Case No.: 17-35427

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGRETTY RABANG; OLIVE OSHIRO; DOMINADOR AURE; CHRISTINA PEATO; ELIZABETH OSHIRO,
Appellees,

v.

ROBERT KELLY, JR.; RICK D. GEORGE; AGRIPINA SMITH; BOB SOLOMON; LONA JOHNSON; KATHERINE CANETE; ELIZABETH KING GEORGE; KATRICE ROMERO; DONIA EDWARDS; RICKIE WAYNE ARMSTRONG,
Appellants.

Appeal from the United States District Court for the Western District of

Washington

No. 2:17-cv-00088-JCC

REPLY BRIEF

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I. REPLY

Rabang expressly concede the biggest of the legal mistakes Kelly identified: the District Court's analytical framework. Rabang make the significant concession that the District Court's basis for jurisdiction—its exhaustion analysis—is not defensible. See Appellees' Brief 14 n 8. This concession, by itself, supports reversal. Rabang does not effectively defend any of the three legal mistakes identified by Kelly in their opening brief. [1]

Rabang attempt to defend jurisdiction based on the BIA letters, ignoring two significant flaws with this position:

(1) the District Court's reliance on the BIA letters relates only to the discredited exhaustion analysis—the letters have no additional legal significance to the jurisdictional issues, and

[1] Appellants' Opening Brief 2 (legal mistakes include (1) failing to apply the proper analysis from *Lewis v. Clarke*, (2) improperly relying on and giving deference to the BIA letters, and (3) applying an inapposite legal analysis of exhaustion).

(2) numerous authorities unrebutted by Rabang show that the BIA letters have no effect outside the government-to-government relationship between the Tribe and the United States.

The BIA letters are irrelevant to whether federal courts possess or lack jurisdiction to preside over these claims, which require resolution of an intra-tribal dispute concerning the legitimacy of actions by the Nooksack Tribal Council.

Rabang assert that the opinions of the BIA "invalidate" or "void" the Council's acts, but Rabang only repeat this bare assertion. They do not support it with argument or authorities. Kelly, in contrast, demonstrated through argument and unrebutted authorities that the BIA, like federal courts, has no authority to resolve the intra-tribal governance disputes. Rabang remain silent in the face of Kelly's authorities, failing to address them.

Rabang ignore virtually all of the cited and briefed cases that are controlling on the issue whether federal courts have

jurisdiction to resolve claims that turn on the outcome of the intra-tribal dispute, including: 1) *Santa Clara Pueblo v. Martinez*,[2] 2) *Montana v. U.S.*,[3] 3) *Williams v. Gover*,[4] 4) *Lewis v. Norton*,[5] 5) *Demontiney v. United States*,[6] 6) *Smith v. Babbitt*,[7] 7) *Miccosukee Tribe of Indians v. Cypress*,[8] 8) *Runs After v. United States*,[9] 9) *In re Sac & Fox Tribe of the Miss. In Iowa/Meskwaki Casino Litig.*[10]

Rabang did not even discuss, analyze or apply *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285 (April 25, 2017), which the

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[2] Appellants' Opening Brief 39, 40, 46 citing 436 U.S. 49 (1978).
[3] Appellants' Opening Brief 39, 46, citing 450 U.S. 544 (1981).
[4] Appellants' Opening Brief, 40, 41, 46, citing 490 F.3d 785 (9th Cir. 2007).
[5] Appellants' Opening Brief 42, 43, citing 424 F.3d 959 (9th Cir. 2005).
[6] Appellants' Opening Brief 58, citing 255 F.3d 801 (9th Cir. 2001).
[7] Appellants' Opening Brief, 42-43, 47, citing 100 F.3d 556 (8th Cir. 1996).
[8] Appellants' Opening Brief 44, 46, citing 975 F. Supp. 2d 1298 (S.D. Fla. 2013).
[9] Appellants' Opening Brief 45-46, citing 766 F.2d 347 (8th Cir. 1985).
[10] Appellants' Opening Brief 47, citing 340 F.3d 749 (8th Cir. 2003).

