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

SONIA LOMELI; TERRY ST. GERMAIN; NORMA ALDREDGE; RAENNA RABANG; ROBLEY CARR, individually on behalf of his minor son, LEE CARR, enrolled member of the Nooksack Indian Tribe,

Plaintiffs/Appellants,

v.

ROBERT KELLY, RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, KATHERINE CANETE, LONA JOHNSON, JEWELL JEFFERSON, AND ROY BAILEY,

Defendants/Appellees.

NO. 2013-CI-APL-002

OPINION

I. INTRODUCTION

This appeal is from the Tribal Court's order dismissing Appellants' second amended complaint. Appellants requested the Tribal Court enjoin members of the Nooksack Tribal Council from conducting disenrollment proceedings against them. Appellants are understandably gravely concerned at the prospect of disenrollment. We understand how serious the prospect of disenrollment is to Appellants, and how it impacts their cultural, social and political identity.

We also recognize that determining its own membership is a hallmark of a tribe's sovereignty. It is one of the few aspects of tribal sovereignty that has withstood the relentless attempts by outside forces to tear down tribal self-governance, and one of the few aspects of tribal sovereignty that has not been eroded by the federal government.

Judges are not sages. We do not delude ourselves into believing we have the wisdom of a Solomon. It is not our role to insert ourselves into the Tribe's political fray, or second guess the political judgments made by the Tribe's elected leaders or its voting members, even if we believe those judgments unwise. We, like the trial court, are limited to resolving legal questions where authorized by the Tribe's Constitution[1] and laws.

[1] Unless otherwise specified, all references within this opinion to the "Constitution" are to the Constitution and Bylaws of the Nooksack Indian Tribe of Washington.

The nature of this dispute requires us to find the delicate balance between Nooksack law and politics keeping in mind the equal importance attached to both Tribal membership and Tribal sovereignty. The Tribe's Constitution guides us in this difficult task, which we are duty bound to perform.

The Nooksack judiciary is not the only Nooksack governmental body whose decisions are tethered to the Tribe's Constitution and laws. The decisions of its elected officials are as well. The trial judge expressed it well and it is worth repeating:

> The Tribal Council members named in this Complaint hold an obligation to act in the best interests of the Nooksack Indian Tribe. Membership and enrollment decisions impact individual lives in the deepest possible ways and those decisions cannot be taken lightly. This Court recognizes the serious implications of this case and its decision on this motion and all the others that have preceded it. It is the solemn obligation of this Court to follow the law of the Nooksack Indian Tribe and it is the obligation of the Tribal Council to do the same.

Order at 20.

II. FACTS

The Trial Court made the following largely undisputed relevant factual findings. The record supports those findings so we adopt them for the purpose of this appeal.[2]

In December 2012, Terry St. Germain, one of the named Appellants in this case, sought to have his children enrolled in the Tribe. He submitted applications for the children to the Nooksack Enrollment Office. On December 19, 2013, at a special meeting of the Nooksack Tribal Council, the Tribal Council heard the enrollment applications for others applying for enrollment, as required by the Nooksack Enrollment Ordinance. Enrollment Officer Roy Bailey, one of the named defendants, did not present Mr. St. Germain's children for enrollment.

At the meeting, Rudy St. Germain, the Tribal Council Secretary, asked why the St. Germain children were not presented for enrollment to the Council. Officer Bailey stated that the application did not provide information that would make the children eligible for enrollment. Secretary St. Germain noted that if the St. Germain applicants were not eligible for enrollment, then neither was he eligible for enrollment. Tribal Council Chairman Robert Kelly stated that he would do further research with Mr. Bailey to determine whether the applicants might be eligible for enrollment and that the issue would be discussed at a future meeting.

At the Tribal Council's regularly scheduled meeting on January 8, 2013, Mr. Bailey informed the Council that he and Chairman Kelly had gone to the Bureau of Indian Affairs' Regional Office to conduct the research and found no documentation to support the enrollment of the St. Germain children. Mr. Bailey also stated that supporting documents for enrollment of approximately 300 enrolled Nooksack members either did not exist in the files or were

[2] The facts pertaining to specific issues are discussed in the sections of this opinion addressing those issues.

"missing." This included Secretary St. Germain and another Tribal Council member, Michelle Roberts.

Following that meeting, Chairman Kelly called a Special Meeting that was held on February 12, 2013. At that meeting, the Council passed Resolutions 13-02, 13-03, and 13-04. During that meeting, the Council requested both Secretary St. Germain and Council Member Roberts leave and St. Germain and Roberts were not able to cast votes on these resolutions. The resolutions passed by votes of 5-0.

Resolution 13-02 states that the Nooksack "Constitution explicitly addresses loss of membership whereby the Tribal Council shall by ordinance prescribe rules and regulations governing involuntary loss of membership and such reasons shall be limited exclusively to failure to meet the requirements set forth for membership." The Resolution further states the Council has the final decision on the loss of membership. The Resolution resolves that notice be provided to "each member who descended from Annie James (George) or Andrew James and claim [sic] right to membership based through lineal descendancy of an original Nooksack Public Allottee." Notices of Intent to Disenroll were sent to about 306 current tribal members notifying them of their rights to hearing under Title 63 of the Nooksack Tribal Code, which governs enrollment and disenrollment procedures.

Following the passage of this resolution, the Council cancelled "first Tuesday" Tribal Council meetings. Under the Tribal Constitution's Bylaws, Tribal Council meetings are to be held on the first Tuesday of each month. The Chairman may call special meetings with 24 hours notice to the Council members. Since February, 2013, "first Tuesday" Council meetings have not been held. The Tribal Council has cancelled the meetings, citing concerns for public safety arising out of the animosity surrounding the potential disenrollments of the Appellants and the other approximately 300 members. Regular Council business has been conducted with Special Meetings called by the Chairman.

On March 1, 2013, the Tribal Council passed Resolution 13-38, which authorized a request to the Secretary of the Interior to hold a Secretarial election to amend the Nooksack Constitution's Article II on Membership by deleting section 1.h thereof. *See* CONST. art. X (requires the Secretary of the Interior hold an election to amend the constitution if requested by the Council or one-third of the Tribe's voters). That request went to the Secretary of the Interior, which held an election on June 21, 2013. The Constitutional amendment passed, and was certified on August 2, 2013 by the Bureau of Indian Affairs (BIA) pursuant to authority duly delegated to the BIA by the Secretary of the Interior.

The Appellants filed suit in the Nooksack Tribal Court on March 13, 2013 seeking declaratory and injunctive relief. The original Complaint was amended with leave of the court.[3]

[3] The amended complaint alleges the following against Appellee Tribal Council members while acting in their official capacity: (1) failure to hold regular Tuesday meetings as required under the Council Bylaws so as to prevent the Tribe's membership from commenting on the proposed disenrollment proceedings; (2) adoption of resolutions that conflict with the Tribe's Constitution; (3) initiation of the disenrollment proceedings contrary to Title 63, and the adoption of Resolution 13-53, which installed an Election Board, after two Council members were excluded from the meeting when the resolution was adopted in violation of the Bylaws and customary law, rendering the

The Appellants also sought two preliminary injunctions to enjoin the Tribal Council from conducting disenrollment proceedings. The Tribal Court denied both.

Following the initial denial, the Appellants sought Permission to File an Interlocutory Appeal with the Nooksack Court of Appeals. This Court's Chief Judge refused to grant permission for an interlocutory appeal, finding the trial court "did not commit 'obvious error' which would render further proceedings useless." Order Denying Permission for an Interlocutory Appeal, June 18, 2013, at 6. The Appellants then sought an order to stay the disenrollment proceedings, which we granted pending the Tribal Court's decision on the dismissal motion.

