11-15-13 P03:16 IN

NO. 2013-CI-APL-002

IN THE NOOKSACK COURT OF APPEALS
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON

SONIA LOMELI, ET AL.,

Appellants,

v.

ROBERT KELLY, ET AL.,

Appellees.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The Trial Court dismissed Appellants' Second Amended Complaint based on its "threshold" jurisdictional determination that Appellees "are protected by sovereign immunity." CP 79, Order Granting Defendants' Motion to Dismiss Second Amended Complaint ("MTD Order"), at 8; Response Brief of Appellees ("Response"), at 11. The Trial Court's jurisdictional ruling — if it can be called that — was based on deeply flawed analyses.

As expressed by the Fort Peck Tribal Court of Appeals in *Ft. Peck Sioux Council v. Ft. Peck Tribes*: "Sovereign immunity presupposes that the government, their agencies, and/or officers acting thereunder, do so within the scope of their duties. In other words, sovereign immunity does not shield wrongdoing." 4 Am. Tribal Law 292, 298 (Fort Peck Ct. App. 2003).

> As an example, who stands for the proposition that tribal governments can take property from its members or others within their jurisdiction in violation of its constitution or without statutory authority? Who supports a government that enacts laws contrary to the will of the people as expressed in its constitution? Who then will advocate the notion that it is fair and just for one to have a right but their only remedy is barred by sovereign immunity? . . .

Id. at 298-99. Indeed:

> The authority given to those fine people who we elect and appoint to powerful positions understand that their authority is not vested by divine right, but rather, it is the people who elected or appointed them and it is that same electorate who created this government with a constitution granting limited power to their leaders and it is

> within that framework, and that framework only, they have consented to be governed.
>
> Thus, we come to the critical question before us: Does the defense of sovereign immunity advance its purposes and rationale when invoked against a claim that challenges the constitutionality of a [law or procedure]? We think not. We see no benefit flowing from sovereign immunity when it does nothing more than shield an inquiry into whether a provision of existing law passes constitutional muster. Such invocation does nothing more than take a doctrine intended for the people's protection and use it as a weapon of deprivation. Neither our Tribal Council nor this Court can condone such misuse. We are confident that our Tribal Council shares our belief that a government can only be as strong as its will to treat its people righteously.

Id. It is beyond question that *some* form of relief is available when a plaintiff alleges that a tribal government has violated its own constitutional and/or statutory law — government agencies are not entitled to absolute immunity.[1]

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[1] "Absolute immunity is rare, and is based on the principle that certain types of public officials, such as legislators, prosecutors, and judges, should be granted absolute immunity in order to insure independence of action on their part, so that they may exercise discretion in the performance of their duties without harassment or intimidation, and without fear that their actions might result in personal liability." Barbara J. Van Arsdale, et al., *Persons or Acts Entitled to Absolute Immunity*, 15 Am. Jur. 2d Civil Rights § 102 (2013). These concerns are not at issue when a government official is sued in this or her "official capacity," as "[a]n official capacity action is not against the public employee personally." *Govan v. City of Clovis*, No. 13–0547, 2013 WL 5532144, at *9 (E.D. Cal. Oct. 7, 2013). Rather, **official capacity suits are against government agencies — and therefore against the government —** "**not against the people through whom agencies act.**" *Hobbs v. Roberts*, 999 F.2d 1526, 1530 (11th Cir. 1993); *see also generally Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). "*Young* falsely purports to permit relief only against a state official rather than the state, but in reality, it permits relief against the state." Ralph Brubaker, *From Fictionalism to Functionalism*, 13 Am. Bankr. Inst. L. Rev. 59, 123 n. 321 (2005); *see also id.* ("It is the case with respect to every instance of an *Ex parte Young* injunction . . . that the state is the only real party in interest and the state official against whom the injunction (nominally) runs has no personal interest. That is *Young*'s fiction.) (quotation omitted). To the extent that the Trial Court applied an absolute immunity analysis, it was incorrect. Appellees were not sued for passing laws and instituting procedures in their roles legislators, *cf. Cline v. Cunanan*, No. NOO-CIV-02/08-5, at 6 (Nooksack Ct. App. Jan. 12, 2009) — their official positions have been sued for taking action in furtherance of unconstitutional laws and illegal procedures. *See* CP 9, Reply in Support of Plaintiffs' Emergency Motion for TRO, at 6 ("Here,

Known as the "*Ex parte Young* exception"[2] to sovereign immunity, "if a plaintiff seeks to enjoin acts, harmful to him, about to be taken by a government officer under an unconstitutional regulatory statute, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J., & Thomas, J., concurring; quotation omitted).

Here, the vital question before this Court of Appeals is the proper test to employ in determining whether a Nooksack plaintiff who is harmed or about to be harmed by his or her government, is entitled to bring a claim to prospectively enforce the Constitution and laws of the Nooksack Indian Tribe.[3]

Defendants are doing more than merely casting a vote. . . . Defendants have taken it upon themselves to act in furtherance of the already enacted (and unconstitutional) law by initiating disenrollment proceedings themselves . . . .") (citing *Terry–Carpenter v. Las Vegas Paiute Tribal Council*, Nos. 02-01, 01-02 (Las Vegas Paiute Ct. App. 2003)).

[2] *See Saahir v. Estelle*, 47 F.3d 758, 760-61 (5th Cir. 1995) ("[I]n *Ex parte Young*, 209 U.S. 123 (1908), [the Court] held that acts by state officials contrary to [superior] law cannot have been authorized by the State and that suits seeking to enjoin such acts are not suits against the State. Thus, a suit challenging the constitutionality of a state official's action is not one against the State and is not barred . . . .") (citation omitted). The "fiction" of the *Ex parte Young* exception is that it is the public official that is subject to suit. But, as discussed *supra*, at n.1, the suit is actually against the government. *See generally* Opening Brief of Appellants, at 19 n.10.

[3] *See also Menefee v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 97-12-092-CV, 2004 WL 5714978, at *3 (Grand Traverse Tribal Ct. May 5, 2004) ("This Court has inherent power to interpret the Constitution."); *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."); *Crater v. Galaza*, 508 F.3d 1261, 1267 (9th Cir. 2007) ("The federal judiciary is duty-bound to maintain the supremacy of the Constitution, and thus a federal court cannot be required to give effect to any law — be it a federal statute or a state court decision — that, in the court's independent judgment, violates the Constitution."); *U.S. v. Sampson*, 275 F.Supp.2d 49, 68 (D. Mass. 2003) ("[T]he very meaning of an enforceable constitution is that an unconstitutional law may not be enforced."); *Seattle School Dist. No. 1 of King County v. State*, 585 P.2d 71, 87 n.7 (Wash. 1978) ("The power of the judiciary to enforce rights recognized by the constitution, even in the absence of implementing legislation, is clear.").

In answering this question, the Trial Court formulated a perplexing test — apparently based loosely on the rejected minority opinion of Justice Kennedy in *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and found nowhere else in Indian Country — whereunder a court must, in this order: (1) scrutinize the merits of a plaintiff's claims,[4] (2) conclude that the governmental conduct that violated the law "verges on bad faith" and is not a mere "technical error[] of law,"[5] and (3) determine whether a "bad faith" error is extreme enough to warrant an exception to sovereign immunity by balancing "'[a]ny resulting disadvantage to the plaintiff'" with "'the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention.'"[6]

Appellees vaguely endorse the Trial Court's complicated test, arguing that this Court's statement that "'individual officers may be sued for declaratory or injunctive relief where the actions taken exceed his or her authority,'" somehow equates to the Trial Court's unheard of "bad faith" standard. Response at 21 (quoting *Cline*, No. NOO-CIV-02/08-5, at 6; CP 44, Order Denying Motion for Preliminary Injunction, at 9).

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[4] *See e.g.* CP 79, MTD Order, at 9 ("In order to find that the *Young* exception . . . applies here, this Court must first find that the Defendants acted outside of the scope of their authority.").

[5] CP 44, Order Denying Motion for Preliminary Injunction, at 7; *see also id.* at 9 ("[T]he Court finds that it can only act to grant prospective injunctive relief should the actions taken by Defendants clearly and unambiguously violate their official duties in ways more egregious than an error of law."); CP 59, Decision and Order Denying Plaintiffs [sic] Emergency Motion for Stay Pending Appeal, at 5 ("[A] mere error of law does not does not itself open the door to stripping an official of his or her sovereign immunity.").