District Court summarily asserted supported denial of the motion to dismiss, even after Kelly demonstrated it did not.[11]

In sum, rather than demonstrating legal correctness, Appellees' brief supports a conclusion of error. The District Court erred not only by justifying jurisdiction through what is conceded to be an inapposite exhaustion analysis, but by misapplying *Lewis v. Clarke* and other precedent that Rabang decline to address.

A. Rabang Concede the District Court's Exhaustion Analysis Is Not Defensible and Fail to Argue Controlling Precedent

Rabang agree with significant positions of Kelly. By lack of challenge, Rabang agree that the issues presented by Kelly Defendants may be heard in this appeal. Rabang agree the standard of review is *de novo*.[12] Rabang purport to agree that the tests set forth in *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013) control the determination whether

[11] See Appellants' Opening Brief, 33-37. See Appellees' Brief 11, 15 (mentioning the case but failing to present argument or application).
[12] Appellees' Brief 12.

sovereign immunity bars this action, although Rabang misconceive and ignore its tests.[13]

On the merits, Rabang decline to defend the District Court's exhaustion analysis that is the centerpiece of its assumption of jurisdiction. *See* ER 11-14. The District Court recognized that it "ordinarily" would not have jurisdiction because the RICO claims concern matters of internal self-governance. ER 10:26-11:11. It reasoned, however, that there are "four recognized exceptions" based on exhaustion law, and then proceeded to find one of those exceptions satisfied. ER 11:12-25. Specifically, the District Court reasoned that federal court jurisdiction could exist because "exhaustion [of tribal court remedies] would be futile because of the lack of adequate opportunity to challenge the [tribal] court's jurisdiction." ER 11:19-14:14. The District Court concluded there was a lack of adequate opportunity to challenge the tribal court's jurisdiction by "deferring" to the BIA letters wherein the BIA states that it

[13] See Appellees' Brief Argument III.B.-C.

would not recognize the Nooksack government. *Id*.

None of this analysis withstands scrutiny because these exceptions from the exhaustion context do not apply. The exhaustion analysis (and its exceptions) is inapposite, as Rabang concede. This concession is consistent with ample authority that Kelly presented in its main brief. The District Court's starting point that ordinarily district courts would not have jurisdiction over a dispute like this should have been its ending point. There is a fundamental absence of federal court jurisdiction that is not solvable. No law provides jurisdiction.

Rabang downplay their concession by styling it as an acknowledgement that the exhaustion analysis is "somewhat of a red herring."[14] Rabang choose not to explain whatever they mean by "red herring." Rabang decline to present argument or authority to support the exhaustion analysis. This "acknowledgement" undermines the District Court's ruling

[14] Appellees' Brief 14 n. 8.

entirely.[15]

As will be discussed further, Rabang also fail to engage Kelly's authorities.

B. Rabang Mistake the Significance of the BIA Letters

Rabang urge an incorrect and unsupported view that the BIA letters support jurisdiction. But Rabang do not defend the District Court's use of the letters in its exhaustion analysis. Rabang instead assert on appeal—without any authority—that the letters show that the BIA has "officially invalidated" the Nooksack government, so the dispute is resolved. See, e.g.,

[15] The acknowledgement also relieves Rabang from having to defend the District Court's assumption of a "temporary" jurisdiction. The District Court expressed that its jurisdiction was changeable, and might not exist if and when the Tribe did resolve its intra-tribal dispute. ER 11 ("This Court's jurisdiction over this matter is not permanent or inflexible…. If the Court [in *Nooksack Indian Tribe v. Zinke*] determines the DOI decisions were invalid, it is possible that this Court will not have jurisdiction over this matter. Moreover, if the DOI and BIA recognize tribal leadership after new elections, this Court will no longer have jurisdiction and the issues will be resolved internally."). This novel concept is unsupported by precedent, but appears moot given Rabang's concession that the exhaustion analysis through which the District Court assumed "temporary" jurisdiction does not apply.

Appellees' Brief 6-10 ("The United States Officially Invalidates The Holdover Defendants, Who In Turn Expand Their Scheme to Defraud Plaintiffs"), 13 (the DOI "had already rendered that determination [that the tribal government was not properly constituted], three times over."), 14 (DOI's determination was "binding"), 19-21 (it has "already been determined by the DOI that defendants were prohibited from taking any official actions…."). This view permeates Rabang's brief. It is wrong.