The trial court heard Appellees' motion to dismiss on June 22, 2013.[4] The court granted the motion. It dismissed Appellants' second amended complaint, finding it did not have subject matter jurisdiction. The court ruled:

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subsequent Secretarial Election unconstitutional; (4) initiation of disenrollment proceedings by staff and/or Council members in violation of the Constitution's due process guarantees; and (5) initiating disenrollment based on racial animus and/or the Appellants' national origin in violation of the Constitution's equal protection guarantees. Appellants requested declaratory relief, that the Tribal Court issue a writ of mandamus to conduct Tuesday meetings, and that the Tribal Court enjoin the disenrollment proceedings.

[4] During the pendency of the case, the following trial court orders were entered:

1. 03/28/13 – Order from Scheduling Hearing
2. 04/15/13 – Order Resetting Hearing Addressing Other Scheduling matters, and Limiting Number of Participants in Courtroom on Hearing Date
3. 04/23/13 – Decisions and Order Denying Defendants Motion to Strike In Part and Granting In Part
4. 05/07/13 – Order Setting Date for Responding to Motion for Leave to Amend
5. 05/20/13 – Order Denying Motion for Preliminary Injunction
6. 05/20/13 – Order Granting Leave to Amend Complaint
7. 05/20/13 – Scheduling Order for Briefing on Second Emergency Motion for Temporary Restraining Order
8. 05/29/13 – Order for Briefing on Defendants' Motion to Dismiss
9. 05/29/13 – Amended Order for Briefing on Defendants' Motion to Dismiss
10. 05/30/13 – Second Amended Order for Briefing On Defendants' Motion to Dismiss and Setting a Hearing Date
11. 06/03/13 – Decision and Order Denying Plaintiffs Emergency motion for Stay Pending Appeal
12. 06/07/13 – Order on Security for Hearings
13. 06/17/13 – Order Modifying Order on Security
14. 06/17/13 – Decision and Order Denying Plaintiffs Motion for Temporary Restraining Order as to issues Related to Resolution #13-38
15. 06/18/13 – Second Order Granting Leave to Amend Complaint
16. 06/19/13 – Order Denying Plaintiffs Second Motion for Temporary Restraining Order as to Issues Relating to Tribal Council Meetings
17. 06/24/13 – Order on Hearing Attendees for June 25, 2013

This Court has also entered a number of orders:

1. 05/20/13 - Order Denying Motion for Preliminary Injunction
2. 06/18/13 - Order Denying Permission for Interlocutory Appeal
3. 08/14/13 - Order Denying Motion to Disqualify Chief Judge Eric Nielsen
4. 08/14/13 - Order Accepting Appellate Review and Staying Proceedings
5. 08/20/13 - Order on Motion For Clarification or Relief From Stay of Proceedings
6. 08/27/13 - Order Extending Stay

> Plaintiffs have argued in court and in writing that the actions of the Council are without legal justification. They have used the language of conspiracy, more than once referring to the Defendants as a "cabal." Upon very close analysis of the facts and the relevant Nooksack law, the Court finds that the Defendants have acted within the authority granted them by the Nooksack Constitution and Title 63. Therefore, the sovereign immunity of the Tribe extends to them as tribal officials and this Court lacks jurisdiction over them and the actions that have given rise to this suit.

Order at 17-18.

III. DECISION

A. Standard of Review

Under NTC 80.09.010, this Court can "dismiss an appeal, affirm or modify the decision being reviewed, reverse the decision in whole or in part, order a new trial, or take any other action as the merits of the case and the interest of justice may require." However, the code is silent on the standard of review on appeal. In the absence of a code provision, we will look to persuasive and well-reasoned decisions from other jurisdictions for guidance.

The majority of appellate courts review trial court decisions under one of the three standards depending on the issues. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U. S. 552, 558, 108 S. Ct. 2541, 2546 (1988); *Dodge v. Hoopa Valley Gaming Commission*, 7 NICS App. 51, 54 (Hoopa Valley Tribal Ct. App. 2005); *Raymond Johns and Leslie McGhee v. Gracie Allen*, 6 NICS App. 196, 196-197 (Skokomish Tribal Ct. App. 2004) ("In the absence of any specified standard of review, we review issues of fact under the 'clearly erroneous' standard and issues of law de novo.").

A court's ruling on subject matter jurisdiction,[5] tribal sovereign immunity,[6] and its decision to dismiss a complaint[7] are all questions of law. We review those issues de novo.

B. Subject Matter Jurisdiction

Appellants contend the Tribal Court (court) erred in dismissing the suit on the grounds it lacked subject matter jurisdiction. Their suit was brought against the Appellee Tribal Council members and certain named Tribal employees, claiming that while acting in their official capacity they adopted and sought to enforce resolutions and laws Appellants allege violate the Nooksack Tribe's Constitution. The essence of their argument is that because they only request

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7. 09/11/13 - Case Management and Scheduling Order
8. 10/02/13 - Order Accepting Appeal of September 27, 2013 Order

[5] *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir.1996).
[6] *United States v. James*, 980 F.2d 1314, 1319 (9th Cir.1992).
[7] *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir.2011).

injunctive relief, the court had subject matter jurisdiction to grant the relief they requested under the *Ex parte Young* [8] exception to the principle of sovereign immunity.

Appellants further argue that in its determination that it lacked subject matter jurisdiction, the court erred by analyzing the merits of their claims. Appellants contend that when the *Ex parte Young* doctrine is pled, the court's only permissible inquiry is whether the complaint alleges an ongoing violation of law.[9]

Appellees assert the *Ex parte Young* doctrine has never been recognized in Nooksack jurisprudence, and is inapplicable in the context of tribal sovereignty. Appellees argue even if the *Ex parte Young* doctrine is applicable, the trial court correctly ruled the Appellees' actions were shielded by the Tribe's sovereign immunity. Appellees further contend the Appellants invited the court to rule on the merits by litigating the merits without objection.

The parties fail to adequately analyze the constitutional nature and extent of the Tribal Court's jurisdiction. The issues in this case require us to undertake that analysis.

1. Sovereign Immunity and the *Ex parte Young* Doctrine

The immunity of Indian tribes from suits in federal and state courts is well-established; such suits may not be entertained unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), the Court, described tribes "as possessing the common law immunity from suit traditionally enjoyed by sovereign powers."

A tribe's sovereign immunity extends to its officials and employees while acting within their scope of authority. *Cline v. Cimanan*, NOO-CIV-02/08-5, at 4 (citing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) and *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986)).[10] The Nooksack Tribe has codified that legal principle in NTC 10.00.100, which in general terms divests the court of jurisdiction in "any suit brought against the Nooksack Tribe, its officials, its entities or employees without the consent of the Tribe" whether acting in their official or individual capacity.

States, like tribes, are also protected from unconsented suits by their sovereign immunity. *See Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). With one narrow exception, state immunity from suit likewise extends to its agencies and officers. The United States Supreme Court recognized that exception in *Ex parte Young*.

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[8] 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[9] Appellants cite *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 122 S.Ct. 1753 (2002) and its progeny for this proposition.

[10] One rationale in support of conferring immunity on a tribal official is that the official must be able to exercise his or her duties free from intimidation, harassment and the threat of lawsuits for performing those acts of the tribal government that are within the scope of the official's duties. *Satiacum v. Sterud*, 10 ILR 6013, 6016 (Puy. Tr. Ct., Apr. 23, 1982). "The Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct business without constantly having to defend themselves against suit." *Cline*, *supra*, at 7.

In *Ex parte Young*, the Supreme Court held that private litigants could seek an injunction in federal court against a state official, prohibiting the official from enforcing a state law claimed to violate the United States Constitution. *Young*, 209 U.S. at 159–168. *Ex parte Young* rests on the fiction that such a suit is not really against the state, but rather against an individual who has been "stripped of his official or representative character" because of his or her unlawful conduct so any such action would be ultra vires, and state sovereignty therefore cannot be offended by a federal judicial command to the state officer to "conform his or her conduct to the Constitution in the future." *Id.* 159–160. *Ex Parte Young* only applies to prospective declaratory judgments. *See Alden v. Maine*, 527 U.S. 706, 747, 119 S.Ct. 2240 (1999) ("In particular, the exception to our sovereign immunity doctrine recognized in Ex Parte Young ... is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land."); *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, at 646.