[6] CP 59, Decision and Order Denying Plaintiffs [sic] Emergency Motion for Stay Pending Appeal, at 4 (citing *Couer d'Alene*, 521 U.S. at 269 (1997); quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 85 (1984)).

Appellants' position is simple: the test employed by federal courts since 1908 — the test adopted by all tribal courts to evaluate the topic[7] — is the proper test to employ. *See Verizon Maryland, Inc. v. Public Service Com'n of Maryland* (*Verizon*), 535 U.S. 635, 645 (2002) (citing *Ex parte Young*, 209 U.S. 123). Indeed, the *Ex parte Young* test, as it currently exists under federal law, is the only test that makes practicable sense. The Trial Court erred in determining otherwise.

II. ARGUMENT

A. The Trial Court Erred In Its Sovereign Immunity Analysis.

Appellees take the position that N.T.C. §§ 10.00.050 and 10.00.100 divests the Trial Court of its jurisdiction to hear any suit brought against any

[7] Appellees do not cite to any authority to show that the *Ex parte Young* doctrine does not apply in tribal courts. To the contrary, every tribal court decision available in the commonly recognized tribal court databases provides that the *Ex parte Young* exception does apply. *See e.g. Arendt v. Ward*, 9 Am. Tribal Law 443 (Ho–Chunk Trial Ct. 2011) (holding that the *Ex parte Young* exception applies, but only when a plaintiff requests nonmonetary relief); *Cleveland v. Garvin*, 8 Am. Tribal Law 21, 35 (Ho–Chunk Trial Ct. 2009) (holding that the *Ex parte Young* exception applies and that where the exception is properly plead, an "assertion of sovereign immunity is premature" until the parties have completed discovery and the court has evaluated the allegations at trial); *Honyaoma v. Nuvamsa*, 7 Am. Tribal Law 320, 324 (Hopi Ct. App. 2008) (citing the *Ex parte Young* exception and holding that "where a tribal official acts and such action is based upon an unconstitutional law, then that official is not protected by the doctrine of sovereign immunity."); *Fox v. Brown*, 6 Am. Tribal Law 446, 449 n.2 (Mohegan Trial Ct. 2005) ("A limited exception to the general principle of sovereign immunity has long been recognized, where prospective injunctive or declaratory relief is sought challenging the actions of state officials.") (citing *Ex parte Young*, 209 U.S. 123); *Kirkwood v. Decorah*, 6 Am. Tribal Law 188 (Ho–Chunk Trial Ct. 2005) (same); *Whiteagle v. Cloud*, 5 Am. Tribal Law 178 (Ho–Chunk Trial Ct. 2004) (same); *Fletcher v. Grand Traverse Band Tribal Council*, 2004 WL 5714967, at *9 (Grand Traverse Tribal Ct. Jan. 8, 2004) (discussing the *Ex parte Young* exception and differentiating it from qualified immunity*); McDade v. Individual Members of Te-Moak Council*, No. SF-CV-004-99, 2000 WL 35782656, Nev. Inter–Tribal Ct. App. Mar. 8, 2000 ("Because the Appellant alleged unconstitutional acts by Appellees, they have no immunity through the doctrine of sovereign immunity.") (citing *Ex parte Young*, 209 U.S. 123); *Lynch v. Yomba Shoshone Tribe*, Nos. CVC–YT–003–96, CVC–YT–004–96, CVC–YT–005–96, 1997 WL 34704354, at *4 (Nev. Inter–Tribal Ct. App. Jul. 16, 1997) ("Because the appellant alleged unconstitutional acts by Appellees . . . , they have no immunity through the doctrine of sovereign immunity.") (citing *Ex Parte Young*, 209 U.S. 123).

government official, no matter how pled. Response, at 11-13. Appellees cannot seriously maintain this position. To so hold would be to realize the fears expressed in *Ft. Peck Sioux Council*: it would "take a doctrine intended for the people's protection and use it as a weapon of deprivation." 4 Am. Tribal Law at 298. Every tribal court to evaluate the issue has found that the *Ex parte Young* exception, if plead correctly, applies to prevent unconstitutional and illegal acts of tribal governments, vis-à-vis a fictional suit against its tribal officials. *See supra*, at n.7; *Olson v. Nooksack Indian Housing Authority*, 6 NICS App. 49, 54 (Nooksack Ct. App. 2001) (noting that "[v]arious tribal courts as well as the Ninth Circuit have adopted" the *Ex parte Young* exception). Indeed, this very Court in this very litigation has already suggested that the *Ex parte Young* exception applies under Nooksack law. CP 69, Order Denying Permission For Interlocutory Appeal, at 4 n.4.

In *Cline*, the Court noted that the *Ex parte Young* exception "provides an instructive framework to determine whether injunctive or declaratory relief is available," but held that it was inapplicable to the facts at hand because the plaintiffs sought retrospective relief[8] and because the doctrine does not apply to tribal officials acting in a mere legislative capacity.[9] No. NOO-CIV-02/08-5, at 7.

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[8] *See Green v. Mansour*, 474 U.S. 64, 68 (1985) ("We have refused to extend the reasoning of *Young* . . . to claims for retrospective relief.")

[9] As discussed *supra*, at n.1, legislative immunity is absolute and "attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quotation omitted); *see also Tolman v. Finneran*, 171 F.Supp.2d 31, 37-38 (D. Mass. 2001)

The Trial Court, too, did not shy away from applying its own tortured application of the *Ex parte Young* exception. CP 44, Order Denying Motion for Preliminary Injunction, at 7-9; CP 59, Decision and Order Denying Plaintiffs [sic] Emergency Motion for Stay Pending Appeal, at 4-5; CP 79, MTD Order, at 9. There should be no doubt that the *Ex parte Young* exception applies in the Nooksack Tribal Judiciary in some form or fashion.[10]

(discussing "[t]he interplay between the doctrines of legislative immunity, sovereign immunity, and its exception in *Ex parte Young*," and holding that "it is unlikely that *Ex Parte Young* is broad enough to abrogate legislative immunity"). But **Appellees did not plead legislative immunity; they plead sovereign immunity**. *See* CP 55, Answer and Defenses to Second Amended Complaint for Equitable Relief, at 14 ("The Nooksack Indian Tribe and its officers and officials retain sovereign immunity until waived . . . ."); CP 51, Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Jurisdiction, Failure to Join Indispensable Parties, and Unripe Claims, at 2 ("[S]overeign immunity bars this action."). And, at any rate, the doctrine of legislative immunity is inapplicable to the claims asserted by Appellants. *See supra*, at n.1 (citing CP 9, Reply in Support of Plaintiffs' Emergency Motion for TRO, at 6).

[10] Appellees also argue that the *Ex parte Young* "doctrine is based on the need to protect the supremacy of federal law" only, and, thus, "there is no basis to apply *Ex parte Young* when a tribal official is accused of violating tribal law." Response, at 14 (emphasis in original). This is a junk-drawer argument. The *Ft. Peck Sioux Council* Court's discussion absolutely provides the basis. Indeed, Appellees' contrived reasoning could not have even entered the equation until 1976:

> *Ex Parte Young*, 209 U.S. 123, stands for the proposition that sovereign immunity does not bar prospective relief requiring government officials to obey the law. The rationale behind the *Ex Parte Young* doctrine provides, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). "For a number of years, prospective relief against federal officials was available under the fiction of *Ex Parte Young*." *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1085 (9th Cir. 2010) (citing *Larson*, 337 U.S. 682). "However, since 1976 federal courts have looked to § 702 of the [APA] to serve the purposes of the *Ex Parte Young* fiction in suits against federal officers." *Peabody*, 610 F.3d at 1085 . . . .

Muscogee (Creek) Nation Div. of Housing v. U.S. Dept. of Housing & Urban Development, 819 F.Supp.2d 1225, 1233 (E.D. Okla. 2011).

1. Appellants Seek Prospective Relief — The Trial Court Erred In Conducting A Balancing Test.

Appellees further argue that if the *Ex parte Young* exception applies at Nooksack, it applies only where the Trial Court first looks to the merits and determines that the representative tribal official's actions "'exceed[ed] his or her authority . . . in ways more egregious than an error of law.'" Response, at 21 (quoting CP 44, Order Denying Motion for Preliminary Injunction, at 9). This test has not been adopted by any jurisdiction that Appellants are aware of, and Appellees do not and cannot cite to any such authority.