Kelly already have demonstrated that the scope of the BIA determination is limited to the interactions between the U.S. government and the Tribe, citing at least five cases and *Cohen's Handbook of Federal Indian Law*.[16] Rabang choose not to respond to this argument or these authorities showing

[16] Appellants' Opening Brief 47-52, citing *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010), *Wheeler v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 811 F.2d 549 (10th Cir. 1987); *Winnemucca Indian Colony v. United States ex rel. DOI*, 837 F. Supp.2d 1184 (D. Dev. 2011), *Cohen's Handbook of Federal Indian Law* § 5.03[3][c] (2005 ed.); *Hammond v. Jewell*, 139 F. Supp.3d 1134 (E.D. Cal. 2015); *Cayuga Nation v. Tanner*, 824 F.3d 321 (2nd Cir. 2016).

that the BIA holds no authority to issue a decision with broader reach. This Court should view as unchallenged the legal conclusion that the BIA letters do not operate as an "invalidation" of any acts of the Nooksack government. The BIA opinions do not control how the Tribe must view or resolve the dispute, nor do they bind federal courts.

Rabang go further astray when they raise the Administrative Procedures Act and whether the Tribe had to appeal the BIA letters.[17] Any APA appeal would relate only to the Tribe-U.S. government relationship. The BIA determinations—whether arbitrary and capricious, appealed or not—do not control the merits of the intra-tribal dispute or this lawsuit, which is outside the context of the Tribe-U.S. government relationship.

Rabang improperly characterize Kelly's position as an "attempt to bootstrap" an appeal of the DOI letters into this

[17] *See* Appellees' Brief 13-14, citing 5 U.S.C. § 704, 706, 25 C.F.R. § 2.6(c), and *Mem'l, Inc. v. Harris*, 655 F.2d 905, 912 (9th Cir. 1980).

case.[18] To the contrary, Kelly have been clear and consistent: the BIA letters have no relevance to the issue of federal court jurisdiction to preside over a determination of the intra-tribal issues raised in this lawsuit.[19] Kelly maintain the District Court erred when it gave deference to the BIA letters and accepted the BIA's view of the merits of the intra-tribal governmental dispute, including the District Court's repetition of the BIA's view that the Nooksack Tribal Council acted without a quorum.[20] This was not only error, but an affront to tribal sovereignty because, as Kelly extensively briefed,[21] only the Tribe may interpret its own laws and determine the legitimacy of its government. Kelly do not invite this Court to evaluate the merits of the BIA's letters.

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[18] Appellees' Brief 13.
[19] See Appellants Opening Brief 2 at #2, 47-52.
[20] See ER 11:25-12:2. The District Court was of two minds, because it repeated the BIA's opinions and relied upon them to find it has jurisdiction, while also saying, "The Court expresses no opinion as to the validity of the DOI decisions at this time." ER 19 n 2.
[21] See Appellants' Opening Brief VII.D.

Kelly resist briefing the merits of the governance dispute to federal courts because it is outside their jurisdiction. A convincing and plain explanation in the governing documents supports the Tribal Council's actions as legitimate. This Court, the District Court and the BIA lack authority to perform that analysis. This is the wrong forum to resolve the merits of the governance dispute. Rabang are wrong to attempt to force Kelly to a federal court to present a legal analysis of these intra-tribal matters in order to defend Rabang's claims. This is the cornerstone of Kelly's objection to jurisdiction and the point of this appeal: this Court has no jurisdiction to resolve that dispute.

Rabang baldly assert without credibility, "This Case Does Not Involve An Intra-Tribal Dispute."[22] This statement rests on Rabang's false pretense that the BIA has resolved the intra-tribal governance dispute. It has not. In addition to failing to rebut Kelly's authorities on this issue, Rabang offer

[22] Appellees' Brief 12.

not one case to show that the BIA has authority to "resolve" this dispute in a manner binding on the Tribe or the federal courts. *Demontiney v. United States*,[23] among other authorities, makes it clear such jurisdiction is lacking. This Court should reject Rabang's request that it "ignore" the intra-tribal dispute because DOI already resolved it.[24]

To decide Rabang's RICO claims requires a resolution of the intra-tribal dispute, i.e., were the actions of the tribal government legitimate and consistent with tribal law. Neither the District Court nor this Court have authority to preside over a resolution of those issues. That is why the claims may not go forward.