Federal courts also recognized the necessity of a forum to challenge the federal government's enforcement of unconstitutional laws. The courts applied a variation of the *Ex parte Young* doctrine to allow suits in federal court to enjoin federal officials and employees from enforcing an unconstitutional law until Congress stepped in to provide an alternative forum. Prospective relief against federal officials was available under an *Ex parte Young* type fiction until passage of the federal Administrative Procedures Act. *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1078, 1085 (9th Cir. 2010) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949)).

2. The Nooksack Constitution

The Nooksack Tribal Council is the Tribe's governing body and acts through its officers elected by the Tribe's voting members. CONST. art. II. Council members are chosen from qualified Tribal members. CONST. art. IV, § 2. But, unlike state or federal governments, the Nooksack Tribe does not have a separate legislative and executive branch. The elected Tribal Council is both the Tribe's legislative and executive body. CONST. art. VI, §§ 1-3. The Tribe's voting members delegate to the Council its legislative and executive powers and authority. CONST. art. VI, § 4.

The Constitution requires the Tribal Council perform certain legislative acts (denominated as "duties"), and it identifies those. For example, it states the Council "shall" adopt laws governing involuntary loss of membership, "shall" provide through ordinance the establishment of a tribal court, "shall" pass ordinances safeguarding minors and incompetents, and "shall" establish by ordinance a police force. CONST. art. II, § 4, art. VI, §§ 2.A and 2.B.[11] It also grants to the Tribal Council the authority to perform discretionary legislative and executive acts. CONST. art. VI.

[11] *See, Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S.Ct. 428 (1947) (shall is the language of a command).

The Council's legislative and executive power and authority is not unfettered but subject to the limitations imposed by the Constitution. The Nooksack Constitution grants the Council the authority to "promulgate ordinances for the purpose of safeguarding the peace and safety of the members of the Nooksack Indian Tribe" and to "adopt resolutions regulating the procedures of the tribal council itself and of other tribal agencies and officials." CONST. art. VI, §§ 1.H and 1.J. Each of these powers, however, is exercised "subject to any limitations imposed by the Nooksack Constitution and any federal laws that may be applicable." CONST. art. VI, § 1 (emphasis added). Germane to the issues in this case, the Constitution specifically grants the Council "the power to enact ordinances ... governing future membership in the tribe, including adoptions and loss of membership." CONST. art. II, § 2. Just as the Council's general powers to promulgate ordinances and adopt resolutions are subject to any limitations imposed by the Constitution, the Council's power to enact ordinances governing membership must be exercised "in conformity with this constitution." CONST. art. VI, § 1. Simply put, the actions of the Tribal Council must conform to the Constitution.

The Nooksack Constitution also includes a Bill of Rights, which provides:

> All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of the Nooksack Indian Tribe in the exercise of its powers of self-government shall apply to members of the Nooksack Indian Tribe.

CONST. art. IX.

If the Tribal Council fails to perform a constitutionally required act, Tribal members must have a forum to compel their elected officials do what the Nooksack Constitution requires or these constitutional provisions cease to be requirements and become mere aspirations. If the Tribe's officials, employees or agents enforce or threaten to enforce a law or policy that violates the Tribe's Constitution, Tribal members must have a forum to prohibit that enforcement or the Constitution's limitations on government's power and authority become meaningless. The Nooksack Constitution recognizes that forum is the Tribal Court.

The Constitution's language prescribing the Tribal Court's jurisdiction is where our analysis begins. One constitutionally required Tribal Council duty is "to provide, through ordinance, the establishment of a tribal court." CONST. art. VI, § 2.A.1. The Council has done so through Title 10. But it is the Constitution that prescribes the Tribal Court's jurisdiction. Article VI, § 2.A.3 of the Nooksack Constitution reads:

> This Court (Tribal Court) shall have jurisdiction over all Indians on tribal lands; over all civil matters concerning members of the Nooksack Indian Tribe; over all matters concerning the establishment and functions of the tribal government, provided that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government; and over all cases and controversies between Indians and non-Indians where such cases are brought before by stipulation of the non-Indian, provided the court shall have jurisdiction over civil matters arising on

> tribal lands without the necessity of stipulation of any parties; and provided jurisdiction over Indian employees of the federal government for matters concerning the duties and actions of such employees in the furtherance of their employment shall be subject to the rules and regulations prescribed by the federal government. (Emphasis added).[12]

In *Campion v. Swanasel*, 4 NICS App. 159, 161 (1996), this Court held the clauses "over all civil matters concerning members of the Nooksack Indian Tribe" and "over all matters concerning the establishment and functions of the tribal government" were two distinct grants of Tribal Court jurisdiction. In *Campion*, eight tribal members filed a complaint against eight other tribal members and the Nooksack Tribal Council alleging the 1996 amendments to the Nooksack Election Ordinance were unconstitutional and denied them their voting rights. The *Campion* Court held because the "action presents issues unique to the members of the Nooksack Indian Tribe regarding the manner in which the 1996 tribal election was conducted," under the "over all civil matters concerning members of the Nooksack Indian Tribe" clause, the Tribal Court had subject matter jurisdiction over the suit. *Id.* The *Campion* court rejected the argument the clause limited the Tribal Court's jurisdiction to cases between tribal members. It reasoned:

> The Nooksack people have granted jurisdiction to the tribal court in civil matters concerning tribal members. The role of this Court is to abide by the clear and unambiguous language of the constitutional and statutory provisions before us. We will not violate this fundamental principle of statutory construction.

Id.

Our role, "to abide by the clear and unambiguous language" of constitutional and statutory provisions, requires we determine the Constitution's meaning. To determine the meaning of its language we will employ traditional rules of grammar. *See Lake County v. Rollins*, 130 U.S. 662, 670, 9 S.Ct. 651, 652 (1889) ("To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involved no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.").

The Constitution's language defining the Tribal Court's jurisdiction is punctuated in a methodical way, to contain four clauses, each separated by a semicolon. A semicolon is used to show a "stronger separation between the parts of a sentence than does a comma." Madeline Semmelmeyer & Donald O. Bolander, *The New Webster's Grammar Guide* 235 (Berkeley ed. 1991). It is used to "separate phrases, clauses, or enumerations, of almost equal importance, especially when such phrases or clauses contain commas within themselves." Lois Irene Hutchinson, *Standard Handbook for Secretaries*, 239 (8th ed.1979).

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[12] *See*, footnote 6.

The structure of the four clauses is parallel. The first two are relevant to this case. The first clause states "over all civil matters concerning members of the Nooksack Indian Tribe." The second states "over all matters concerning the establishment and functions of the tribal government" with the proviso "that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government." The proviso follows a comma. A semicolon separates these two clauses, and the second clause contains a comma within itself, indicating the two clauses are of equal importance and confer two separate and distinct grants of jurisdiction.

The last antecedent rule, another grammatical rule commonly applied in discerning the meaning of a statute, provides that a limiting phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376 (2003). The rule disfavors an interpretation that would have words "leaping across stretches of text, defying the laws of both gravity and grammar." *Flowers v. Carville*, 310 F.3d 1118, 1124 (9th Cir. 2002).

The comma in the second clause followed by the phrase "that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government" modifies the phrase it immediately follows: "over all matters concerning the establishment and functions of the tribal government." It means that the Tribe does not waive its sovereign immunity where the matter at issue concerns "the establishment and functions of the tribal government." That modifying phrase does not leap across and modify the independent clause "over all civil matters concerning members of the Nooksack Indian Tribe."

