the very core of tribal sovereignty," and are barred by sovereign immunity. *Id*. at 1089 (citing *Hardin v. White Mountain Apache Tribe*,779 F.2d 476, 478-80 (9th Cir. 1985) and quoting *Baugus v. Brunson*, 890 F. Supp. 908, 911 (E.D. Cal. 1995)).

Here, Plaintiffs' suit "attack[s] the very core of tribal sovereignty" by seeking to attach liability to tribal officials exercising one of the most basic of an Indian tribe's powers. *Bruce*, 394 F.3d at 1225. As the District Court aptly summarized, Plaintiffs' allegations strike at the heart of Defendants acts carrying out the Tribe's powers to govern its membership, contending that Defendants, in "positions of power and control over members of the Tribe" as members of the Tribe's Executive Committee: (1) passed a Tribal enrollment ordinance, which

empowered them to make membership determinations on behalf of the Tribe; (2) made a determination regarding the degree of Indian blood of a deceased Tribal member; and (3) disenrolled Plaintiffs on the grounds they lack the requisite blood quantum for membership in the Tribe. (E.R. 302:11-12; 303:3-5; 322:18-19; 324:19-20; 328:18-20, 336:12-16.)

Each act upon which Plaintiffs seek to predicate Defendants' liability is fundamentally an act of tribal governance. Holding tribal officials personally liable for such acts of governance necessarily interferes with the Tribe's sovereignty and ability to govern. *Shermoen v. U.S.*, 982 F.2d 1312; *Maxwell*, 708 F.3d at 1089. Accordingly, the Tribe is the real party in interest and its immunity bars Plaintiffs' claims for money damages.

2. Immunity Bars Plaintiffs' Injunctive Relief Claims To Force The Tribe To Enroll Them As Members.

a) No Federal Law Authorizes The Injunctive Relief Plaintiffs Seek.

Trying to pierce Defendants' immunity, Plaintiffs also assert the *Ex Parte Young* doctrine applies. (Opening Brief, 49-53.) While this doctrine allows suit against individual government officials in some circumstances (none existing here), Plaintiffs' citations confirm the doctrine applies only where a federal right to relief exists in the first instance. (Opening Brief, pp. 50-53.) *See Hibbs v. HDM Dep't of Human Res.*, 273 F.3d 844, 871 (9th Cir. 2001) (*Ex Parte Young* allows a

plaintiff to maintain suit against officials "only if the [federal law] gives him a right of action against them."); *see, e.g. Vann v. United States DOI,* 701 F.3d 927, 928 (2012) (alleging violation of federal law in the form of a treaty between the United States and Cherokee tribe). As previously discussed in section I.C.1, § 1981 and § 1985 create no federal right to relief in an tribal membership dispute, and so cannot support an injunction here.

Nor does the 1989 agency decision Plaintiffs identify supply them a right of action. *See Hibbs*, 273 F.3d at 871. As Plaintiffs' own case law holds, *Ex Parte Young* applies only to "claims that officials are violating either the federal constitution, federal statute [or] . . . federal common law." *Salt River Project Agric. Improvement & Power Dist.,* 2012 U.S. App. LEXIS 10862, *14 (9th Cir. May 29, 2012). None of Plaintiffs' authorities show an agency decision amounts to federal common law supporting *Ex Parte Young* relief, let alone that the DOI decision Plaintiffs identify gives them a right of action here. Rather, all of the cases cited to support this novel theory merely hold that the doctrine of collateral estoppel applies to final determinations of agency decisions. (Opening Brief at 51.)[13] Because Plaintiffs simply lack any right to injunctive relief, the District

[13] To the extent Plaintiffs are attempting to argue that collateral estoppel would apply to bar the Tribe from determining its membership, this argument fails as Plaintiffs have not come close to meeting their burden of demonstrating it by referencing a case decided twenty years ago involving a completely different

Court did not have before it any membership issue, let alone any issue subject to collateral estoppel based on a twenty-year-old agency decision involving none the Plaintiffs in this case.

b) The Tribe's Immunity Bars An Order Requiring The Tribe To Take The Affirmative Action Of Enrolling Plaintiffs As Members.