C. This Court Should Reverse Due to Sovereign Immunity Because This Is an Official Capacity Suit

This Court should reverse because the Kelly Defendants' assertion of sovereign immunity is well taken. Under the Ninth

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[23] See Appellants' Opening Brief 58, citing 255 F.3d 801 (9th Cir. 2001).
[24] Appellees' Brief 14.

Circuit tests set forth in *Maxwell*, the substance of the allegations must be examined to determine whether the allegations concern official acts taken on behalf of the Tribe, rather than individually, or if the relief would operate against the tribe. The Kelly Defendants demonstrated that this examination leads to the conclusion under both tests that sovereign immunity bars the lawsuit.[25]

Rabang do not adequately respond. Rabang appear to concede that *Maxwell* controls,[26] but address other, inapposite authorities.

Lewis v. Clarke, a case Rabang fail to address, sets out an analysis consistent with this Circuit's analysis in *Maxwell*. These cases demonstrate that sovereign immunity applies.

1. Rabang Sue the Individuals *Because of* Their Official Acts on Behalf of the Tribe

This is the epitome of an official capacity suit. The

[25] See Appellants' Opening Brief 24-30 (individuals acting in official capacity), 30-33 (relief operates against the Tribe).
[26] See Appellees' Brief 18.

allegations are premised on acts *of the sovereign* that disenrolled Rabang and denied Rabang government benefits. Because the First Amended Complaint (FAC) concerns itself with acts of governance, this is an official capacity lawsuit barred by sovereign immunity.

Rabang allege they were harmed when the Tribe disenrolled them and cut off their government benefits, and that they should receive restitution and injunctive relief to stop the harm and restore their status and benefits. Individuals cannot disenroll persons or deprive persons of government benefits. Only a government can do that. *See Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (acts of a government, not individuals, caused plaintiff's injuries, so lawsuit stated official capacity claims barred by sovereign immunity). The only conceivable RICO predicate acts or pattern of racketeering are the conduct alleged in Paragraphs 26 to 72 of the FAC, which are exclusively acts of governing. ER 357-67. These acts include the Tribe through these defendants

disenrolling Rabang, terminating a judge's employment, enforcing disenrollment by terminating housing and TANF benefits, issuing notices of disenrollment, and receiving the BIA's letters. Rabang fail to allege any individual acts. They allege only official acts. As in *Imperial Granite*, this Court should hold that this is an official capacity suit barred by sovereign immunity.

Rabang insist that this is a personal capacity suit because they said so in the FAC.[27] This rationale is inconsistent with *Maxwell* and *Lewis v. Clarke*, which require that the *factual* allegations be scrutinized. Self-serving characterizations do not control. Rabang misunderstand or misconstrue this Court's discussion in *Porter v. Jones* to argue otherwise, insisting that Rabang may characterize in what capacity the suit is brought and that characterization will control.[28] This Court in *Porter* only noted that the distinction between an individual or official

[27] Appellees' Brief 15.
[28] See Appellees' Brief 15 citing *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003).

capacity suit is substantive and has important ramifications, i.e., is not simply a pleading device. The case does not stand for the proposition that a plaintiff may elect the capacity in which it sues to avoid sovereign immunity, or that a plaintiff's characterization of the capacity controls and may not be construed as a pleading device.

Rabang's argument that they may simply elect in what capacity to sue, choosing to seek recompense from individuals for harm caused by acts of governing,[29] is misconceived, unsupported and wrong. The individuals are not sureties of the governmental action. Rabang allege acts of government that harmed them, and they can only look to that government for a remedy (but, in this case, not in this court system). The law does not allow the plaintiffs to simply make such an election.