Moreover, the enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). Where the legislative body uses certain language in one part of a statute and different language in another, it is generally presumed that the legislature acts intentionally. *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983); *see also Boudette v. Barnette*, 923 F.2d 754, 756–57 (9th Cir.1991) (The doctrine of "*expressio unius est exclusio alterius*" "creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions"). The inclusion of the limiting phrase "that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government" in the clause "over all matters concerning the establishment and functions of the tribal government," but its omission in the clause "over all civil matters concerning members of the Nooksack Indian Tribe," leads to the presumption where the matter concerns members of the Tribe the Tribal Court has subject matter jurisdiction notwithstanding the Tribe's sovereign immunity.

Traditional rules of grammar and statutory construction support the *Campion* court's holding that Article VI, § 2.A.3 of the Nooksack Constitution confers subject matter jurisdiction with the Tribal Court "over all civil matters concerning members of the Nooksack Indian Tribe" and "over all matters concerning the establishment and functions of the tribal government" when there is a waiver of immunity. The threshold question is whether a complaint alleges civil matters "concerning members of the Nooksack Indian Tribe" or "matters concerning the establishment and functions of the tribal government." If the allegations are the former, the Tribal Court has subject matter jurisdiction regardless of whether the Tribe's officials and

employees are clothed with the Tribe's sovereign immunity. If, however, the allegations concern the "establishment and functions of the tribal government," the court has no subject matter jurisdiction unless the Tribe expressly waives sovereign immunity. *Olson v. Nooksack Indian Housing Authority*, 6 NICS App. 49, 51-52 (Nooksack Tribal Ct. App. 2001).

3. Tribal Court Jurisdiction under the Constitution and Title 10

The functions of the Tribe's government are not much different than those of any government. Generally, governmental functions are functions intimately related to the public interest and generally performed by government employees.[13] These functions require either the exercise of discretion in applying government authority or the use of value judgments in making decisions for the government. Elected Council members, and the Tribe's agents, must be free from intimidation, harassment and the threat of lawsuits in executing the functions of tribal government. The Tribe's officers necessarily enjoy the discretion to determine the manner and method in which it administers the Tribe's governmental functions. The Constitution's proscription on the Tribal Court's subject matter jurisdiction where there is no waiver of immunity when the issue concerns "the establishment and functions of the tribal government" supports the rationale that "The Nooksack Tribal Council and its officers need to be able to enact ordinances and conduct business without constantly having to defend themselves against suit." *Cline v. Cunanan*, NOO-CIV-02/08 – 5 at 7 (2009).

A duty, however, is an obligation. While the manner or means of performing a duty allows for discretion and value judgments, its performance is nonetheless required. The Nooksack Constitution requires the Tribal Council to perform certain legislative duties. CONST. art. II, § 4, art. VI, § 2.A and 2.B. The failure of the Tribe's officers to perform a constitutionally required act is a "civil matter[] concerning members of the Nooksack Indian Tribe" and subject to the Tribal Court's jurisdiction to compel the officers to perform the constitutionally required act.

An ordinance adopted by the Tribal Council under its delegated authority cannot trump the Constitution adopted by the Tribe's membership. The Tribal Council does not have the power or authority to enact an ordinance that conflicts with the jurisdiction granted the Tribal Court by the Constitution. Our duty is to harmonize Title 10, the ordinance establishing the Tribal Court and its jurisdiction, and the Constitution if possible. *See Zadvydas v. Davis*, 533 U.S. 678, 689, 121 S.Ct. 2491 (2001) (statutes are to be construed so as to avoid constitutional questions if possible.). Both the trial court and this Court are required to interpret and supplement Title 10 with the "traditions, customs and common understanding of the people of the Nooksack Tribe." NTC 10.00.070. And Title 10 is to be liberally interpreted and applied to protect individual rights "guaranteed by" the Nooksack Constitution and the Indian Civil Rights Act. NTC 10.00.80.

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[13] By way of example, the Tribe's governmental functions include providing police protection (CONST. art. VI, § 2.B), regulating activities within its territory (CONST. art. VI, § 2.C), imposing, collecting and expending revenue (CONST. art. VI, § 1.G and 1.K), establishing a court system (CONST. art. VI, § 2.A), and adopting and enforcing laws for the health, safety and welfare of its members (CONST. art. VI, § 1.H).

Title 10 recognizes the Tribal Court's jurisdiction to compel the Tribe's officers to do what the constitution requires. NTC 10.00.100 divests the court of subject matter jurisdiction in "any suit brought against the Nooksack Tribe, its officials, its entities or employees without the consent of the Tribe," except the court has the authority to enter declaratory or injunctive relief when "any officer, employee or agent of the Nooksack Indian Tribe" is sued "to compel him/her to perform his/her non-discretionary duties under the laws of the Nooksack Indian Tribe and the United States." (Emphasis added). NTC 10.00.100(b).

This provision shields the Tribe's government from attacks that could threaten the Tribe's limited resources and its ability to govern itself, but is consistent with constitutional requirements and the constitutional mandate that the Tribal Court shall have jurisdiction over "all civil matters concerning members of the Nooksack Indian Tribe." We interpret Title 10 as a codification of the Tribal Court's constitutional grant of jurisdiction to authorize the issuance of a writ of mandamus to compel Tribal Council officers to perform constitutionally required non-discretionary duties.

The enforcement of laws is generally an executive function. The Bill of Rights, the provision that the Tribal Council's general powers to promulgate ordinances and adopt resolutions are subject to the constraints of the Constitution, and the provision that the Council's powers to enact ordinances governing membership be exercised in conformity with the Constitution would all be without meaning or effect if a Nooksack Tribal member could not challenge the constitutionality of a law or policy enforced or threatened to be enforced by Tribal officials or employees. There can be no doubt that the Nooksack Constitution grants Nooksack Tribal members a constitutional right to challenge the constitutionality of Tribal laws and policies.

It defies logic that the "common understanding of the people of the Nooksack Tribe" who adopted a Constitution containing a Bill of Rights and requiring Tribal Council action to comply with its terms would not also provide a Tribal forum for determining the constitutionality of the laws or policies adopted by the Council or for guaranteeing respect for their Bill of Rights. By making it not only a duty, but the first duty, of the Tribal Council to establish a tribal court, and by granting the court jurisdiction over "all civil matters concerning members of the Nooksack Indian Tribe," there can likewise be no doubt the Nooksack membership intended the Tribal Court be that forum. It matters not whether it is considered a waiver of sovereign immunity or a constitutional mandate, the applicability of the Nooksack Bill of Rights to "actions of the Nooksack Indian Tribe in the exercise of its powers of self-government," and the constitutional provisions requiring Tribal Council action to be consistent with the Constitution, firmly establish that the Tribal Court has the jurisdiction and the duty to consider a Tribal member's challenge to the constitutionality of a law or policy enforced by the Tribe's officials or employees.