What standards is a trial court to apply in determining what constitutes an "egregious" violation of law, as opposed to a "technical error[] of law" under this test? CP 44, Order Denying Motion for Preliminary Injunction, at 7; *see e.g. Mansoory v. SC & A Const., Inc.*, No. 3920-VCP, 2009 WL 2140030, at *6 n.32 (Del. Ct. Ch. Mar. 16, 2009) (noting that the term "technical error of law" is ambiguous and undefined and instead using the "harmless error" standard to review an arbitration award). The Trial Court's apparent solution — that the Nooksack Judiciary balance "[a]ny resulting disadvantage to the plaintiff [with] the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention" — has been explicitly rejected as unworkable by the U.S. Supreme Court. CP 59, Decision and Order Denying Plaintiffs [sic] Emergency Motion for Stay Pending Appeal, at 4 (citing *Couer d'Alene*, 521 U.S. at 269 (1997); quotation omitted). As noted by Professor Schwartz:

> In *Idaho v. Coeur d'Alene Tribe of Idaho*, the plaintiff Native American Tribe alleged ownership in certain submerged lands and argued that the state had no right to regulate those lands. The Supreme Court held that the relief sought was retroactive in nature and thus barred by the Eleventh Amendment. Justice Kennedy, author of the majority opinion, joined by Chief Justice Rehnquist in Parts II-B, II-C, and II-D, advocated a new case-by-case approach to the *Ex parte Young* doctrine. Under this formulation a federal court would consider . . . whether "special factors" counseled against the exercise of federal court jurisdiction. However, seven Justices — Justice O'Connor, concurring, joined by Justices Scalia and Thomas, and Justice Souter dissenting, joined by Justices Stevens, Ginsburg, and Breyer — rejected the Kennedy-Rehnquist attempt to narrow the *Young* doctrine. As Justice Souter stated, **Justice O'Connor's view that there is no justification for narrowing the Young jurisprudence is the "controlling" one and "wisely rejects" Justice Kennedy's "call for federal jurisdiction contingent on case-by-case balancing** . . . ."

Martin A. Schwartz, *Prospective Relief: The Doctrine of Ex Parte Young*, Sec. 1983 Litig. Claims & Defenses § 8.04 (2013) (quoting *Couer d'Alene*, 521 U.S. 261; citing *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000); and *Earles v. State Bd. of Certified Pub. Accounts of Louisiana*, 139 F.3d 1033 (5th Cir.), *cert. denied*, 525 U.S. 982 (1998)) (emphasis added); *see also South Dakota Farm Bureau, Inc. v. South Dakota*, 197 F.R.D. 673, 680 (D.S.D. 2000) (same); *Froebel v. Meyer*, 13 F.Supp.2d 843, 854 n.9 (E.D. Wis. 1998) (same).[11]

[11] Appellants do not argue that *Coeur d'Alene* has been "overruled." Response, at 16 n.14. Rather, Appellants argue that "the *Couer d'Alene* opinion that the Trial Court relied upon is not controlling; and subsequent decisions of the Supreme Court and the federal circuit courts of appeal have made this crystal clear." Opening Brief of Appellants, at 27 (citing *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007)).

The balancing test was "wisely reject[ed]" by the *Coeur d'Alene* majority, because it is unnecessary. *Coeur d'Alene*, 521 U.S. at 297. Government agencies that do not act in compliance with superior law are not protected by sovereign immunity — and as long as the relief requested is nonmonetary, there can be no *legitimate* implications upon the sovereign. The issue in *Coeur d'Alene* was not the anticipated effect that the suit might have upon the state's ability "to carry out its functions," but, rather, whether the relief requested was the functional equivalent of the types of monetary relief that the *Ex parte Young* does not allow. CP 59, Decision and Order Denying Plaintiffs [sic] Emergency Motion for Stay Pending Appeal, at 4 (quotation omitted). The distinction is vital. When the relief sought is monetary, the "fiction" of *Ex parte Young*[12] collapses because the relief derives from the public fisc. *See Harkless v. Sweeny Independent School Dist.*, 388 F.Supp. 738, 747 (D.C. Tex.), *aff'd in part, rev'd in part*, 554 F.2d 1353 (5th Cir. 1977) ("When a state official is asked to make a payment directly from the public fisc . . . , our courts will no longer close their eyes to the fact that such relief is in fact relief against the state.").

The declaratory and injunctive relief that was requested in *Coeur d'Alene* sought to extinguish the state's control over vast reaches of land and water. 521 U.S. at 282. The Court found that this was "the functional equivalent of a quiet title action" and therefore was not allowed under *Ex parte Young*. *Id.* at 281.

[12] *See generally* Opening Brief of Appellants, at 19 n.10.

Here, though, Appellants have unquestionably sought nonmonetary relief in the form of an injunction. Numerous courts have found that the "enjoining of enforcement of an unconstitutional statute" is not monetary, is not "'the functional equivalent of a quiet title action,'" and does not raise the type of apprehensions at issue in *Coeur d'Alene*. *Akella v. Michigan Dept. of State Police*, 67 F.Supp.2d 716, 724 (E.D. Mich. 1999) (quoting *Coeur d'Alene,* 521 U.S. at 282); *see also Ottawa Tribe of Okla. v. Speck*, 447 F.Supp.2d 835 (N.D. Ohio 2006) ("[A]nything short of a quiet title action is not barred under *Coeur d'Alene*.").

The Trial Court has embraced an unheard of test that fails to appreciate what exactly it is that the *Ex parte Young* exception seeks to shelter. Governmental entities cannot act in violation of a superior law — there need not be anything "egregious" about it. The Trial Court's test unnecessarily complicates a "'straightforward' inquiry into 'whether [the] complaint alleges an ongoing violation of [superior] law and seeks relief properly characterized as prospective.'" *Indiana Protection and Advocacy Services v. Indiana Family and Social Services Admin.*, 603 F.3d 365, 732 (7th Cir. 2010) (quoting *Verizon*, 535 U.S. at 645).

2. The Trial Court Erred In Evaluating The Merits.

The test employed by the Trial Court goes far beyond a jurisdictional ruling. While the federal courts envision a "straightforward" and "simple" test, "which excludes questions regarding the validity of the plaintiff's cause of

action,"[13] *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 416 (5th Cir. 2004), Appellees argue that, somehow, a threshold jurisdictional ruling should include a full evaluation of the merits.[14] But when a trial court dismisses a suit on immunity and jurisdictional grounds[15] — when it determines that the *Ex parte Young* doctrine is inapplicable — it "does not reach the merits of [a plaintiff]'s claims." *Dovid v. U.S. Dept. of Agriculture*, No. 11-2746, 2013 WL 775408, at *1 (S.D.N.Y. Mat. 1, 2013); *see also In re Deposit Ins. Agency*, 482 F.3d 612, 623 (2007) ("When a court reviews the legal merits of a claim for purposes of *Ex parte Young*, it reviews only whether a violation of federal law is *alleged* . . . .") (emphasis in original). The Trial Court's ruling was far from a "threshold" or "jurisdictional" determination — it was a determination on the merits, conducted under the guise of a jurisdictional ruling.[16]

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[13] As noted above and in Appellants' Opening Brief, the federal courts employ the "relatively simple [and] quite easy to apply" *Verizon* test: Prospective injunctive or declaratory relief to prevent the contravention of tribal law (constitutional or statutory) is permitted against a tribal official, but retrospective relief is barred. *Brennan v. Stewart*, 834 F.2d 1248, 1253 (5th Cir. 1988). This "inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646

[14] Appellants do not argue that the test employed by the federal courts would "waive[] Appellees immunity here regardless of whether Appellees have acted beyond the scope of their authority." Response, at 16. Appellants argue only that test employed by the federal courts provides a reasonable opportunity to, after discovery and on the *full* merits, prove that a government agency is acting in contravention of superior Nooksack law. *Id.* If it is violating superior law, then the *Ex parte Young* exception to sovereign immunity applies; if it is not violating superior law, then the *Ex parte Young* exception to sovereign immunity does not apply. But this cannot be determined in fairness on a jurisdictional basis. If Appellees felt that Appellants allegations were meritless, they were free to file a motion for summary judgment. But that is not what has transpired.