[29] See Appellees' Brief 15-16, arguing that "by naming" the defendants in their individual capacities, Rabang have resolved the issue whether this is an official capacity suit. *Maxwell* and *Lewis v. Clarke* show otherwise.

Rabang's citation to *Kentucky v. Graham*[30] does not support their position but instead drives Kelly's point home. The U.S. Supreme Court said, "Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). "[A] judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents . . . ." *Id*. at 169. If this is an official capacity suit based on the nature of the alleged conduct, Rabang's only remedy is with the government. They may not "choose" to simply sue the officials individually instead in an effort to avoid sovereign immunity.

Graham further undermines Rabang's position because it shows that the nature of the lawsuit controls, not a plaintiff's characterization in its complaint. *Graham* concerns a 42 U.S.C.

[30] See Appellees' Brief 16.

§ 1983 civil rights claim against police officers. After the case settled, the plaintiffs sought an attorney fee award from the officers' employer the State of Kentucky, arguing that on the face of the complaint they had sued an officer in *both* his official and personal capacities. *Id*. at 161, 163-65. The U.S. Supreme Court rejected the argument, noting that due to Eleventh Amendment Immunity, the suit "was necessarily litigated as a personal-capacity action." *Id*. at 169. *Graham* does not support Rabang's election theory or the view that whatever a plaintiff states in a complaint is controlling.

Bender v. Williamsport Area Sch. Dist. similarly stands for the proposition that a plaintiff's allegation regarding capacity is not controlling. The U.S. Supreme Court in *Bender* reviewed a free speech claim against school officials who had purportedly been sued according to the plaintiff "in their individual and official capacities." Notwithstanding this assertion, the U.S. Supreme Court noted "[t]here is, however, nothing else in the complaint, or in the record on which the

District Court's judgment was based, to support the suggestion that relief was sought against any School Board member in his or her individual capacity." 475 U.S. 534, 543 (1986). The Court held that the school officials had been sued in their official capacities. *Id*. The holding supports Kelly.

Rabang quote a footnote from *Bender* regarding whether a party sued in his official capacity can appeal in his individual capacity.[31] (The answer is no.) Rabang fail to explain the relevance of this quote, and Kelly submit it has none. Both *Graham* and *Bender* support a conclusion that this Court should not rely on Rabang's characterization, but rather scrutinize the factual allegations to determine the capacity in which the defendants are sued.

Rabang offer no authority to subvert the analysis required by *Maxwell* and *Lewis v. Clarke*. Rabang invent a qualifier when discussing *Maxwell*, stating that under *Maxwell* a court scrutinizes the capacity issue "[w]hen the intent of the plaintiff

[31] Appellees' Brief 16.

is unclear."[32] The case nowhere includes that qualifier. Rabang also misunderstand a discussion in *Maxwell* when they argue that after deciding *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), this Court rejected the "scope of authority" approach to distinguish official capacity from individual capacity lawsuits.[33] To the contrary, the *Maxwell* court simply observed that the *Cook* court relied more on the remedy-focused analysis than the scope of authority analysis. *Maxwell* at 1088-89. The *Maxwell* court reiterated that two tests exist to distinguish individual and official capacity suits, stating that the tests are not coextensive:

> This does not mean that the "scope of authority" and "remedy sought" principles are coextensive in individual capacity claims. Such a conclusion would be a major departure from the common law immunity doctrine that shapes tribal sovereign immunity.

Maxwell, 708 F.3d at 1089. This Circuit has not overthrown

[32] See Appellees' Brief 18.
[33] Appellees' Brief 20.

the official capacity test.

Rabang decline to address additional cases that also support the conclusion that the substance of the allegations demonstrate an official capacity suit.[34] Under the first test in *Maxwell*, sovereign immunity applies.

2. Relief Would Operate Against the Tribe

Rabang argue that notwithstanding the restitution and injunctive and declaratory relief the FAC seeks against the governmental action of the Tribe, the Court should not be concerned about the nature of the relief because they would happily extract a monetary judgment from the individuals in lieu of the actual relief from the Tribe for which they pleaded.[35] The discussion above, which shows that a plaintiff may not simply make this election, is equally applicable to refute this

[34] See Appellants' Opening Brief 28-30, citing *Fletcher v. United States*, *Imperial Granite Co. v. Pala Band of Indians*, 116 F.3d 1315 (10th Cir. 1997) and *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668 (8th Cir. 1986), neither of which Rabang address.