Under NTC 10.00.050, the Tribal Court has "exclusive jurisdiction" over all matters where the Tribe's officers[14] are parties in their official capacity. That provision specifically prohibits the court from "exercising jurisdiction over the Nooksack Indian Tribe without an

[14] "Officer" means a person "holding public office" and "authorized" by the government "to exercise some specific function." *Black's Law Dictionary*, 7th Edition (1999) at 1113. A Tribal Council member is a Tribal "officer."

express waiver of sovereign immunity" and provides it shall not be construed as a waiver of sovereign immunity of the Tribe or its officers. Where the Tribe consents to a suit, NTC 10.00.90(b) prohibits the Tribal Court from entering a temporary or preliminary restraining order "against the Nooksack Indian Tribe or its officer, employee, or agent acting within the scope of his/her authority." NTC 10.00.90(b) (emphasis added). NTC 10.00.90(b) "shall not apply to the Nooksack Tribal Council." NTC 10.00.90(b)(2).[15]

It is possible to interpret Title 10 consistent with the Constitution's prescription regarding the Tribal Court's jurisdiction. Title 10 recognizes the Tribal Court's "exclusive jurisdiction" over all matters where the Tribe's officers are parties in their official capacity. Although that exclusive jurisdiction is not to be construed as a waiver of the sovereign immunity of the Tribe or its officers, sovereign immunity is not at issue if the Tribe's officer, employee or agent, acting in his or her official capacity, enforces or threatens to enforce an unconstitutional law or policy, because he or she does not have the "authority" to enforce laws that do not comply with the Constitution. Where a Tribal member sues a Tribal officer, employee or agent in their official capacity alleging the law or policy is unconstitutional, the Tribal Court has jurisdiction to afford declaratory or injunctive relief. Our interpretation of Title 10 comports with the Constitution granting the Tribal Court jurisdiction over "civil matters concerning members of the Nooksack Indian Tribe" and is consistent with the Constitution's unmistakable requirement there be a forum for Tribal members to challenge the constitutionality of Tribal laws and policies.[16]

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[15] We note Title 10 does not purport to prohibit the court from entering a permanent injunction or writ of mandamus.

[16] During oral argument before this Court, counsel for Appellees twice acknowledged that Nooksack Tribal members have the right to challenge the constitutionality of acts and omissions of the Tribal Council, and that the Tribal Court is the proper forum for such challenges. The following exchange occurred near the beginning of Appellee's argument (at 11:02:45):

> Judge Pouley: OK, so let's say *Ex parte Young* doesn't apply. Is there any law that applies at Nooksack that would allow the citizens to prevent the, a Council from going rogue, and if the Constitution defines the scope of their authority and they start doing things that are beyond what the Constitution allows them to do, what remedy does the citizenry have to stop that from happening? Because whether it's, let's for at least a minute not talk about whether it's an enrollment issue or some other, just in general, the Constitution says this is what the Council can do, we have a case where the Council is doing something obviously outside the scope of that, what, how does the citizenry stop that, or can they?
>
> Counsel: A suit against an individual Tribal official who is acting outside the scope of his authority as defined by Nooksack law can go forward unless it's a claim for money damages. A prospective case can go forward. Now that's not because *Ex parte Young* so provides, it's because this Court has decided that in the *Cline* case.

Then, at the conclusion of Appellees' oral argument (at 11:39:55), the Chief Judge again put the question directly to counsel for Appellees, albeit in somewhat different terms:

> Judge Nielsen: I have one last question. Give me a rule – if I were to draft a rule whereby a Tribal member or a citizen of the Tribe could challenge the constitutionality of an act of the Tribal Council, what would that rule say? Give me the rule.

We hold: Where a suit is brought by a Tribal member against an officer, employee or agent of the Tribe acting in his or her official capacity and alleges the law or policy the officer, employee or agent is enforcing or threatening to enforce is unconstitutional, the Tribal Court has subject matter jurisdiction under both Article VI, § 2.A.3 of the Nooksack Constitution[17] and Title 10 of the Nooksack Tribal Code to order declaratory or injunctive relief.

Given our holding, we decline to accept Appellants' invitation to apply the *Ex parte Young* exception to Nooksack jurisprudence. The doctrine is ill-suited to the structure of the Tribe's government, which combines both legislative and executive power in the Tribal Council, and its Constitution. As discussed in note 10, *supra*, and elsewhere in this opinion, adopting *Ex parte Young* as proposed by Appellants could significantly compromise the Tribal Council's ability to efficiently exercise its duties and powers on behalf of the Tribe and the Tribe's members. Furthermore, the rationale underlying the doctrine, state compliance with the federal constitution, is inapplicable. We find it is unnecessary to employ an *Ex parte Young* type fiction where the Tribe's Constitution itself clearly provides a Tribal member with a right to challenge the enforcement or threatened enforcement of an unconstitutional law or policy, and with a forum where the member can bring that challenge.

We also hold that where a Tribal member files such a suit, the Tribal Court must make a threshold finding on the constitutionality of the law or policy the member seeks to have the Tribal officers or employees enjoined from enforcing. That finding dictates whether the Tribal Court has jurisdiction to enter an order enjoining or restraining its enforcement, assuming the plaintiff can show such an order is warranted as a matter of equity or law.

The Tribal Court had jurisdiction over Appellants' causes of action that are based on the allegation Appellees were enforcing or threatening to enforce laws and policies that violate the Nooksack Constitution. The court properly addressed the constitutionality of those laws and policies in determining whether it had jurisdiction. The parties were given the opportunity to make a record and present arguments on the issue, which they did. The parties have also thoroughly and extensively briefed those issues in the Tribal Court and in this appeal.

C. Plaintiffs/Appellants

Before we discuss the substantive issues in this appeal, we first address who the Plaintiffs/Appellants are in this case. This issue has been consolidated with the other issues in this appeal.

Counsel: That would say if the Tribal Council acts outside the authority conferred by the Constitution, that they as individuals are not protected by sovereign immunity, and therefore they would be liable to an injunction action.

[17] We do not decide the full parameters of the Tribal Court's jurisdiction under CONST. art. 2, § 2.A.3. That will need to be decided on a case-by-case basis. In *Campion v. Swanasel*, this Court held the Tribal Court had jurisdiction under Article 2, § 2.A.3 where suit was brought against the Nooksack Tribal Council alleging the 1996 amendments to the Election Ordinance were unconstitutional and denied the plaintiffs their voting rights.

On August 14, 2013, this Court entered an Order Staying Proceedings stating "disenrollment proceedings authorized by the order and judgment shall be stayed pending this Court's final decision." Appellees' Motion for Clarification argued our order was unclear, overly broad, and in error because (1) "the sole Appellants before the trial court and this Court are five Nooksack tribal members subject to disenrollment proceedings;" (2) the Tribal Council, not the Tribal Court, "authorized" the disenrollment proceedings, and thus an automatic stay under NTC 80.06.010 "is limited to reviving the lawsuit and does not stay the disenrollment proceedings;" and (3) a stay that enjoins the disenrollment proceedings would in effect constitute an injunction, the Court of Appeals lacks the authority to issue injunctions, and even if the Court had authority to issue injunctions, doing so here "is unwarranted under the standard for granting injunctive relief articulated by the federal courts." Appellees' Motion for Clarification included a lengthy footnote arguing that this is not a class action. Appellants having "neither sought class certification, nor alleged sufficient facts to proceed as a class." and that the five named Appellants[18] "are seeking relief for themselves alone."

Based on the representations in Appellees' Motion for Clarification, this Court issued an August 20, 2013 Order On Motion for Clarification clarifying that its August 14 Order Staying Proceedings applied only to the named Plaintiffs/Appellants, and setting the time for Appellants' response to Appellees' Motion for Clarification.

Appellants' Interim Response asked this Court issue an order deferring any ruling on Appellees' Motion for Clarification. Appellants' Interim Response brought for the first time to this Court's attention a stipulation filed by the parties with the trial court on March 20, 2013, assertedly based on comments made by counsel in open court on May 18, 2013 and approved and incorporated by reference in an Order of the court filed on March 28, 2013. The stipulation provided, among other things, that (1) counsel for Appellants "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 . . ."; and (2) "[n]o person will be disenrolled prior to completion of the meetings before the Tribal Council, regardless of whether that individual has requested a meeting with the Tribal Council."