The Ninth Circuit has repeatedly emphasized that *Ex Parte Young* relief is unavailable where it cannot be granted "by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign . . . ." *Shermoen*, 982 F.2d at 1320; *Dawavendewa*, 276 F.3d at 1159-61(refusing to permit employee of tribally regulated employer to amend racial discrimination complaint to name Navajo Nation officials because plaintiff's "real claim is against the Nation itself" and relief "would operate against the Nation").

Based on this controlling precedent, the District Court concluded Plaintiffs' requested relief "would 'require affirmative action by the sovereign,' *i.e*. the Pala Tribe's re-enrollment of Plaintiffs" and "[s]uch a remedy would operate against the Pala Tribe, impermissibly infringing upon its sovereign immunity." (E.R. 17:12-15 (citations omitted)). The substance of relief Plaintiffs seek only confirms the accuracy of that conclusion. Specifically, Plaintiffs ask this Court to require

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putative tribal member. *See Plaine v. McCabe,* 797 F.2d 713, 720 (9th Cir. 1986) (explaining requirements for administrative collateral estoppel).

"affirmative action by the sovereign" Tribe, by entering "a permanent injunction to invalidate Defendants' wrongful disenrollment actions," which, in the end, could only be effected by an official act of the Tribe, adding Plaintiffs to its membership rolls. (E.R. 357:23-24.) In effect, Plaintiffs ask this Court to direct a sovereign tribe to disregard its own Constitution and laws to reinstate Plaintiffs to its membership rolls, despite the Tribe's considered decision warranting otherwise.

Plaintiffs' demand that the Court restore to them "the money and lost benefits that were withheld and/or taken away from Plaintiffs *while they were wrongfully disenrolled*" demonstrates further affirmative action required of the Tribe. (E.R. 358:1-2.) Only the Tribe can reinstate Plaintiffs and grant them the benefits of tribal membership, and Defendants in their individual capacities lack the ability to cause the Tribe to take the actions Plaintiffs ask this Court to direct.[14]

In sum, only the Pala Tribe, whose immunity is unquestioned, could provide the requested relief because Defendants only "possess the power" to grant Plaintiffs the membership they seek "*on behalf of the tribe*." *Maxwell,* 708 F.3d at

[14] *See Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989) (holding injunctive relief sought by plaintiff could be "obtained only from the defendants in their official capacities, not as private individuals" because relief sought was for violations of policy carried out in their official capacities); *Kuck v. Danaher*, 822 F. Supp. 2d 109, 148 (D. Conn. 2011) (same); *DeLoreto v. Ment*, 944 F. Supp. 1023, 1031 (D. Conn. 1996) (holding "injunctive relief of reinstatement [as a state agency employee] could only be awarded against Defendants in their official capacities" because "[c]learly, in their individual capacities they have no authority to reinstate Plaintiffs").

1088 (emphasis added). Thus, Plaintiffs' relief necessarily requires "affirmative action by the sovereign," rendering *Ex Parte Young* inapplicable. *Shermoen*, 982 F.2d at 1320.

IV. The Record Presents Alternative Grounds For Affirming Judgment For Defendants.

Although the District Court properly dismissed the case on sovereign immunity grounds (E.R. 43:5-12), Defendants presented alternative bases requiring dismissal. Each equally supports affirmance.

First, putting aside that Plaintiffs' suit was effectively one against the Tribe, dismissal was also required because the Tribe itself is a necessary and indispensible party to a dispute adjudicating its membership and may not be joined because it possesses immunity. (S.E.R. 16:18-18:2, 47:1-52:13.) Second, Plaintiffs cannot state a federal or state claim for relief based on their disenrollment from a federally recognized Indian tribe. (S.E.R. 18:3-22:20, 52:14-61:11.)

A. The Tribe Is A Necessary And Indispensable Party That Cannot Be Joined.

The Federal Rules require dismissal where a necessary and indispensable party cannot be joined to the action. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19. Such is the case here with respect to the sovereign Tribe.

First, the Tribe is a necessary party because Plaintiffs cannot obtain complete relief without action by the Tribe. Fed. R. Civ. P. 19(a)(1). While

Plaintiffs purport to sue Defendants in their individual capacities (Opening Brief at 48), Defendants in their individual capacities cannot grant Plaintiffs' demand that the Tribe reinstate them. (E.R. 300:8-12, 357:23-26.) *See Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989).