[35] Appellees' Brief 18-19.

argument by Rabang.

The substance of the FAC controls.[36] In reviewing the allegations as *Maxwell* and *Lewis v. Clarke* instruct, this Court will have little choice but to conclude that Rabang complain about governmental acts and plead for relief that would operate against the Tribe, i.e., to halt and undo the governmental acts of disenrollment and associated loss of membership benefits.

Edelman v. Jordan, a case briefed and argued by Kelly[37] to which Rabang make no reply, underscores the conclusion that the relief would act upon the Tribe. The U.S. Supreme Court held that where the plaintiff sought retroactive benefits wrongly denied by the state government, it was a lawsuit against the officers in their official—not individual—

[36] "The focus of any Rule 12(b)(6) dismissal—both in the trial court and on appeal—is the complaint." *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

[37] Appellants' Opening Brief 36 citing *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).

capacities.[38] This authority controls. Rabang offer no counter authority. In *Edelman*, the plaintiff could not solve the sovereign immunity hurdle by voluntarily agreeing to collect personally from the official Mr. Edelman, the Director of the Department of Public Aid of Illinois, instead of from Illinois. Yet this is what Rabang propose.

Rabang's unsupported position that a plaintiff may simply choose whether it would rather enforce relief against the government or an official personally contradicts the established judicial approach that the Court must weigh the substance of the complaint to determine whom the suit is really against. Rabang cite only *Maxwell*, *supra*, where two paramedics were denied tribal sovereign immunity to bar claims of negligent care, and *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015), where tribal police and casino staff were denied sovereign immunity to bar claims of illegal seizure, false imprisonment, conversion

[38] 415 U.S. at 678.

and other torts.[39] These cases are factually distinguishable from Rabang's. This Court in *Pistor* underscored that officials cannot be individually sued for acts of internal tribal governance:

> [I]n *Hardin*, sovereign immunity barred the plaintiff from litigating a case against high-ranking tribal council members seeking to hold them individually liable for voting to eject the plaintiff from tribal land. To hold otherwise, we ruled, would interfere with the tribe's internal governance. *See Hardin*, 779 F.2d at 478. "*Hardin* was in reality an official capacity suit," barred by sovereign immunity, because the alternative, to "[h]old[] the defendants liable for their legislative functions[,] would . . . have attacked 'the very core of tribal sovereignty.'" *Maxwell*, 708 F.3d at 1089 (quoting *Baugus v. Brunson*, 890 F. Supp. 908, 911 (E.D. Cal. 1995)).

Pistor, 791 F.3d 1104, 1114 (9th Cir. 2015), citing *Maxwell, supra*, and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985). Like the plaintiff in *Hardin*, Rabang seek to sue Kelly for acts of internal tribal governance. This attacks "the very core of tribal sovereignty." Sovereign immunity

[39] Appellees' Brief 18.

applies.

Rabang cite cases to show that in some circumstances officials can be subject to RICO claims.[40] Rabang argue the general proposition that defendants who are officials *can* be subject to RICO claims, but do not show that in this lawsuit they properly are. The cases cited by Rabang were premised on individual acts of corruption. Bribery and *quid pro quo* influence peddling were alleged, i.e., acts outside of the acts of governing. Rabang has not alleged these acts. None of Rabang's cases involve official conduct or the defense of sovereign immunity. These cases do not support affirmance.

The more persuasive case law involves RICO claims and sovereign immunity where courts have held that the RICO claims may not go forward due to sovereign

[40] Appellees' Brief, 19, citing *United States v. Dischner*, 974 F.2d 1504 (9th Cir. 1992) (bribery and kickbacks), *United States v. McDade*, 28 F.3d 283 (3rd Cir. 1994) (bribery and extortion), *United States v. Cianci*, 210 F. Supp.2d 71, 75 (D.R.I. 2002).

immunity.[41] Equally persuasive is this Court's *Lewis v. Norton* decision explaining that plaintiffs may not use "otherwise applicable federal statutes" to raise in federal court "intramural matters such as conditions of tribal membership." 424 F.3d 959, 961 (9th Cir. 2005). Again, Rabang fail to address these cases.