[15] This is what the Trial Court here purported to do. *See* CP 79, MTD Order, at 8 (dismissing Appellants' Second Amended Complaint based on what the Trial Court deemed to be a "threshold" jurisdictional determination that Appellees "are protected by sovereign immunity").

[16] It is unclear what standard the Trial Court applied. Although the Trial Court purported to apply the Fed. R. Civ. Proc. 12(b)(1) dismissal for lack of jurisdiction standard, it appears to have

The test employed by the Trial Court is also practicably unworkable. Appellees argue that they are immune because they have not violated the law, but then argue that the Court has no jurisdiction to evaluate whether they have violated the law, because they are immune.[17] Response, at 15-16. Under this logic, there is no circumstance where a plaintiff would be able to get to the full merits of his or her case — the merits would be determined, as they were here, under some type of amorphous standard where the plaintiff is entitled to no discovery; no opportunity to put on evidence or testimony; and no chance for cross-examination. *See generally Cleveland*, 8 Am. Tribal Law at 31-34.

What would it look like if a plaintiff prevailed on a motion to dismiss for lack of jurisdiction? With a determination on the merits having already been made, the mere entry of a judgment? What, then, is the point of N.T.C. § 10.05.110's stay of discovery for suits against tribal officers? To be sure, N.T.C.

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employed the standard for judgment on the pleadings under Fed. R. Civ. Proc. 12(c). CP 79, MTD Order, at 2 (citing *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989)). Under Fed. R. Civ. Proc. 12(c), the trial court reviews not only the complaint, *cf. Sepulvado v. Louisiana Bd. of Pardons and Parole*, 171 Fed.Appx. 470, 473 (5th Cir. 2006) (under Fed. R. Civ. Proc. 12(b)(1) courts are "confined to reviewing only the complaint"), but also the answer and any written instruments attached to any of the pleadings. "A judgment on the pleadings is a decision on the merits." *General Conference Corp.*, 887 F.2d at 230. While "courts generally strive to decide cases on the merits," dismissal for lack of jurisdiction "is not on the merits." *Cook v. Board of Sup'rs of Lowndes Cty.*, 806 F.Supp. 610, 613 (N.D. Miss. 1992).

[17] To provide but one example of how this logic fails, Appellees argue that "[e]ven if Appellees lacked authority to cancel meetings for public safety reasons, Appellees are immune from suit . . . ." Response, at 35. But employing the test advocated by Appellees and the Trial Court would result in the following statement: "Even if Appellees lacked authority to cancel meetings for public safety reasons, Appellees are immune from suit [because they did not lack authority to cancel meetings for public safety reasons]." *Id.* The statement is illogical — two propositions that are contradictory cannot both be true.

§ 10.05.110 contemplates a procedure whereby tribal officials are allowed to assert immunity as a jurisdictional defense. Upon a finding that the defendants are not entitled to immunity, a plaintiff is allowed to propound discovery in order to make a case on the merits. If an evaluation of the merits was part of the immunity analysis, there would be no point in allowing discovery — the merits would have already been decided.

Appellants do agree with Appellees on one point, though: "naming individual officers in a complaint does not automatically allow a case to proceed." Response, at 17 (citing *Cline*, No. NOO-Civ-02/08-05, at 7). Rather, in order to properly plead an *Ex parte Young* claim, the relief sought must, for instance, be nonmonetary, *Suever v. Connell*, 579 F.3d 1047, 1058-59 (9th Cir. 2009), and be against an official that has taken, or is slated to take, action in furtherance of the prohibited law or policy. *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002). The suit must also allege a violation of a *superior* law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

Appellees cite to two cases that implement these rules, *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), and *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013), in attempt to convince the Court that the straightforward *Verizon* standard is "confusing and seemingly contradictory." Response, at 18. It is not. At issue in *Treasure Salvors* was whether an *in rem* proceeding against property could be construed as an action against state officials in their official

capacities. 458 U.S. at 685-86. The Court found that the suit could be construed as such, because the state officials were in control of the property and were duty-bound to take action in furtherance of superior federal law in relation to that property. *Id.* at 680. The Court did not look to the merits of the case — whether the property legally belonged to the state — because the question was irrelevant to the *Ex parte Young* analysis.[18]

Miller does not stand for the proposition cited by Appellees either. *Miller* did not look to the merits to determine whether tribal officials were "acting within the scope of their authority." Response, at 17. Rather, the *Miller* court determined that the plaintiffs did not allege violation of a superior federal law. The plaintiffs in *Miller* alleged "that federal antitrust laws apply to the Tribe and its officers as federal laws of general applicability." *Miller v. Wright*, No. 11-5395, 2011 WL 4712245, at *3 (W.D. Wash. Oct. 6, 2011). The trial court found that these federal laws do not apply to tribal governments, and plaintiffs therefore did not allege a violation of a superior federal law. *Id.* at 4. The *Miller* plaintiffs also argued that the tribal officials "acted outside the scope of their authority by signing and/or enforcing the TribeState agreement to impose cigarette taxes." *Id.* There, too, the trial court found that the plaintiffs did not allege a violation of a superior federal law because, tribes, under federal law, have a "legally recognized

[18] It is also worth noting that *Treasure Salvors* was decided in 1981, 20 years before the announcement of the "straightforward" test adopted by the *Verizon* Court in 2002. *See e.g. Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, 362 F.3d 512, 517 n.2 (8th Cir. 2004) (distinguishing cases that "were decided before *Verizon*").

authority to impose taxes." *Id.* On appeal, the Ninth Circuit Court of Appeals upheld the decision, finding that under federal law, "'[t]he power to tax transactions occurring on trust lands . . . is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law . . . .'" *Miller*, 705 F.3d at 928 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980)). Neither the trial court nor the court of appeals in *Miller* looked to the merits — neither court evaluated whether the tribe *actually* taxed transactions occurring on trust lands — because the inquiry was irrelevant to the *Ex parte Young* analysis.

Appellees also argue that "Appellants cannot come at this late hour and complaint that the Trial Court should not have examined the merits when Appellants themselves engaged in the merits" by seeking two Motions for Temporary Restraining Order ("TRO"). Response, at 18-19. This is a throwaway argument that the Court need not indulge. Clearly, Appellees are aware that "different standards of proof and analysis [a]re applied" to a TRO motion — a dismissal motion for lack of jurisdiction "is not based on whether Plaintiff is likely to prevail" on the merits. *Brown v. New York*, No. 13-0645, 2013 WL 5464646, at *19 (N.D.N.Y. Sept. 30, 2013); *see also Butler v. National Collegiate Athletic Ass'n*, No. 96-1656, 1996 WL 1058233, at *5 (W.D. Wash. Nov. 8, 1996) ("Having denied Defendant's motion to dismiss, the next question becomes whether to issue a preliminary injunction. This question involves different

standards [in that] it involves [an analysis of] the merits of the case."); *Savage v. Tweedy*, No. 12-1317, 2012 WL 6618184, at *3 (D. Or. Dec. 13, 2012) (same).[19]

B. Appellants Did Not Sue Appellees In Their Personal Capacities.

Appellees submit that the Trial Court's test is proper because it is akin to the *respondeat superior* test employed in a Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2674, analysis. Response, at 16 n.12; *see Johnson v. Sawyer*, 47 F.3d 716, 730 (5th Cir.1995) (en banc) ("All FTCA liability is *respondeat superior* liability. . . . Under the FTCA, the United States is not liable if the private employer would not be liable pursuant to local law."). But as noted *supra*, at n.1, official capacity suits are against government agencies — and therefore against the government — "not against the people through whom agencies act." *Hobbs*, 999 F.2d at 1530. The FTCA analysis seeks to hold the government accountable for the actions of its agents when acting in their role as government agents — it is a question of agency. If Appellants had sued Appellees in their personal capacities, and if Appellees had raised the defenses of legislative, judicial, prosecutorial, or qualified immunity, this *would* be the inquiry.[20] *See*

[19] Appellees also make the tenuous argument that "Appellants have fully litigated the merits of the case without objection" vis-à-vis their TRO motions. Response, at 19. If only. The Trial Court's analysis of the merits was conducted under the preliminary injunction and/or TRO standard, and was expressly limited to that analysis. *See e.g.* CP 44, Order Denying Motion for Preliminary Injunction, at 7 ("[T]his analysis applies only to the facts as they've been presented at this early stage . . . .").