Second, the Tribe is a necessary party because it has a number of legally protected interests in preserving its own sovereign immunity and its "right not to have [its] legal duties judicially determined without consent," not to mention its membership. *Shermoen*, 982 F.2d at 1317; *Kennedy v. United States DOI*, 2012 U.S. Dist. LEXIS 65352, at *17, 19 (E.D. Cal. May 9, 2012) (citing *Santa Clara Pueblo*, 436 U.S. at 72 n. 32). The Tribe also has an interest in the outcome of this case "because the dispute . . . raises questions about compliance with the Tribe's constitution, . . . and [Enrollment] Ordinance." *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at *17-18 (dismissing action involving intratribal leadership and membership disputes due to failure to join Tribe). In addition, the lawsuit seeks the recovery of Tribal benefits only available to Tribal members, and thus necessarily impacts the sovereign treasury, which federal law protects. (E.R. 300:8-12, 358:1-2.) *See Shermoen*, 982 F.2d at 1320 (recognizing a suit is against the sovereign if "the judgment sought would expend itself on the public treasury" (quoting *Land*, 330 U.S. at 738)).

Defendants cannot "adequately represent" these legally protected interests of the Tribe because the litigation "affects the rights of the [Defendants] as individuals," in addition to affecting "the tribe to which they belong and which [Plaintiffs] would have them represent." *Shermoen*, 982 F.2d at 1318. Were Defendants to ultimately face individual liability, they would have incentive to make the arguments necessary to protect their own individual interests, to the possible detriment of the Tribe's interest. *Andrews v. Daw*, 201 F.3d 521, 525 (4th Cir. 2000).

Indeed, Plaintiffs assert Defendants are rogue officials who, disregarding their duties to the Tribe, "under the guise of acting in their official capacity, used disenrollment as an excuse to retaliate and discriminate against Plaintiffs, . . . ignor[ed] the resolution previously passed by [the Tribe], . . . flagrantly violated the resolution passed by [the Tribe] and thus subverted the will of the [the Tribe] . . . ." (Opening Brief, pp. 23, 26, 34, 36.) Thus, as the District Court aptly questioned, "how can one both act outside the scope of their authority, but yet also represent the interests of the Tribe . . . ?" (E.R. 70:23-24; *see also* E.R. 70:19-22 ("[I]f [Defendants] were acting outside the scope of their authority, how is it that they would be expected to represent the interests of the Tribe if, in fact, their actions were inconsistent with the Tribal documents?").)

Under Rule 19(b), the Tribe is an indispensable party in a membership dispute because protecting the Tribe's immunity is a "compelling factor" supporting dismissal, especially for a suit challenging tribal self-governance. *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996); *Dawavendewa*, 276 F.3d at 1162; *Kennedy*, 2012 U.S. Dist. LEXIS 65352, at **34-35. Accordingly, Rule 19 presents an alternative ground for affirmance.

B. Plaintiffs Fail To State A Claim Upon Which Relief Can Be Granted.

Putting aside the other significant barriers to their suit, Plaintiffs cannot state a claim upon which the District Court could grant relief. Fed. R. Civ. P. 12(b)(6). This is perhaps not surprising, given that federal and state law simply do not countenance causes of action in favor of those disappointed by an Indian tribe's membership decisions. *Santa Clara Pueblo*, 436 U.S. at 72 & n.32; *Lamere*, 131 Cal. App. 4th at 1067.

1. Plaintiffs Cannot Bring This Intratribal Membership Dispute Into Federal Court Under 42 U.S.C. § 1985(3).

Plaintiffs' complaint mentions various sources of substantive rights—the First and Fifth Amendments, ICRA, the Indian Citizenship Act of 1924, and Pala Constitution (E.R. 352:8-15)—none of which support a § 1985(3) claim here.

Neither the First nor Fifth Amendments apply to actions of tribal officials governing an Indian tribe, as "the Bill of Rights . . . do[es] not of [its] own force

apply to Indian tribes." *Nevada v. Hicks*, 533 U.S. 353, 383 (2001); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1978).

