No. 2016-CI-CL-002

IN THE NOOKSACK
TRIBAL COURT OF APPEALS

GABRIEL S. GALANDA; ANTHONY S. BROADMAN; RYAN D. DREVESKRACHT,
Petitioners,

v.

NOOKSACK TRIBAL COURT,
Respondent.

MOTION AND AMICI CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF PETITIONERS

Prof. Robert Williams
Prof. Eric Eberhard
Prof. Robert Hershey
Prof. Colette Routel
Prof. James Diamond
Prof. David Wilkins

MOTION

Pro se professors Robert Williams, Eric Eberhard, Colette Routel, Robert Hershey, James Diamond and David Wilkins respectfully seek permission to file the following amici curiae brief in this case. Amici's interests in this case stem from a concern for the integrity of all tribal court systems, the application of the Indian Civil Rights Act, and the fundamental rights of those within the jurisdiction of tribal courts to enjoy basic freedoms from oppression and arbitrary governmental action.

Professor Williams has worked in and around tribal courts for over 30 years. He served as Chief Justice (1998-2000; 2004-2008) and as Associate Justice (1988-1997) on the Court of Appeals for the Pascua Yaqui Indian Tribe. Professor Williams also served as the Chief Justice of the Yavapai-Prescott Apache Tribal Court of Appeals (2003-2005), and as Associate Justice and Judge Pro Tempore for the Tohono O'odham Judiciary (1998-2008). He has taught Federal Indian Law since 1981, and at the University of Arizona College of Law for 29 years. He is permanently tenured as the E. Thomas Sullivan Professor of Law and serves as Faculty Chair of the College of Law's Indigenous Peoples Law and Policy (IPLP) Program.

Professor Eberhard has worked in and around tribal courts since 1973. In 1983, he was recognized by the Courts of the Navajo Nation for his outstanding service. His career in Indian law began in legal services on the Navajo, Hopi and

White Mountain Apache Reservations, and as the Deputy Attorney General of the Navajo Nation. From 2009 to 2016 Professor Eberhard was a Distinguished Indian Law Practitioner in Residence at the Seattle University School of Law. Today he teaches Indian law as an Affiliate Assistant Professor at the University of Washington School of Law.

Professor Hershey has worked in and around tribal courts for 40 years. He was Staff Attorney for the Fort Defiance Agency of Dinebeiina Nahilna Be Agaditahe (DNA Legal Services) on the Navajo Indian Reservation. From 1983 to 1999, he served as Special Litigation Counsel and Law Enforcement Legal Advisor to the White Mountain Apache Tribe, and, from 1995 to 1997, as Special Counsel to the Pascua Yaqui Tribe. Professor Hershey also serves, now in his twenty-seventh year, as Judge Pro Tempore for the Tohono O'odham Judiciary, and he was an Associate Justice for the Yavapai-Prescott Indian Tribal Court of Appeals. He has taught Indian law at the University of Arizona College of Law for 25 years.

Professor Colette Routel is tenured at Mitchell Hamline School of Law in St. Paul, Minnesota, and Co-Director of the School's Indian Law Program. She has taught Federal Indian Law since 2004. While teaching, Professor Routel has maintained a substantial pro bono practice, which includes representing tribal members in tribal court criminal proceedings. In recent years, she has also served as a tribal court judge, presiding over election disputes for the Leech Lake Band

of Ojibwe and the White Earth Nation, and as an appellate judge for the Prairie Island Indian Community and the White Earth Nation.

Professor James Diamond is the Director of the Tribal Justice Clinic and Professor of Practice at the University of Arizona College of Law, where he teaches and supervises law students in a clinical setting as they serve as tribal judicial clerks. Professor Diamond is admitted to practice in the Pascua Yaqui and Mashantucket Pequot Tribal Courts.

Professor David Wilkins holds the McKnight Presidential Professorship in American Indian Studies at the University of Minnesota. He has adjunct appointments in Political Science, Law, and American Indian Studies and has taught in those areas for the last 26 years. Professor Wilkins earned his Ph.D. in Political Science from the University of North Carolina/Chapel Hill in 1990.