[20] As the Tribal appellees in the *Allen v. Smith* litigation now before the Ninth Circuit Court of Appeals correctly note, "[u]nlike qualified immunity, tribal sovereign immunity" is analyzed "without regard to the potential merits." Appellees' Answering Brief, *Allen v. Smith*, No. 13-5552 (9th Cir. Nov. 8, 2013), ECF No. 16-1 at 45 (citation omitted).

Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989, 995 (11th Cir. 1990) (government agents are shielded by absolute immunity when "acting within the scope of their discretionary authority"). But because Appellees were sued in their official capacities, the agency question is irrelevant. As described by the Supreme Court in *Kentucky v. Graham*,

> When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as . . . absolute immunity [and] qualified immunity . . . . In an official-capacity action, these defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess . . . .

473 U.S. 159, 166-68 (1985) (quotation and citation omitted).

Here, the Trial Court erred in that it did not analyze the suit as a suit against Appellees in their official capacities.[21] Because Appellees were sued in their official capacities, as government entities, any agency question — whether the individual Appellee "acted outside the scope of their official duties" as a Tribal Councilmember — is extraneous. CP 79, MTD Order, at 8; *id.* at 168. The correct inquiry is whether the individual Appellee, acting in his or her official capacity: (1) is carrying out or implementing laws or policies that violate the constitution or other superior law, *National Audubon Society*, 307 F.3d at 847;

[21] *See e.g.* CP 79, MTD Order, at 8 (holding that Appellants sued Appellees in their "personal capacity" such that they "became personally liable."); CP 71, Order Denying Plaintiffs' Second Motion for Temporary Restraining Order, at 3 ("Plaintiffs argue that . . . it [sic] has named the Defendants individually. However, [the requested relief] would by necessity fall against Defendants in their *official capacities* because the Defendants themselves have no authority to act on behalf of the Tribe and its government if they are acting privately.") (emphasis in original)

and (2) whether the relationship between the prohibited law or policy and the Appellee's acts in furtherance thereof is "fairly direct." *NAACP v. L.A. Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983); *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 469 (9th Cir. 1999). The Trial Court should have answered these questions in the affirmative and ended the analysis there. But the Trial Court's insistence on analyzing the suit as against Appellees in their personal capacities prohibited it from doing so — a clear error of law.

C. The Trial Court Erred By Holding That Appellees Did Not Violate The Nooksack Constitution.

Again, because the Trial Court's error was jurisdictional, the Court need not appraise the Trial Court's rulings on the merits. But even were the Court to evaluate the Trial Court's rulings on the merits — and it need not — it must find that the Trial Court erred in evaluating Appellants' constitutional claims.

1. N.T.C. § 63.04.001(B)(1)(a) Is Unconstitutional.

Article II, Section 2 of the Nooksack Constitution, **explicitly limits the reasons for disenrollment** to a "failure to meet the requirements set forth for membership in this constitution." Const., art. II, § 2. Appellees argue that "N.T.C. § 63.04.001(B)(1)(a) is constitutional" because it "does not add an additional reason for disenrollment." Response, at 28. But, clearly, it does. The "requirements set forth for membership in th[e] constitution," Const., art. II, § 2, are as follows:

> (a) All original Nooksack Public Domain allottees and their lineal descendants living on January 1, 1942.
>
> (b) All persons of Indian blood whose names appear on the official census roll of the tribe dated January 1, 1942, provided that the January 1, 1942, roll may be corrected by the tribe with the approval of the Secretary of the Interior.
>
> (c) Lineal descendants of any enrolled member of the Nooksack Indian Tribe subsequent to January 1, 1942, provided such descendants possess at least one-fourth (1/4) degree Indian blood.
>
> (d) All persons who received a payment under the Act of April 30, 1965, entitled Nooksack Tribe of Washington, Distribution of Judgment Fund (80 Stat. 906), October 6, 1966, and lineal descendants of any persons so receiving a payment, provided such descendants possess at least one-fourth (1/4) degree Indian blood.
>
> (e) Official membership roll of the tribe shall be approved by the Tribal Council and by the Secretary of the Interior or his authorized representative.
>
> (f) Any persons who possess at least one-fourth (1/4) degree Indian blood, and who is adopted by an enrolled member of the tribe under the laws of the Nooksack Indian Tribe or any state of the United States.
>
> (g) Any person who possesses at least one-fourth (1/4) degree Indian blood and who is an adopted member of the tribe pursuant to the constitution and the ordinances enacted thereon.
>
> (h) Any persons who possess at least one-fourth (1/4) degree Indian blood and who can prove Nooksack ancestry to any degree.

Const., art. II, § 1(a)-(h). Failure to "submit adequate documentation . . . at the time or enrollment" is not mentioned on this list. N.T.C. § 63.04.001(B)(1)(a). This is because whether a member submitted a perfect application at the time of enrollment — at the time that the Enrollment Department, at no fault of the member, maybe upwards of forty years ago, determined that the applicant *did* submit adequate documentation — is irrelevant. Should a member be forced, at

every moment in his or her life, to question the enrollment department's assessment of documentation at the time of enrollment? In enacting Article II, Section 2 of the Nooksack Constitution, the Nooksack membership answered that question in the negative.[22] The only proper reason for initiating disenrollment, under the Constitution, is upon the presentation of documentation that the targeted Nooksack does not "meet the requirements set forth for membership in th[e] constitution."[23] Const., art. II, § 2. Without a Constitutional amendment, Appellees cannot legislate their way out of this requirement.

Appellees also seek to evade the Trial Court's flawed ruling by arguing that N.T.C. § 63.04.001(B)(1)(a) was not "at issue in this case because it concerns potential issues in disenrollment meetings of the Council, which have not occurred and were not before the Court." Response, at 27. According to Appellees, "Appellants attacked only Resolution 13-02 below on this ground" and, therefore, the Trial Court was not required to determine whether N.T.C. §

[22] If Appellees wish to add "proof of adequate documentation at the time or enrollment" to the reasons for legal disenrollment in Article II, Section 2, there is a process for doing that. *See generally* Const., art. X. Appellees have yet to initiate this process, at least to Article II, Section 2.

[23] Appellants did not even attempt to provide evidence that Appellants do not meet the requirements set forth for membership in Article 2, Sections 2(b)-(h) of the Constitution. *See* Response, at 3 (admitting that Appellees initiated disenrollment only because "BIA staff could not locate any records to establish that [Appellants] were (or are) lineal descendants of an Original Nooksack Public Domain Allottee" under Article II, Section 2(a) of the Constitution). Appellees argument that "there is no proof that any person subject to potential disenrollment would have met Section 1(H) standards" is unfounded. *Id.* at 33. It is not the targeted Nooksack's responsibility to provide evidence that they are Nooksack; it is Appellees responsibility to provide evidence that they are not. *See* N.T.C. § 63.00.004 ("No disenrollment action shall be taken without documentation to support the decision."). And, at any rate, Appellants have provided this evidence, but Appellees have deemed it irrelevant due to N.T.C. § 63.04.001(B)(1)(a)'s additional reason for disenrollment. *See generally* CP 23, Second Declaration of Gabriel S. Galanda, Exs. A-C.

63.04.001(B)(1)(a) is unconstitutional. *Id.* Appellees misconstrue the proceedings below.

N.T.C. § 63.04.001(B)(1)(a) was clearly at issue in this case, and Appellants made this clear in their pleadings. True, Appellants did argue that Resolution No. 13-02, too, is unconstitutional — because it allowed disenrollment for something other than a "failure to meet the requirements set forth for membership in th[e] constitution." Const., art. II, § 2. But this does not detract from the fact that the unconstitutionality of Title 63 was put directly at issue vis-à-vis Resolution No. 13-02, to the extent that Resolution No. 13-02 was based on this unconstitutional statute.[24] As Appellants made clear in their Response in Opposition to Defendants' Motion to Dismiss:

> Article II, Section 4 of the Constitution clearly states that the "reasons for [loss of membership] shall be limited exclusively to failure to meet the requirements set forth for membership in this constitution" (emphasis added). Defendants would read this provision as stating that reasons for loss of membership include (1) failure to meet the requirements set forth for membership in this constitution, and (2) failure to have the correct box checked on the original enrollment application. Resolution No. 13-02 initiates the disenrollment process against over 300 Nooksacks not because they do not "meet the requirements set forth for membership in this constitution," but because Plaintiffs were not originally enrolled under Article II, §1 (A) and (C). To the extent that defendants are

[24] *See* CP 14, Declaration of Gabriel S. Galanda, Ex. 4 (Resolution No. 13-02) (citing "Title 63, Section 63.04.001, Section B" for authority to initiate disenrollment "when it is discovered they were erroneously enrolled in that there was inadequate documentation or research providing that they met the constitutional membership criteria at the time of enrollment").