On April 15, 2013, the Nooksack Office of Tribal Attorney received an April 12 letter from Counsel for Appellants conveying the list anticipated by the stipulation. While asserting that the letter and list did not limit the representation to "anything less than all 306 or whatever

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[18] Appellees assert there are five named Plaintiff/Appellants, whereas Appellants and the trial court judge consistently refer to six named Plaintiff/Appellants. The original complaint named as Plaintiffs four adult members of the Nooksack Tribe (Sonia Lomeli, Terry St. Germain, Norma Aldredge, and RaeAnna Rabang). The First Amended Complaint and the Second Amended Complaint name as Plaintiffs these four adult Tribal members, plus "Robley Carr, individually on behalf of his minor son, Lee Carr." Presumably, the discrepancy regarding five or six Plaintiffs is the result of an apparent drafting error in which counsel for Plaintiffs appear to have omitted the word "and" in the clause "individually on behalf of his minor son" following the name of Robley Carr. If Mr. Carr is named only in a representative capacity, then there would only be five named Plaintiff/Appellants. If however, Mr. Carr is named individually and on behalf of his minor son, there would be six named Plaintiff/Appellants. (Plaintiffs also sought leave to file a Third Amended Complaint that would have added Francine Adams as an additional named adult Tribal member Plaintiff, but the Third Amended Complaint was ultimately withdrawn by Plaintiffs prior to any ruling on the relevant motion to amend.)

other number of those enrolled Nooksack Tribal members who are the subject of the Disenrollment Proceedings," the April 12 letter states, among other things

> We hereby furnish a list of those individuals we are authorized to represent in *Lomeli v. Kelly* and in the Disenrollment Proceedings. In *Lomeli*, we represent the six enrolled Nooksack member plaintiffs . . . as well as those similarly situated. See First Amended Complaint . . . . To be equally clear to the Tribal Council as we have been to the Tribal Court, *Lomeli* is a distinct matter from the Disenrollment Proceedings.
>
> In the Disenrollment Proceedings, we represent the 271 enrolled Nooksack members disclosed on the attached Representation List.

A letter on the letterhead of the Nooksack Office of Tribal Attorney (OTA) dated April 19, 2013, addressed to counsel for Appellants, in regards to the April 12 letter and representation list submitted to the OTA by counsel for Appellants, begins by stating:

> The Tribal Council is in receipt of your representation list of 271 names attached to your seven page letter. Per the March 20, 2013 Stipulation, the list represents those persons for whom you are authorized to act in the litigation before the Nooksack Tribal Court as well as the disenrollment proceedings.

We subsequently found both the March 20 stipulation and the April 12th letter ambiguous. We ordered the trial court to issue findings of fact and conclusions of law as to the effect of the May 20 stipulation, and who were the plaintiffs in this suit. We consolidated that issue with the others in this appeal.

The trial court found the complaint only names six plaintiffs. On each occasion where the trial court requested clarification on the identity of the plaintiffs in this case, counsel for the plaintiffs stated they represented the named plaintiffs only. Plaintiffs never sought class certification, nor did they amend their complaint to add plaintiffs other than Robley and Lee Carr,[19] and the stipulation made a distinction between those persons counsel claimed to represent in the disenrollment proceedings and in this case. Order at 2-5.

Appellants contend the plaintiffs in this case are all those who the Tribe seeks to disenroll, and not just those plaintiffs named in the complaint. We review the trial court's findings of fact under the clear error standard. We find the record supports the court's findings, and its conclusion that the only plaintiffs in this case are those six specifically named is supported by the court's findings. Appellants assert their own interpretation of the stipulation

[19] The fact that the first and second amended complaints added Robley and Lee Carr to the list of named plaintiffs, and that a proffered third amended complaint would have added Francine Adams as a named plaintiff, supports the trial court's ruling that persons not named as plaintiffs in the caption are not party to this suit. There would have been no need to add names to the caption if the parties did indeed include all 306 potential disenrollees, or the 271 names counsel for Plaintiff/Appellants ultimately submitted to Appellees following with the stipulation.

and the statements made by counsel belie the court's findings. They do not make any persuasive argument that convinces us the court's findings are clear error.[20]

D. Resolution 13-02

In their complaint Appellants made a number of allegations related to actions or inactions taken by the Appellee Tribal Council members in their official capacity. One of those allegations is that Resolution 13-02 is unconstitutional. In reaching its decision, the trial court found the Resolution did not violate the Constitution or the Tribe's laws. Related to this issue, Appellants argue that Title 63 is likewise unconstitutional. The court found it was not. The court had jurisdiction over the claims related to the constitutionality of Resolution 13-02 and Title 63. We review the court's decision regarding the constitutionality de novo.

The Constitution provides the Tribal Council "shall have the power" to enact ordinances governing future membership and the "loss of membership." CONST. art. VI, § 2. This constitutional provision can be amended by the membership, but under its plain meaning the Council has the exclusive authority to prescribe rules and regulations governing involuntary loss of membership. CONST. art. II, § 4 ("The tribal council *shall*, by ordinance, prescribe the rules and regulations governing the involuntary loss of membership."). Any ordinance adopted governing the loss of membership, however, must conform to the Constitution. CONST. art. II, § 2.

The Council exercised its duty in adopting Title 63. NTC 63.04.001(B) provides in pertinent part:

> The burden of proof in disenrollment actions rest [sic] with the Tribe. However, at no time will staff employed in the Enrollment Department purposely initiate a reason for loss of membership. Any tribal member requesting loss of membership of another tribal member will need to present written documentation on how the information was obtained that warrants disenrollment. The Tribal Council will have the final say on loss of membership.

Appellants argue this provision limits the authority for initiating disenrollment to individual tribal members. They argue the Tribal Council does not have the constitutional or statutory authority to initiate disenrollment proceedings (although they concede the Council has a "judicial role"). Thus, Appellants argue, Resolution 13-02, which initiates disenrollment proceedings against the Appellants, is unconstitutional and violates Title 63. We disagree.

Although NTC 63.04.001 provides a procedure for a tribal member to request the disenrollment of another tribal member, it cannot be read, as Appellants contend, to prohibit the Tribal Council itself from initiating disenrollment proceedings.[21] As the court pointed out, it

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[20] Appellants admit that this issue is "largely moot" because the other members subject to disenrollment filed their own suit in *Roberts v. Kelly*, 2013 CI-CI-003. Reply Brief of Appellants at 34, n35.

[21] Appellants also assert the disenrollment proceedings were initiated by enrollment officer Roy Bailey, in violation of the "at no time will staff employed in the Enrollment Department purposely initiate a reason for loss of membership" language in NTC 63.04.001. The court found when Officer Bailey processed applications from Terry

would be absurd to read that language as somehow prohibiting the Tribal Council from initiating disenrollment proceedings where it obtains evidence a member is erroneously enrolled – particularly given the Tribal Council's broad constitutional authority to determine membership and loss of membership.[22] *See* NTC 10.01.020 ("The Tribal Court shall interpret tribal ordinances resolutions, regulations, and policies in order that the substantive intent of the Tribal Council is ensured. The court shall not indulge in highly technical or legalistic interpretations of tribal ordinances, regulations, and policies when such interpretation would defeat the overall legislative goals of the Tribal Council.").

The trial court also found "[t]he substantive intent of 63.04.001(B) is to allow the Tribal Council to make determinations about enrollment and disenrollment and to prevent arbitrary disenrollment proceedings initiated by Enrollment Department staff and individual tribal members who are not elected to carry out the functions of tribal officers." Order at 12. We agree. We do not interpret the language in NTC 63.04.001 as the Tribal Council's intent to limit its own broad authority.

It is also absurd to read this language as giving the Council the authority to determine whether a member should be disenrolled but limiting its authority to initiate disenrollment proceedings. Under Appellants' reasoning, even if the Tribal Council has information that a member was improperly enrolled, the Council must turn a blind eye. The law and the Constitution have no such mandate. *See Suquamish Tribe v. Lah-Huh-Bate-Soot*, 4 NICS App. 32, 56 (Suquamish Tribal Ct. App. 1995) (strained or absurd consequences from a reading of a statute are avoided) (citations omitted). Resolution 13-02 does not violate Title 63 or the Constitution.