Amici submit this brief in their personal capacities, and not on behalf of any law school, tribe, or other institution with which they are affiliated.

Amici respect and appreciate the Court's expertise on these matters, but seek to aid the Court in its treatment of this case. The extreme situation in which the parties to this matter find themselves warrants this additional practical and academic lens.

Amici respectfully request that the Court grant Petitioners' Second Motion to Show Cause and declare their disbarment or banishment invalid.

BRIEF

I. INTRODUCTION

Amici have reviewed and analyzed certain papers and orders in this case and share the Court's fears "that at Nooksack the rule of law is dead." Order Re: Motion to Enforce Contempt Order, at 1 (Aug. 15, 2016). Critically, Amici offer no assistance or argument regarding the underlying intertribal citizenship dispute that has fomented this civil rights crisis. But Amici do have grave concerns regarding patent violations of ICRA, harm to the integrity of all tribal courts, and, most importantly, the strategic deprivation of counsel and barred access to justice for Nooksack tribal citizens. Dr. Martin Luther King's warning that "Injustice anywhere is a threat to justice everywhere"[1] haunts this matter. The Nooksack Tribal Court Clerk and those directing him are directly harming the rights of Indians everywhere to access justice and enjoy the rights guaranteed them by Nooksack and federal law.

II. ARGUMENT OF AMICI CURIAE

A. Background

Based on a review of certain papers on file in this and related cases, Amici understand the following:

On March 28, 2016, former Nooksack Tribal Court Chief Judge Alexander was fired "as [she] was preparing a final draft of [her] ruling on Plaintiffs'

[1] Proclamation of President George W. Bush Re: Martin Luther King, Jr., Federal Holiday, 2009 WL 106857, at *1 (2009).

mandamus petition" to compel the Tribal Council election.[2]

On April 5, 2016, the Tribal Court Clerk rejected Petitioners' pro se Complaint and Motion for Injunctive Relief and Declaratory Judgment and a motion by Michelle Roberts, pro se. Throughout April and since, the Tribal Court Clerk has rejected every filing attempted by Petitioners and their clients, whether such filings are for the Tribal Court or this Court.

When Petitioners and Ms. Roberts have been able to file documents through email with the Court of Appeals, the Court of Appeals has consistently ordered the Tribal Court Clerk to accept filings.

On May 25, 2016, the Nooksack Court of Appeals ordered the Tribal Court Clerk to accept and file Petitioners' Complaint. The Clerk refused. On June 28, 2016, the Court held the Clerk in contempt. The Clerk refused to purge the contempt by filing Petitioners' Complaint. And the Nooksack Chief of Police failed to comply with the Court's order to enforce its contempt powers. The Court then held the Chief of Police in Contempt on August 15, 2016.

In short, it appears that some faction of Nooksack tribal government refuses to honor the rule of law. In such cases, a court must step in and provide due process to those to whom it is owed.

B. The Court Should And Can Act.

[2] The National American Indian Court Judges Association decried Judge Alexander's termination as "a clear threat to judicial independence." Press Release, National American Indian Court Judges Association, Judicial Independence (May 11, 2016), *available at* https://turtletalk.files.wordpress.com/2016/05/naicja-press-release-judicial-independence.pdf.

The Tribal Court's actions are not unprecedented. They harken back to attempts by Southern states in the 1960s to prevent civil rights lawyers from being admitted to practice. For example, in *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968), several out-of-state attorneys involved in civil rights litigation were denied admission pro hac vice in the Southern District of Mississippi. The Fifth Circuit Court of Appeals issued a writ of mandamus compelling the lower court to admit attorneys representing African-Americans in civil rights cases. *Id*. And Mississippi's efforts in 1968 were not unlike Virginia's attacks on the NAACP in 1963; these attacks were part of a concerted effort to deprive African-Americans of lawyers to bring desegregation lawsuits. *See Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 445 (1963) (Douglas, J. concurring) ("This Virginia Act . . . reflects a legislative purpose to penalize the N.A.A.C.P. because it promotes desegregation of the races."). The same strategy is being used at Nooksack.