> correct in their interpretation of Title 63 . . . it is violative of the Constitution . . . .[25]

CP 64, at 33-34, 34 n.16.

Finally, Appellees note that N.T.C. § 63.04.001(B)(1)(a) "was approved by the Secretary" of the Interior as required by Article II of the Constitution. Response, at 29. Appellees fail to explain how this has any bearing on the constitutionality of the statute. It has none.

2. Resolution No. 13-02 Is Unconstitutional.

Appellees do not even attempt to repair the Trial Court's inaccurate finding that there exists some "provision in the Constitution that reserves determinations regarding Loss of Membership to the Tribal Council." CP 44, Order Denying Motion for Preliminary Injunction, at 12; *see also* CP 79, MTD Order, at 9 (same). Instead, Appellees argue that N.T.C. § 63.04.001(b)'s "refer[ence] to the Tribal Council five times" indicates "the Council's pervasive authority over disenrollment proceedings," which, in turn, indicates the authority to "initiate[] disenrollment proceedings." Response, at 29. This argument, however, rests on two conditions that Appellees assume, but fail to establish.

[25] Prior to Appellees filing of their Motion to Dismiss, it was unclear whether Appellees were relying on N.T.C. § 63.04.001(B)(1)(a) or N.T.C. § 63.00.04 for their authority to initiate disenrollment. Resolution No. 13-02 relies on both. *See generally* CP 14, Declaration of Gabriel S. Galanda, Ex. 4. Returning to the *Ex parte Young* exception, it was thus unclear which unconstitutional law Appellees were acting in furtherance of. Clearly, though, Appellees were acting in furtherance of Resolution No. 13-02 — an unconstitutional regulation based on either unconstitutional statute. At any rate, there is no question that Appellants have remained adamant throughout this litigation that both statutes exceed the authority provided by Article II, Section 2 of the Nooksack Constitution. Indeed, Appellees do not even attempt to dispute that N.T.C. § 63.00.04 is unconstitutional. *See generally* Opening Brief of Appellants, at 33 n.22.

First, Appellees assume that the Tribal Council has been granted the constitutional authority to initiate and adjudicate disenrollment proceedings. Contrary to the Trial Court's erroneous finding, they have not.[26] The Constitution grants the Tribal Council with the sheer "power to enact ordinances . . . governing future membership . . . and loss of membership." Const., art. II, § 2. This says nothing about adjudicating or initiating disenrollment proceedings. The Trial Court's findings otherwise were in error.

Second, even assuming that the Tribal Council was granted constitutional authority to initiate and adjudicate disenrollment proceedings, Appellees assume that the Tribal Council granted itself the constitutional authority to initiate disenrollment proceedings. In arguing that they have, Appellees point to no specific provision of Title 63 — because it does not exist — but instead to the Council's nebulous "pervasive authority over disenrollment proceedings." Response, at 29. "[P]ervasive authority over disenrollment proceedings" be what it may, the power to initiate disenrollment proceedings is not part of that authority, at least according to Title 63. *Id.*

Finally, Appellees' argument from "implicit divestiture" is misplaced. Response, at 31. Surely, the Nooksack Indian Tribe has the inherent sovereign

[26] Appellants are perplexed by Appellees' argument that Appellants are "utilize[ing] inaccurate citations to the record in this section" by "cit[ing] to a portion of the Trial Court's Order which found that the Constitution does give the Council authority to determine loss of membership." Response, at 29 n. 26 (emphasis in original). Appellants' citation is accurate. Appellants are pointing out that the Trial Court found constitutional authority where none exists. That finding of the Trial Court was in error; appellants point out errors on appeal.

authority to exercise its government however it wishes, and other governments have no business interfering in the exercise of that authority.[27] And, here, the Nooksack Indian Tribe has exercised that authority by enacting a constitution, and a tribal code to implement the authority delegated by that constitution. Like the U.S. Constitution, which leaves all powers not explicitly entrusted to the federal government to the states,[28] the Nooksack Constitution leaves all powers "not expressly referred to in th[e] constitution" to "the people of the Nooksack Indian Tribe" — not to those people elected to the Tribal Council. Const., art. VI, § 4; *see also generally* Const., Preamble (citing Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476); *In re Village Authority to Remove Tribal Council Representatives*, 11 Am. Tribal Law 80, 84 (Hopi Ct. App. 2010). Appellants do not argue that the power to initiate disenrollment has somehow been taken away from the Nooksack Indian Tribe. Surely, such powers may be exercised by the Tribe, vis-à-vis its membership, "through the adoption of appropriate . . . constitutional amendments." Const., art. VI, § 4. Through such amendment, these powers may even be assigned to the Tribal Council. But this has yet to occur.[29]

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[27] There are, of course, certain exceptions in the federal courts that not applicable to the appeal at bar. Appellants take no position on the application of so-called federal "laws of general applicability" to tribal governments. *See generally Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

[28] *See e.g. Ogden v. Saunders*, 25 U.S. 213 (1827); *People of State of N. Y. v. O'Neill*, 359 U.S. 1 (1959).

[29] Which explains why, pursuant to N.T.C. § 63.04.001(b), only a "tribal member [may] request[] a loss of membership of another tribal member" by "present[ing] written documentation."

3. Resolution No. 13-38 Is Unconstitutional.

Appellees argue that "the Council's reason for passing Resolution 13-38 certainly meets the rational basis test." Response, at 33; *see also id* ("Amending the Constitution for the sake of clarity and avoiding abuse serves a legitimate governmental purpose, which is all that is necessary to survive rational basis scrutiny."). As described below, Appellees are wrong on this issue. But that is beside the point at this juncture — the Trial Court did not even apply the rational basis test. This alone merits reversal and remand. *See e.g. Melton v. Gunter*, 773 F.2d 1548 (11th Cir. 1985).

But even were the Court to analyze the merits of this claim — which, as should be clear now, it need not, for multiple reasons — Appellees' own facts provide evidence that Resolution No. 13-38 was not passed "for the sake of clarity and avoiding abuse." Response, at 33. On March 25, 2013, Appellants Tribal Council Secretary Rudy St. Germain and Councilwoman Michelle Roberts were informed "of a special meeting for March 26, 2013, at 10:00 a.m. to include a two-hour executive session related to this litigation." *Id.* at 8-9. Secretary St. Germain and Councilwoman Roberts were not allowed to attend the executive session as it was "related to the disenrollment proceedings." *Id.* at 9. Resolution No. 13-38 was passed at that meeting. *Id.* If Resolution No. 13-38 was passed "for the sake of clarity and avoiding abuse," Response, at 33, then how was it "related to the disenrollment proceedings"? *Id.* at 9. Likewise, if Resolution No.

13-38 "did not target Appellants," *id.* at 33, then how is it "related to the disenrollment proceedings"? *Id.* at 9. At minimum, Appellants are entitled to discovery on this claim. *See e.g. Kirsh v. City of New York*, No. 94-8489, 1995 WL 383236 (S.D.N.Y. Jun. 27, 1995).

4. Appellants Have Been Denied Due Process.

Appellees have not produced any documentation to show that Appellants do not "meet the requirements set forth for membership in th[e] constitution."[30] Const., art. II, § 2. Appellees do not argue that they have.[31]

Relying on the erroneous ruling that is being appealed in this proceeding as authority, Appellees argue that "the Enrollment Ordinance 'does not require the Tribal Council to provide documentation evidence prior to initiating disenrollment proceedings.'" Response, at 34 (quoting CP 69, Order Denying Permission for Interlocutory Appeal, at 4). But the clear text of N.T.C. § 63.00.004 directly contradicts this statement: "[n]o disenrollment action shall be taken without documentation to support the decision." Appellees are dead wrong.

[30] Again, even if Appellees had provided evidence that that Plaintiffs' original enrollment files had the wrong box checked, this is not enough to initiate disenrollment. *See* Const. art. II, § 4.