Rabang's lawsuit seeks remedies to actions of the Tribal government, and that is the hallmark of an official capacity suit. Rabang's FAC seeks equitable, injunctive and ancillary relief, a declaratory judgment, a cease and desist order, a money judgment and "[r]estitution to Plaintiffs of all money, property and benefits Plaintiffs were unlawfully defrauded and deprived of by the RICO defendants." ER 387. This relief would operate against the Tribe and interfere with its exercise of its sovereign powers. Pursuant to controlling Ninth Circuit authority, sovereign immunity applies.

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[41] See Appellants' Opening Brief 42-47 citing, e.g., *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996) and *In re Sac & Fox Tribe of the Miss. In Iowa/Meskwaki Casino Litig*., 340 F.3d 749 (8th Cir. 2003).

3. Rabang Decline to Discuss or Apply *Lewis v. Clarke*, Which Supports Application of Sovereign Immunity to Bar the Lawsuit

The District Court summarily and unpersuasively purported to rely on *Lewis v. Clarke*, which Rabang had urged through their filing of a Notice of Supplemental Authority on the day the decision was entered.[42] Kelly demonstrated that this reliance was misplaced.[43] Rabang make no argument concerning application of *Lewis v. Clarke*. Rabang mention the case only in their Fact Section regarding the District Court's order,[44] and for a general principle of personal capacity lawsuits.[45] This Court should consider Rabang to have conceded that *Lewis v. Clarke* does not support jurisdiction in this case.

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[42] ER 398 (Dkt. #61).
[43] See Appellants' Opening Brief 33-37.
[44] Appellees' Brief 11.
[45] *Id.* at 15.

4. Sovereign Immunity Applies to This Official Capacity Suit; Standing Is Not an Issue

Rabang attempt to distract the Court from the controlling authorities discussed above with an ill-defined and unsupported "standing" objection.[46] This fails. To begin, Rabang do not contest Kelly's argument that there has been no waiver of the Tribe's sovereignty.[47] Rabang may only avoid the Tribe's sovereignty through a waiver argument, an effort Rabang never attempted.

Rabang offer no example of any court applying the concept of standing to an assertion of sovereign immunity. The cases cited by Rabang on page 21 of their brief repeat general propositions from this area of law but do not support Rabang's argument that, even if this is an official capacity lawsuit, a "standing" defect prevents operation of the jurisdictional bar. Furthermore, plaintiffs typically must pass standing thresholds, not defendants. See *Lujan v. Defenders of Wildlife*, 504 U.S.

[46] See Appellees' Brief 21-22.
[47] See Appellants' Opening Brief 37-38.

555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (plaintiff must establish Article II standing). Rabang fail to show that this Court *could* find it has jurisdiction over an official capacity suit against a tribe.

The controlling authorities before this Court demonstrate the opposite: if the suit is determined to be an official capacity suit against a tribe, tribal sovereign immunity bars it in the absence of an effective waiver. *See, e.g.*, *Cook v. AVI Casino Enterprises, Inc.*, *supra*, 548 F.3d at 725 ("Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe."). *See also FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) (absent waiver, sovereign immunity shields the government and its agencies and employees from suit); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007) (waivers of tribal sovereign immunity must be explicit and unequivocal); *United States* v. *Mitchell*, 463 U.S. 206, 212, 77 L. Ed. 2d 580, 103 S. Ct. 2961

(1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction"). Absent an effective waiver of sovereign immunity—which has not been argued—this Court has no jurisdiction.