The Tribal Court, and whoever is directing it, is no different than the governments who used arbitrary attorney admission standards to disenfranchise unpopular civil litigants in the 1960s. And Petitioners' clients are no less entitled to counsel than marginalized African-Americans in the 1960s South. It is not enough to suppose that Petitioners' clients can retain other counsel. No matter who represents these litigants—indeed even when they attempt to file papers *pro*

se—the Tribal Court blocks any avenue to justice.

Just as the Fifth Circuit Court of Appeals did in 1968, this Court should compel the admission of Petitioners. *See In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975) ("We granted mandamus compelling their admission."). In other words, this is not simply a matter of Petitioners' right to be treated fairly and provided due process. Far more importantly, Petitioners' clients must be afforded access to court. And only this Court has the power to open the courtroom doors.

The Court's authority certainly includes this power. Issuing a formal writ of mandamus is an appropriate remedy for the improper refusal to admit an attorney to practice. *In re U.S.*, 791 F.3d 945, 960 (9th Cir. 2015); *Monoz v. U.S. Dist. Court for Cent. Dist. of Cal.*, 446 F.2d 434, 435 (9th Cir. 1971).

C. The Grave Consequences Of Not Acting

ICRA was intended to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S.Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)). The enforcement of ICRA falls largely to tribal courts. *See id.*, at 65-66 (citations omitted). ICRA also embodies the traditional tribal governmental function of ensuring that those living under the authority of an Indian tribe are treated fairly.

The risks of not acting to restore the rule of law at Nooksack include the

harm to the more than 330 Nooksack citizens that Petitioners represent.[3] But the ripple effect of respondents' lawlessness will reach far beyond the boundaries of Nooksack.

Respondents' actions risk confirming the views of non-Indian judges of tribal courts as "rat's nest[s]." *Alvarez v. Lopez*, No. 12-15788, 2016 WL 4527558, at *5 (9th Cir. Aug. 30, 2016) (Kozinski, J.). Justice Roggensack of the Wisconsin Supreme Court, for example, has recently authored a law review article calling for the rejection of any legislation that would force non-Indians to "proceed in tribal court without [a guarantee of] constitutional rights [or] power of review of tribal court decisions." Patience Drake Roggensack, *Plains Commerce Bank's Potential Collision With the Expansion of Tribal Court Jurisdiction by Senate Bill 3320*, 38 U. Balt. L. Rev. 29, 38-39 (2008).

The suspicions and denigration of tribal courts as second-class forums will gain credence among those who are hostile to tribal sovereignty. But that loss of credibility is not simply shameful and embarrassing for tribal sovereigns and we attorneys and judges who serve them. It wounds *every* tribal court. And when tribal courts lack respect and comity from their non-tribal sister courts, they

[3] We note that they do not represent only disenrollees. They also represent dozens of Nooksack citizens who are not proposed for disenrollment—and who seek redress for Defendants' refusal to hold an election as required by the Nooksack Constitution, but who Defendants have also denied access to the Tribal Courthouse. "Without counsel to understand the protections afforded and object to transgressions, any such arbitrary and unjust actions of the government remain unchecked." Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 Mich. J. Race & L. 317, 346 (2013).

perform the absolutely critical function demanded of them.

Tribal courts are the frontlines for carrying forward the important work of tribal governments such as Indian child welfare, criminal matters, and dispute resolution in connection with reservation economic development. This matter may seem limited to a dispute over Petitioners and their 330 clients, but the effects of Respondents' recalcitrance in the face of the Court's orders reach much further.

III. CONCLUSION

Amici respectfully request that the Court grant Petitioners' Second Motion to Show Cause and declare their disbarment or banishment invalid.

Respectfully submitted this 19th day of September 2016:

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Prof. Colette Routel

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the foregoing document was served upon the following individuals via electronic mail on September 19, 2016:

Katie Nicoara
Court Administrator
Northwest Inter-Tribal Court System

Betty Leathers
Court Clerk
Nooksack Tribal Court

Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe

Professor Eric Eberhard