Appellants also appear to argue the Resolution violates their right to due process under the Indian Civil Rights Act (25 U.S.C. § 1308), incorporated in the Constitution. V. art. IX.[23] The Appellants' due process argument rests on Appellants' assertion the Tribal Council has not provided them with evidence "as to how or why" they are not entitled to membership. In the related case, *Roberts v. Kelly*, 2013 CI-CI-003, the Tribal Court found all those who have been sent notices of disenrollment received detailed ancestral histories dating back generations. Oder Granting Defendant's Motion to Dismiss, at 9 (*Roberts v. Kelly*, CI-CI-003, October 17, 2013).

St. Germain for the St. Germain children, Bailey found the children lacked the necessary documentation for enrollment. Chairman Kelly and Mr. Bailey were then tasked with researching this issue, and they thereupon discovered there was no documentation to support the enrollment of the Appellants, as well as the others who have received Notices of Intent to Disenroll. Order at 12. The court concluded Officer Bailey did not initiate a disenrollment process, but only carried out the research as he was instructed to do by the Tribal Council. The record supports the court's findings and those findings support its conclusion. There is no basis in the record to support the assertion Mr. Bailey "purposely initiated a reason for loss of membership."

[22] "Such a reading would require the Court to ignore both the clear mandate of the Constitution reserving the authority to determine loss of membership to the Council, as well as the intention of the Membership Ordinance, which states that it is adopted in conformity with the Constitution's requirement that the Council 'prescribe rules and regulations governing involuntary loss of membership.'" Order at 11, citing NTC 63.00.002.

[23] "The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of the Nooksack Indian Tribe in the exercise of its powers of self-government shall apply to members of the Nooksack Indian Tribe." CONST. art. IX.

Appellants dispute that finding. This is a factual matter the trial court did not address in this case, nor will we, because it was not pled in Appellants' second amended complaint.

We note, however, the burden of proving a member did not meet the requirements of enrollment at the time of enrollment rests with the Tribe, which contemplates the Tribe is required to present some quantum of evidence to show the person is not entitled to enrollment. NTC 63.04.001. The disenrollment proceedings have not occurred to date and we will not infer the Tribal Council intends to ignore the law and disenroll Appellants without meeting its burden.

E. Title 63

Appellants contend that NTC 63.04.001(B)(1)(A) violates the Constitution. We, like the court below, hold it does not.

Article II, § 2 of the Nooksack Constitution limits the reasons for disenrollment to a "failure to meet" the constitutional requirements for enrollment. NTC 63.04.001(B)(1)(A) provides a member shall be disenrolled upon discovery the member was erroneously enrolled because the member did not "submit adequate documentation." The error may have been the result of "fraudulent submission, mistakes in blood degree computations, or inadequate research." *Id.* A person is only constitutionally entitled to enrollment if the person can show he or she meets the criteria listed in CONST. art. II, § 1.[24] NTC 63.02.001(D) requires a person applying for enrollment produce documentation that he or she meets one of the listed criteria for enrollment. Any person can assert they are entitled to enrollment, but without adequate documentary evidence that shows he or she meets one of the criteria the person's mere assertion alone is insufficient. NTC 63.04.001(B)(1)(A) does not add another unconstitutional reason for disenrollment. It provides a means for the Tribal Council to enforce the constitutional requirements for enrollment, asks no more than what a person is required to submit when applying for enrollment (adequate documentation), and ensures the Tribal Council fulfills its authority to determine "loss of membership."

F. Resolution 13-38/Constitutional Amendment

Appellants argue that Resolution 13-38 is likewise unconstitutional.[25] We review this claim de novo as well.

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[24] Those criteria are as follows: (1) descendancy from Nooksack Public Domain allottees and their lineal descendants living on January 2, 1942; (2) Indian blood whose names appear on the Nooksack census roll dated January 1, 1942; (3) lineal descendants of a person who was enrolled after January 1, 1942 if they possess ¼ Indian blood; (4) those who received payments under the Distribution of Judgment Fund dated October 6, 1966 and their lineal descendants provided they have ¼ Indian blood; (5) two types of adoption, both requiring at least ¼ Indian blood. CONST. art. II, § 1 (A through G).

[25] Appellants pled the Secretarial Election is unconstitutional because the Council adopted Resolution 13-53, which installed an Election Board, after two Council members were excluded from the meeting when the Resolution was adopted in violation of the Bylaws and customary law. Appellants do not make this argument on appeal, and we fail to see how the Resolution installing an Election Board, even if two Council members were improperly excluded from the meeting where the Resolution was adopted, somehow renders the Constitutional amendment adopted by a majority of the members unconstitutional.

Resolution 13-38 requested the Secretary of the Interior hold an election to amend the Constitution to delete Article II. §1.H. That subsection provided a person was entitled to enrollment if he or she possessed ¼ degree of Indian blood with Nooksack ancestry to any degree. The Secretarial election was held, the amendment was approved by the membership, and the election was certified by the BIA.

Appellants claim the Resolution specifically targeted them in violation of the Indian Civil Rights Act (ICRA) and the Nooksack Constitution's guarantee members will be "accorded equal rights pursuant to tribal law." CONST. art. IX. Appellants' contention is meritless and borders on frivolous.

First, this issue is a challenge to the Council's request for an election to amend the Constitution. *See* CONST. art. X (Constitution may be amended by a majority vote of the membership in an election called for that purpose by the Secretary of the Interior). There is no constitutional requirement the Tribal Council give a reason for its request. The Council's request was a legislative governmental function. There is no legal basis to support an assertion Appellee Council members exceeded their authority in requesting the election.

Second, Appellants have no cognizable cause of action. The trial court correctly ruled the Secretarial Election was conducted by the federal government and is a purely political event. Order at 17. In addition, as the trial court found, "this was a federal election." *Id.* It found the Tribal Court the wrong venue in which to challenge the election and Appellants' remedy was to challenge it in federal court. *Id.* Indeed, Appellants requested the federal district court enjoin the Secretary from conducting the election. That request was denied. *Germain v. Department of Interior*, C-13-945 (W.D. Wash., June 19, 2013).

Third, Appellants allege their right to equal protection guarantees under the Constitution and ICRA were violated because they were impermissibly "targeted" based on their race or national origin, and the purpose of the amendment was to ensure that if they are disenrolled they will remain disenrolled. "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," *Santa Clara Pueblo*, 436 U.S. at 72, n.32, and one of the few remaining parts of tribal sovereignty that lie in the sole discretion of the tribal government. *Patterson v. Council of the Seneca Nation,* 157 N.E. 734 (1927); *Morton v. Mancari,* 417 U.S. 535 (1974); *Aguayo et. al. v. BIA*, 55 IBIA 192, 2013 WL 8436503 (2013). The Constitution and ICRA do not prohibit the Tribe from exercising its discretion to determine its membership or from adopting specific criteria for membership, even if the criteria are based on ancestry, blood quantum, race, or ties to the community. As the federal District Court found "neither ICRA or any other law prohibits a tribe from using race or ancestry in defining its membership." *Germain v. Department of Interior*, *supra*, at 10. A "bare constitutional amendment redefining membership is not unlawful." *Id.* at 11.

Even if we were to find the Tribal Council officers requested the Secretarial election because they knew former Article II, § 1.H was the only criteria Appellants could meet for enrollment if they are disenrolled and applied to be re-enrolled, there is simply no basis to infer that was the reason the majority of the Tribe's members adopted the amendment, nor is the

Tribal Court in a position to attempt to discern the motives or intent behind each member's vote. The adoption of a constitutional amendment is a purely political decision. It is not our job to protect the Tribe's members from the consequences of their political decisions. Even if the Tribal Court was the proper forum to challenge the election, that election has occurred and has been certified by the BIA. The Tribal Court does not have the authority to nullify a constitutional amendment adopted by the membership.