A court, moreover, may consider the issue of sovereign immunity *sua sponte*. *See Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 873 n.2 (9th Cir. 1987) ("The effect of the Eleventh Amendment must be considered sua sponte by federal courts"); *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir. 1999) ("Eleventh Amendment sovereign immunity limits the jurisdiction of the federal courts and can be raised by a party at any time during judicial proceedings, or by the court *sua sponte*"). Similarly, where federal statutes provide that foreign states are not subject to the jurisdiction of federal courts absent an exception, this Court applies a presumption that a foreign state is immune from suit. *See Peterson v. Islamic Republic of Iran*, 627 F.3d 1117,

1123-29 (9th Cir. 2010). This presumption "is partly motivated by the fact that federal jurisdiction does not exist unless one of the exceptions to immunity from suit applies." *Id*. at 1125. Because established law holds that tribal governments are not subject to the jurisdiction of federal courts unless waiver is demonstrated, this Court should presume that sovereign immunity bars the lawsuit. Here, sovereign immunity has been properly asserted. This Court has a duty to address it and assure itself of its own jurisdiction.

Cayuga Nation v. Tanner shows that courts will not use an absence of clarity regarding tribal governance to disadvantage a tribe, but will presume authority to assert defenses to protect a tribe's interests.[48] Recall that the Second Circuit dismissed a standing objection and allowed a tribal faction to preserve the tribe's rights by bringing a lawsuit without resolving which faction represented the legitimate

[48] See Appellants' Opening Brief 59-60, citing 824 F.3d 321, 328 (2nd Cir. 2016).

government of the tribe. 824 F.3d at 328. Pursuant to *Cayuga Nation*, a tribal dispute regarding tribal governance may not be used by others as an excuse to trample tribal rights.

Rabang again attempt to coax this Court into evaluating the merits of the intra-tribal dispute, which has always been Rabang's goal. Through their "standing" argument, Rabang argue that until this Court decides the legitimacy of the Nooksack Tribal Council, the Nooksack's sovereign immunity is suppressed. This Court should reject Rabang's position. Under Ninth Circuit law, these claims are barred by sovereign immunity because Kelly are sued in their official capacities as agents of the tribe that disenrolled Rabang.

This Court should reject Rabang's so-called standing objection. Tribal sovereign immunity applies and this Court has no jurisdiction.

D. This Court Should Reverse for Lack of Subject Matter Jurisdiction Over the Intra-Tribal Dispute

Kelly also demonstrated that even if sovereign immunity

does not apply, dismissal is proper due to a lack of subject matter jurisdiction. To allow a lawsuit whose merits turn on resolving issues of tribal self-governance would be to permit an end-run around the tribal self-government exception to federal jurisdiction. Rabang encourage this Court to do so. Rabang fail to offer any authoritative support or even a rationale why this Court should.

Kelly offered analysis and authority demonstrating why this Court should not.[49] Rabang have refused to engage it. *See supra*, I.A.-B. Three of the most persuasive circuit court authorities demonstrating a lack of federal court jurisdiction are *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005), *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996), and *Demontiney v. United States*, 255 F.3d 801, 814 (9th Cir. 2001).[50] Rabang do not discuss or rebut these authorities. Kelly have fully briefed the grounds for reversal, and Rabang have not responded. Rabang's

[49] Appellants' Opening Brief 38-61.
[50] *Id.* at 56, 58.

brief digresses instead of showing that any of Kelly's authorities and analyses are wrong.

This Court and the District Court lack subject matter to resolve the internal tribal governance dispute put at issue by the RICO claims. The claims may not go forward.

II. CONCLUSION

This lawsuit attempts to bring an intra-tribal dispute to the wrong forum. Rabang's position that the BIA letters mean something relevant to jurisdiction of the federal courts is unsupported by any authority or principle. The letters have no significance here. The District Court relied on them for its exhaustion analysis, but Rabang rightly conceded that analysis is inapplicable.

This Court should enforce the well-supported principle that sovereign immunity prevents plaintiffs from suing tribes and those through whom tribes act to seek redress for tribal governmental action, as Rabang do here. Federal courts also may not resolve claims that require a merits determination of

intra-tribal government disputes, as Rabang's claim require.

This Court should reverse and direct entry of an order of dismissal.

DATED this 10th day of October, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 5,608 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is not more than the permitted 6,500 words; and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

DATED this 10th day of October, 2017.

Respectfully submitted,

By: s/ Connie Sue Martin
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of 2017, I electronically filed the foregoing **REPLY BRIEF** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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