As discussed above in section I.B.1.a, ICRA also cannot serve as the substantive basis for this Court's jurisdiction over an intratribal dispute. *See Nero*, 892 F.2d at 1462. Nor can the Pala Constitution support Plaintiffs' § 1985(3) claim because federal courts lack power to grant relief for civil claims predicated on the violation of tribal laws, even tribal laws incorporating ICRA. *Boe*, 642 F.2d at 276-77; *Demontiney v. United States ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 814 (9th Cir. 2001); *accord Nero*, 892 F.2d at 1460-61. Likewise, the Indian Citizenship Act, which merely bestowed *United States* citizenship upon Native Americans, does not create a private right of action relating to tribal membership. *See* 8 U.S.C. § 1401(b).

Additionally, although this Court has not yet reached the issue, tribal officials cannot conspire in violation of § 1985(3) while governing an Indian tribe, as Defendants were. (E.R. 300:2-3, 312:4-6.) *See Runs After*, 766 F.2d at 354.

Accordingly, Plaintiffs cannot establish a claim cognizable under § 1985(3).

2. Plaintiffs Also Cannot State A Claim Under 42 U.S.C. § 1981 Based On An Intratribal Membership Dispute.

As discussed in section I.C.1 above, Plaintiffs' claim under 42 U.S.C. § 1981 also fails, as that provision does not apply to membership determinations

by an Indian tribe. *Nero*, 892 F.2d at 1463. Indeed, imposing prohibitions against racial discrimination on Indian tribes' membership determinations would be inimical to the concept of tribal sovereignty itself. *Id.* at 1463. An Indian tribe, by definition, constitutes a "people distinct from others," distinguished by race, among other attributes. *Kansas Indians*, 72 U.S. 737, 755 (1867); 25 C.F.R. § 83.7(b); *see also* 25 C.F.R. § 83.7(e); 25 U.S.C. § 479. It follows that § 1981 cannot be construed to provide a civil right of action alleging Defendants' defined membership by differentiating among "eth[n]ically distinctive subgroup[s] of people." (E.R. 353:22-23.)

Thus, Plaintiffs cannot state under § 1981 membership-based civil claims Congress refused to grant under ICRA. *Santa Clara Pueblo*, 436 U.S. at 71.

C. Plaintiffs Cannot State A Claim For Conversion Based On Loss Of Tribal Membership Or Its Benefits.

Plaintiffs' allegations of conversion of the "money and benefits provided by Pala" stemming from the alleged wrongful disenrollment fail to allege ownership or a right to possession of property required for a conversion claim. *Kremen v. Cohen*, 337 F.3d 1024, 1029-30 (9th Cir. 2003); *Moore v. Regents of University of California*, 51 Cal. 3d 120, 136 (1990).

Plaintiffs allege conversion of their property interest in "money and benefits" dependent on their membership in the Tribe. (E.R. 354:6-9; *see* E.R. 303:3-6, 315:26-316:1, 354:11-13, 358:1-2.) Following their removal from the

Tribe's membership rolls, Plaintiffs necessarily lack a property interest in any "money and benefits" stemming from tribal membership. *Montgomery v. Flandreau Santee Sioux Tribe,* 905 F. Supp. 740, 743, 746 (D.S.D. 1995). And IGRA, which vests the Tribe with the authority to allocate gaming revenue according to its own laws, vests no property right in Plaintiffs. *See* 25 U.S.C. § 2710(b)(3); *Lewis*, 424 F.3d at 963 (quoting 25 C.F.R. § 290.23).

Nor is the membership privilege itself an actionable property right. *Jeffredo*, 599 F.3d at 917-19 (citing *Santa Clara Pueblo*, 436 U.S. at 72 n.32); *see Smith*, 100 F.3d at 559. To be sure, even when Plaintiffs were members, they never had a vested right to the Tribe's real or personal property. *United States v. Jim*, 409 U.S. 80, 81-82 (1972); *Sizemore v. Brady*, 235 U.S. 441, 446-47 (1914).

In sum, Plaintiffs lack a property right supporting a conversion claim based on their disenrollment from a sovereign Indian tribe.