[31] Citing to the Trial Court's flawed order now under appeal as evidence, Appellees argue that they have provided "detailed ancestral histories" to Appellants. Response, at 35 (quotation omitted). Appellants have yet to see these "detailed ancestral histories." *Id.* Any "evidence" provided to Appellants — if the term "evidence" is construed as a mere self-fulfilling statement made by Appellees — has related to alleged errors on their enrollment applications and has had nothing to do with whether Appellants meet the requirements for membership as expressed in Article II, Sections 1(a)-(h) of the Nooksack Constitution. *See generally* CP 14, Declaration of Gabriel S. Galanda, Ex. 1.

Appellees' also maintain that that Article IX's "due process of law" requirement, 25 U.S.C. § 1302(a)(8), does not require documentation evidence prior to initiating disenrollment proceedings because "case law surrounding loss of citizenship [is] inapposite." Response, at 34. According to Appellees, the loss of tribal membership is somehow less significant to that of federal citizenship, such that it "cannot be compared." *Id.* This discourteous argument should fall on deaf ears.[32]

No authority exists for Appellees' position that tribal membership is somehow inferior to federal citizenship. To the contrary, in *Poodry v. Tonawanda Band of Seneca Indians*, the Second Circuit Court of Appeals found just the opposite. 85 F.3d 874, 895-96 (2nd Cir. 1996) (analyzing tribal banishment and noting that " deprivation of citizenship is an extraordinarily severe penalty with consequences that may be more grave than consequences that flow from conviction for crimes") (quotation omitted); *see also DeVerney v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 96-0201, 2000 WL

[32] *See* David Wilkins, *The Disenrollment Disaster: My Citizenship is Better Than Yours!*, Indian Country Today Media Network, Nov. 7, 2013, *available at* http://indiancountrytodaymedianetwork.com/2013/11/07/disenrollment-disaster-my-citizenship-better-yours (the argument that "termination of a Native person's citizenship is not equal to the loss of U.S. citizenship and [that] the loss of tribal membership is not akin to becoming stateless . . . denigrates the very essence of indigenous nationhood"); Suzianne D. Painter-Thorne, *If You Build it They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 Lewis & Clark L. Rev. 311, 320 (2010) ("For the individuals affected . . . disenrollment from their tribe can mean the division of family and separation from their tribe and culture. It can also mean unemployment, the loss of their homes . . . .").

35749822 (Grand Traverse Ct. App. Nov. 15, 2000) ("[M]embership is a 'property right' subject to due process once it is granted.").

By failing to produce any documentation to show that Appellants do not meet the requirements set forth for membership in the Nooksack Constitution prior to the initiation of disenrollment proceedings, Appellees violated superior Nooksack law. To the extent that the Trial Court ruled otherwise, it was in error.

D. The Trial Court Erred By Holding That Appellees Did Not Violate The Nooksack Bylaws.

1. Tuesday Meetings.

Appellees contend that that the their obstruction of Tuesday meetings required by Article II, Section 2 of the Nooksack Bylaws is legally permissible because the Tribal Council is immune from suit. The flaw in Appellees reasoning on immunity is discussed above and will not be repeated here — suffice to say that the argument is intransitive and contradictory: Appellees sovereign immunity test requires an evaluation of the merits, yet Appellees argue that they are not subject to an evaluation on the merits, because they are immune.[33]

Appellees' also submit that the Tribal Council's obstruction of Tuesday meetings is acceptable because "it is a political question." Response, at 36. Admittedly, a properly plead *Ex parte Young* exception does not defeat the

[33] In their Opening Brief and below, Appellants have cited *Garfield v. Coble*, No. ITCN/AC 03-020, 2004 WL 5748178 (Nev. Inter-Tribal Ct. App. June 28, 2004), for the mere proposition that "Bylaws are enforceable against the Tribal Council." Appellants' Opening Brief, at 55. Appellants have not submitted this authority to prove a waiver of tribal sovereign immunity. Indeed, Appellants have steadfastly maintained that sovereign immunity is not at issue here, due to their proper pleading of the *Ex parte Young* exception. Appellees' argument otherwise, *see* Response, at 36 n. 32, is completely off base.

political question doctrine — they are subject to an entirely separate analysis. But the Trial Court did not dismiss this claim based on the political question doctrine. Instead, the Trial Court dismissed the claim, improperly, on sovereign immunity grounds. *See* CP 79, MTD Order, at 18. (finding that the Bylaws are "to be followed by the Council in the same manner as the Constitution," but holding that "the sovereign immunity of the Tribe protects the Council" from suits seeking to enjoin their interference with monthly meetings). If it is a valid defense, the political question doctrine is one for the Trial Court to evaluate on remand.

2. Special Meetings.

Citing to an erroneous holding in the Trial Court Order that is on appeal as if it were evidence, Appellees feign that the special meetings requested by Appellants have occurred and that, therefore, this claim is moot. Response, at 37 (citing Order Granting Defendant's [sic] Motion to Dismiss, *Roberts v. Kelly*, No. 2013-CI-CL-003, at 13 (Oct. 17, 2013)); *see also id.* at 38 (citing to CP 79, MTD Order, for its sole authority as to why Appellants lack standing). However, the meetings have not taken place. *See* Notice of Appeal, *Roberts v. Kelly*, No. 2013-CI-CL-003, at 12 (Oct. 28, 2013) ("The Trial Court erred in finding that special meetings occurred, when they did not occur . . . ."). The Trial Court's finding of facts and conclusions of law on this matter are in error.

E. The Trial Court Erred In Failing To Find That Appellees Violated Title 63.

Appellees argue that Appellee Bailey, in his official role as an Enrollment Officer, did not initiate disenrollment. Response, at 39-40. Appellants, though, have submitted abundant evidence to substantiate their claim that he did. *See* CP 6, Declaration of Rudy St. Germain, at 2-3 (noting that Appellee Robert Kelly "informed the Tribal Council that Jewell Jefferson and Ron Bailey at the Nooksack Tribal Enrollment Office had taken the initiative to begin the process of disenrolling 306 currently enrolled Nooksacks"); CP 39, Declaration of Jewell Jefferson, at 3 (noting "Roy Bailey's efforts to disenroll over 300 members of the Nooksack Tribe" and that disenrollment was not "properly started with a documented request for loss of membership of a tribal member by another tribal member, as required by Title 63"). But the Trial Court did not take this evidence into account. Instead, the Trial Court took Appellees' facts as true, and ignored much of Appellants' facts.

Appellees argue that the Trial Court did not have to take Appellants' facts as true for the purpose of its "threshold" jurisdictional determination, CP 79, MTD Order, at 8, because under "[c]onclusions of law disguised as fact and unwarranted inferences of fact are not accepted as true [or] viewed in the light most favorable to [Appellants]." Response, at 40. Appellees are wrong. Taking the Second Amended Complaint as a whole, Appellants have sufficiently alleged that Appellee Bailey initiated disenrollment. Whether Appellants will ultimately

succeed in proving the facts alleged is an issue for another day.[34] But it cannot be said that Appellants have merely recited the elements of the claim. At minimum, Appellants have presented a factual issue that cannot be resolved on jurisdictional grounds.

F. The Trial Court Erred By Striking Appellants' Exhibit And Refusing To Strike Appellees' Declaration.

1. Declaration Of Grett Hurley.

Appellees argue that the Trial Court "properly allowed Mr. Hurley's Declaration regarding the intent of Appellees related to the Stipulation" because counsel for Appellants have "filed multiple Declarations in this case, including one giving testimony." Response, at 43. Aside from the fact that the Trial Court entirely failed to rule on Appellants' Motion to Strike — so both parties are left guess whether that was the Trial Court's actual reasoning — "two wrongs do not make a right." *Mihalek Corp. v. State of Mich.*, 630 F.Supp. 9, 12 (E.D. Mich. 1985). If Appellees wished to strike Appellants' Declarations, that was within

[34] Citing to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Appellees argue that Appellants' Complaint would not survive a Fed. R. Civ. Proc. 12(b)(6) motion to dismiss because it does not allege enough content to "draw the reasonable inference that the [Appellees are] liable for the misconduct alleged." Response at 39-40 n.35 (quotation omitted). Appellees' argument on this point is misplaced. While *Iqbal* and *Twombly* have supplanted the more liberal pleading standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *Twombly* also emphasized that the Supreme Court was construing Fed. R. Civ. Proc. 8, not 12(b)(6). *Twombly*, 550 U.S. at 555 56 & n. 3. Rule 8 only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a)(2). As stated in *Twombly*, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is remote and unlikely." 550 U.S. at 556. Here, Appellants' Second Amended Complaint meets the requirements of *Twombly* and *Iqbal* and states a plausible claim for relief.

their discretion. Appellees' choice to remain idle has no effect on the appropriateness of Mr. Hurley's Declaration.