Fourth, Appellants contend they meet the criteria for enrollment under former Article II, § 1.H, but concede there is no showing Appellants were enrolled under that provision. The amendment does not remove the basis for Appellants' enrollment at the time they were enrolled. Its adoption simply does not play a role in any disenrollment proceedings.

In sum, this allegation is really a claim against the Tribal Council for performing a discretionary political act it is constitutionally authorized to perform. The request for a Secretarial election is a function of the tribal government. The Tribal Court and this Court have no jurisdiction over this allegation absent the Tribe's waiver of its sovereign immunity. Because the Tribe did not waive its immunity, the court correctly found it did not have subject matter jurisdiction to address this allegation.

G. Tuesday Meetings/Special Meeting

Appellants allege that because the Appellee Council officials failed to hold Council meetings on the first Tuesday and failed to call a Special Meeting requested by the Council Secretary and another councilmember, Appellees violated Article 2, § 1 and Article 2, § 5 of the Tribal Council Bylaws. These claims go to the issue of the court's jurisdiction so we apply de novo review. We find these issues are also meritless.

Article 2, § 1 of the Tribal Council Bylaws states the Council shall meet the first Tuesday of each month and regular meetings shall be held at the tribal office. Appellees admit the Council has cancelled its Tuesday meetings for security reasons occasioned by the decision to initiate the disenrollment proceedings. The record shows the Council has continued to meet regularly and the Tribal Court found "[b]eginning in late 2011 and through 2012, Council meetings were held at the Nooksack Community Building, with agendas published to the membership prior to the meetings. Since the disenrollment issues arose, the First Tuesday meetings have been cancelled for public safety reasons, with business conducted through the Special Meetings clause under Article II, Section 3 of the Bylaws." Order at 18.

The Tribal Council has the sovereign authority to determine its meeting procedures. CONST. Art. VI, § 1.J. The adherence to Bylaws is a political question not subject to judicial review.[26] *See Miami Nation of Indians v. U.S. Dept. of Interior*, 255 F.3d 342, 347 (7th Cir.

[26] A political question may arise when any one of the following circumstances is present: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious

2001) (citations omitted) (there are a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative branches of the federal government). Because the Tribal Council has the constitutional authority to determine its meeting procedures, we agree with the Tribal Court that "[c]anceling meetings for holidays, public safety reasons or other reasons of public concern do not give rise to the loss of sovereign immunity ...". Order at 18-19. This too is a function of the Tribal government. The Tribal Court did not have subject matter jurisdiction to address this issue because neither the Tribe nor the Council waived its immunity.

Article 2, § 5 requires a Special Meeting be held upon the written request of two council members. The Tribal Court found because those members requesting the meeting are not plaintiffs, Appellants cannot show the requisite standing to litigate the issue. Citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 115 S.Ct. 2431 (1995), the court ruled "[t]he Plaintiffs general interest in the proceedings under the Special Meetings section of the Bylaws is not a 'concrete and particularized' legally protected interest. Rather, it is an assertion of a 'right to a particular kind of Governmental conduct.'" We agree.

Standing is a legal issue subject to de novo review. *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir.1985). Standing requires that a plaintiff allege a concrete injury, that there is a causal connection between the injury and the conduct complained of, and that the injury will likely be redressed by a favorable decision. *United States v. Hays*, 515 U.S. 737, 742–43, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 at 560–61.[27] Appellants do not assert any concrete injury by the Council's failure to hold the Special Meeting.[28] Even if the court had jurisdiction to address this allegation, Appellants have no standing to litigate this issue.

H. Other Issues

Appellants argue the Tribal Court erroneously denied their request for a temporary restraining order to enjoin Appellees from proceeding with disenrollment proceedings. Our decision renders this issue moot.

Appellants also argue the court improperly struck a declaration submitted by Appellants and improperly denied Appellants' request to strike a declaration submitted by Appellees. We review the trial court's evidentiary rulings under the abuse of discretion standard. *See General*

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pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962).

[27] "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Allen v. Wright*, 468 U.S. 737, 752 (1984).

[28] Appellees contend the Special Meeting has been held. Appellants dispute that contention. The record in this case is silent on that issue. The court, however, in the related case found the meeting has occurred. *Roberts v. Kelly*, 2013 CI-CL-003 (Order Granting Defendant's Motion to Dismiss at 13).

Elec. Co. v. Joiner, 522 U.S. 136, 141, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (holding that "abuse of discretion is the proper standard of review of a district court's evidentiary rulings"); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir.2002) (the trial court's exclusion of evidence is reviewed for abuse of discretion and the district court's ruling must be affirmed unless the "evidentiary ruling was manifestly erroneous and prejudicial"); *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1507 (9th Cir.1992) (holding that the district court's evidentiary rulings did not constitute abuse of discretion because "[a]lthough reasonable minds could have reached different conclusions, the district court's rulings [were] not manifestly erroneous").

The court struck the declaration submitted by Appellants that asserts Appellant Lomeli's enrollment records were "sanitized" regarding the membership of her aunt, on the grounds it violated Appellees' attorney-client privilege. The court denied Appellants' motion to strike the declaration of one of the Tribe's attorneys, submitted by Appellees, regarding Appellees' intent related to the March 20th Stipulation on the issue of who the plaintiffs are in this case. We find the trial court's rulings were not an abuse of discretion. Moreover, even if the declaration submitted by Appellants was admitted and the declaration submitted by Appellees was excluded, it would not change the outcome of the case.

Appellants also assert the court failed to address other claims they alleged in their complaint, most of which raise allegations surrounding the conduct of Tribal Council meetings.[29] Opening Brief of Appellants, at 67-70. We have reviewed Appellants' arguments and find those are either political questions not subject to judicial review; directly related to the functions of the tribal government that the court did not have jurisdiction over absent a waiver of immunity; do not violate the Tribe's Constitution, laws or Bylaws; or are moot given our decision.[30] The resolution of those issues will not change our decision, so we decline to address whether the court erred in failing to rule on those allegations.

IV. CONCLUSION

We hold the trial court did not err in finding the plaintiffs in this case were only those named in the complaint.

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[29] Appellants identify those issues as follows: (1) Councilpersons St. Germain and Roberts were forced to exit a Council Executive Meeting; (2) Appellees Jefferson and Bailey were allowed to remain present at a Tribal Council meeting without being properly designated; (3) Resolutions proposed by councilpersons St. Germain and Roberts were not voted on; (4) Title 63's requirement a person must prove ancestry conflicts with former Art. II, § 1.H of the Constitution; (5) At a March, 2013 meeting the Appellee Council members refused to acknowledge a proposal by St. Germain to rescind Resolutions 13-02 an 13-03; (6) There have been "ad hoc" Council meetings where Appellant Council members were not invited to attend; (7) A Council meeting was held in February, 2013 without providing 24 hours notice; and (8) Appellants violated the Bylaws by adopting amendments to Titles 10 and 63 and imposing a moratorium on new enrollments without holding a public meeting.

[30] We note a number of arguments have no bearing on the issues the court had jurisdiction to resolve – whether the Appellee Tribal officers' initiation of proceedings to disenroll Appellees violates provisions of the Nooksack Constitution or the Tribe's laws, and whether Title 63 is unconstitutional. We urge counsel for the Appellants to heed the admonition that "Losers in a trial can go hunting for relief on appeal with a rifle or a shotgun," and "[t]he rifle is better," because"the shotgun approach may hit the target with something but it runs the risk of obscuring significant issues by dilution." *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 955 (7th Cir. 1996) (citation omitted).

For the above reasons we affirm, albeit on other grounds, the Tribal Court's order dismissing Appellants' amended complaint based on the "merits of the case and the interest of justice." NTC 80.09.010.

It is so ordered this 13 day of January, 2014, for the panel:

Douglas Nash, Associate Judge,
Mark W. Pouley, Associate Judge,

Eric Nielsen

Eric Nielsen, Chief Judge