D. Plaintiffs' Cannot State A Defamation Claim Based On Their Disenrollment.

Plaintiffs cannot seek to control the manner in which officials of a sovereign Indian tribe administer membership matters under the guise of a state law defamation claim. *Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968); *Santa Clara Pueblo*, 436 U.S. at 55; *Timbisha Shoshone*, 687 F. Supp. 2d at 1181, 1184-85.

First, Plaintiffs' defamation claim would necessarily require the District Court to resolve whether Defendants enjoy a truth defense (*Washer v. Bank of*

America, 87 Cal. App. 2d 501, 509 (1948))—*i.e.*, whether Plaintiffs are authentically members of the Tribe, under the Tribe's laws (E.R. 356:1-5)—which necessarily raises precisely the sort of questions this Court lacks jurisdiction to decide. *See supra* Section I.B.

Second, in any event, the allegedly defamatory statement about Plaintiffs' deceased relative's blood quantum is not actionable because it referred collectively to over 150 of Ms. Britten's descendants.[15] (E.R. 356:1-2; *see* E.R. 332:7-10, 332:15-17.) "[W]here the group [allegedly defamed] is large—in general, any group numbering over twenty-five members—the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them.'" *Blatty v. New York Times*, 42 Cal. 3d 1033, 1042, 1044, 1046 (1986); Cal. Code Civ. Proc. § 460.

Plaintiffs cannot save their claim by alleging Defendants defamed Ms. Britten, herself, as statements regarding deceased individuals do not constitute defamation. *Kelly v. Johnson Pub. Co.*, 160 Cal. App. 2d 718, 723 (1958); *Saucer v. Giroux*, 54 Cal. App. 732, 733 (1921).

In short, Plaintiffs' defamation claim fails as a matter of law.

[15] Only a fraction of those allegedly disenrolled because of Ms. Brittain's degree of Indian blood chose to join this action. (E.R. 309:7-311:8.)

E. Plaintiffs' Tortious Interference And Conspiracy Claims Fail For Lack Of Any Predicate Wrongful Act Under Federal Or State Law.

Plaintiffs' claims for tortious interference with prospective economic advantage and conspiracy fail because they have not and cannot allege Defendants engaged in any predicate wrongful act. *See Della Penna v. Toyota Motor Sales, U.S.A. Inc*., 11 Cal.4th 376, 393 (1995); *Youst v. Longo*, 43 Cal. 3d 64, 79 (1987). As discussed in detail above, Defendants' acts of disenrolling Plaintiffs from the Tribe in alleged violation of tribal law do not constitute a wrong actionable under either California or federal law. *Lamere*, 131 Cal. App. 4th at 1067; *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Thus, Plaintiffs cannot state a claim for tortious interference with prospective economic advantage or conspiracy.

V. Amendment Cannot Salvage Plaintiffs' Suit.

Plaintiffs' proposed amendment cannot salvage their claims. (Opening Brief, p. 55.) Whether cast as claims for damages or injunctive relief, Plaintiffs' claims challenge the actions of a sovereign tribal government in a purely intramural matter. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56; *Coeur d'Alene*, 751 F.2d at 1116; *Imperial Granite Co.*, 940 F.2d at 1270-71. The federal courts simply lack jurisdiction over such claims, however inventively pled. *Lewis*, 424 F.3d at 960; *Nero*, 892 F.2d at 1462-63.

Conclusion

Plaintiffs are no doubt disappointed by the Tribe's decision that it can no longer grant them the benefits of tribal membership because they do not meet the Tribe's legal requirements. But the Tribe has made its final decision, and no outside court may deprive the Tribe of its authority to make this decision, pursuant to one of its "most basic powers." *Bruce*, 394 F.3d at 1225. Thus, Defendants urge this Court to affirm the District Court's judgment for Defendants.

DATED: November 8, 2013 DENTONS US LLP

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Statement of Related Cases

Pursuant to Ninth Circuit Rule 28-2.6, Defendants state they are aware of no related cases pending before this Court.

Certificate of Compliance

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 13,876 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* Fed. R. App. P. 32(a)(5), (6).

/s/ Sara Dutschke Setshwaelo

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 8, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed on November 8, 2013, at San Francisco, California.

/s/ Sara Dutschke Setshwaelo

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