2. Exhibit A To The Declaration Of Diantha Doucette.

Appellees submit that Diantha Doucette obtained the Exhibit A of her Declaration by either "snag[ging] . . . a copy of an enrollment file" in which it was "unfortunate[ly] plac[ed]" while she was an employee of the Tribe; or from her husband, who obtained it "during his . . . time as a Chairman." Response, at 42-43. Just as the Trial Court had done, Appellees gloss over the testimony of Ms. Doucette. As her Declaration makes clear, Exhibit A was disclosed to her by the Enrollment Department — not "snagged" while she was working for the Tribe or acquired through her husband. CP 23, Declaration of Diantha Doucette, at 2.

Indeed, Ms. Doucette was not the only tribal member to obtain Exhibit A from the Enrollment Department — it appears that Exhibit A was disclosed to the entire Nooksack membership by its being placed in their enrollment files at some point between the year 2000 and the initiation of this lawsuit. *Id.* That the Exhibit was subsequently purged from all of the enrollment files does not take back the fact that it was made public by the Tribal Council and its officers on numerous occasions. *Id.*

G. The Trial Court Erred In Holding That The Named Plaintiffs Represent Only Themselves In This Matter.[35]

On March 20, 2013, the parties in this suit filed a Stipulation with the Trial Court dated March 19, 2013, which provides in pertinent part: "On or before April 13, 2013, Galanda Broadman will furnish a list of those individuals **for whom they are then authorized to act in this matter and in the related proceedings regarding disenrollment of certain Nooksack Tribal Members pursuant to Title 63**." CP 90, Declaration of Gabriel S. Galanda in Support of Response Briefing, Ex. D (Stipulation) (emphasis added).

Appellees argue that, despite what the Stipulation actually says, the Court should look to numerous documents and declarations not referenced within the four-corners of the Stipulation to determine "the intentions of the parties." Response at 23. Appellees, in other words, request the Court to enforce not what the Stipulation says, but their subsequent intent that may have existed in the minds of parties after the Stipulation was already executed. *Id.* at 23-25. This is not how courts interpret stipulations. "[I]n the absence of ambiguous language, a court may not look to parol evidence in ascertaining the intent of the parties." *Fireman's Fund Ins. Co. v. Tropical Shipping and Const. Co.*, 254 F.3d 987, 1003 (11th Cir. 2001); *see also* Ferdinand S. Tinio, *The Parol Evidence Rule and*

[35] This matter is largely moot at this point. There is no question that the "list of those individuals" sent to Defendants on April 12, 2013, which includes 271 of the 306 Nooksacks that have been targeted for disenrollment, are Plaintiffs in the *Roberts v. Kelly* matter accepted for appeal by the Court on November 4, 2013. Order on Motion for Permission to File Appeal and Case Management and Scheduling Order, *Roberts v. Kelly*, No. 2013-CI-APL-003 (Nooksack Ct. App. Nov, 4, 2013).

Admissibility of Extrinsic Evidence to Establish and Clarify Ambiguity in Written Contract, 40 A.L.R.3d 1384, § 3 (1971) ("In the absence of ambiguity, a court may not look to parol evidence to ascertain the parties' intent. . . .").

The Stipulation required that Plaintiffs' counsel submit "a list of those individuals for whom they are then authorized to act **in this matter** and in the related **proceedings regarding disenrollment** of certain Nooksack Tribal Members." Stipulation (emphasis added). "[I]n this matter" clearly refers to the "matter" captioned in the Stipulation itself, this *Lomeli v. Kelly* litigation. The term "[p]roceedings regarding disenrollment" is also quite clear, it refers to the disenrollment hearings now stayed by the Court of Appeals. The "list of those individuals" was sent to Defendants on April 12, 2013, and includes 271 of the 306 Nooksacks that have been targeted for disenrollment. CP 90, Ex. F. The Stipulation is clear and unambiguous – there is no reason to look beyond the text of the Stipulation.

H. The Trial Court Erred By Failing To Address Multiple Claims And Related Arguments.

As noted in Appellants' Opening Brief, a trial court cannot selectively choose what claims it wishes to analyze (or allow a movant to selectively chose which claims it wishes to attack), find that only those claims are meritless, and then dismiss the entire suit based on its analysis of those claims only. Appellees have no answer for the Trial Court's carelessness, other than to simply retort that it did not need to analyze all of Appellants' claims because it "found that

Appellees retained sovereign immunity, which disposed of all of Appellants' claims." Response, at 44. As discussed above, Appellants agree on this point — a trial court need not, and indeed should not, analyze the merits of a plaintiff's claim when conducting an *Ex parte Young* sovereign immunity analysis. That issue aside, and assuming that, as Appellees contradictorily argue, the Trial Court was correct in evaluating the merits, the Trial Court erred in not evaluating all of the merits of Appellants' claims.[36]

I. The Trial Court Erred By Failing To Issue The Requested Injunction.

When a Trial Court fails to issue preliminary or temporary injunctive relief to prevent a government official from acting in furtherance of an unconstitutional law or regulation, the correct remedy is to remand the case "for the issuance of an injunction consistent with [the appellate court's] holding." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1129 (6th Cir. 1991). In their Opening Brief, Appellants cited *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), for the proposition that "the allegation of unconstitutionality will almost always warrant a finding in favor of the movant" such that when the appellate court finds that the trial court errs in its evaluation of the likelihood of success on the merits, the matter is typically remanded to the district court with instructions to enter a preliminary injunction. Appellants' Opening Brief, at 72.

[36] Appellees draw the Court's attention to a typographical error in Appellants' Opening Brief. Response, at 45. The sentence cited by Appellees on Page 69 of Appellants' Opening Brief should read as follows: "Appellees violated Article II, Section 6 of the Bylaws by failing to hold a public meeting as to amendments of Titles 10 and 60, attempting to disenroll over 15 percent of the Nooksack membership, and enacting a Tribe-wide moratorium on new enrollments."

Appellees argue that Appellants "misconstrue" *Hobby Lobby* in that, "[t]here, the court established that there likely was a violation of law, which contracts with the Trial Court's repeated determination that Appellants were not likely to succeed on the merits." Response, at 48.

Appellees miss the point. The Trial Court's "repeated determination that Appellants were not likely to succeed on the merits" *is on appeal to this Court*. If ***this Court*** finds that the Trial Court erred — and that, therefore, Appellants ***were*** likely to succeed on the merits — the proper procedural exchange would be to remand this matter to the Trial Court with instructions to enter a preliminary injunction. Appellants do not misconstrue *Hobby Lobby*. Appellees misconstrue Appellants' Opening Brief.

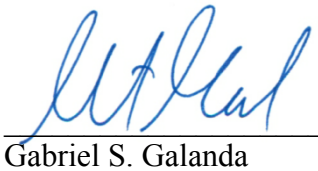
III. CONCLUSION

Appellants respectfully reiterate their request that (1) this matter be reversed and remanded for disposition consistent with a reversal of the Trial Court's dismissal and (2) the Trial Court's denial of Appellants' motions for temporary restraining order be reversed, enjoining Appellees pending trial on the merits.

In the alternative, Appellants again respectfully request that the Trial Court's opinion be vacated, and that this matter be remanded for a more exhaustive analysis of Appellants' claims consistent with this Court's opinion.

DATED this 15th day of November, 2013.

Respectfully submitted,



Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
Attorneys for Appellants

DECLARATION OF SERVICE

I, Gabriel S. Galanda, say:

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am employed with Galanda Broadman, PLLC, counsel of record for Appellants.

2. Today, I caused the attached documents to be delivered to the following:

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

A copy was emailed to:

Thomas Schlosser
Morisset, Schlosser, Jozwiak & Somerville
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509

The foregoing statement is made under penalty of perjury under the laws of the Nooksack Tribe and the State of Washington and is true and correct.

DATED this 15th day of November, 2013.

GABRIEL S. GALANDA