IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

SARAH SUE CHANNING, LESTER JERRY CROW, AND WILLIAM FISHER,

Plaintiffs,

v.

SENECA-CAYUGA NATION, SENECA-CAYUGA BUSINESS COMMITTEE MEMBERS CHARLES DIEBOLD, CURT LAWRENCE, KIM GUYETT, CYNTHIA DONOHUE BAUER, AMY NUCKOLLS, HOYIT BACON, TONYA BLACKFOX AND DOES 1-10.

And

DEB HAALAND
Secretary of the Interior;

BRYAN NEWLAND
Assistant Secretary – Indian Affairs;

UNITED STATES DEPARTMENT OF THE INTERIOR

Defendants.

CASE NO.: 23-CV-00458-SH

PLAINTIFFS' RESPONSE TO TRIBAL DEFENDANTS' MOTION TO DISMISS FOR 12(b)(1) LACK OF SUBJECT MATTER JURISDICTION AND 12(b)(6) FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***page(s)***

Statutes

Regulations

COMES NOW Plaintiffs in the above-captioned case hereby file this Brief in Response to the Federal Defendants' Motion to Dismiss pursuant to FED. R. CIV P.7(a) and LCvR7-1.[1]

I. INTRODUCTION

As set forth in the Complaint, the Plaintiffs Sue Channing ("Channing"), William Fisher ("Fisher"), and Lester Jerry Crow ("Crow")[2] sought relief by Petition for *Writ of Habeas Corpus* under the Indian Civil Rights Act 25 U.S.C. § 1303 ("ICRA") against the Seneca-Cayuga Nation ("Nation"), Charles Diedold, Curt Lawrence, Kim Guyett, Cynthia Donohue Bauer, Amy Nukolls, Hoyit Bacon, Tonya Blackfox and Does 1-10 (collectively the "Tribal Defendants") seeking relief from the Tribal Defendants' imposition of unlawful restraints on the Plaintiffs. Specifically, the Plaintiffs seek relief from restraints the Tribal Defendants unlawfully imposed upon the Plaintiffs' liberty, property rights, and confinement in the form of banishment from all tribal lands and property and all tribal benefits. As the Plaintiffs allege, the Tribal Defendants' action(s) violate the ICRA and the Nation's Constitution, which expressly adopts and incorporates the ICRA and all of its protections.

The Tribal Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As to the Rule 12(b)(1) portion of their motion, the Tribal Defendants assert that the ICRA claims are matters exclusive to tribes and, therefore, the federal courts lack subject matter jurisdiction over petitions for writs of habeas corpus and actions under *Ex Parte Young* seeking prospective relief for the ongoing unlawful actions. (Doc 39, at 13). In addition, the Tribal Defendants argue that this Court lacks subject matter jurisdiction because the Plaintiffs have not exhausted their tribal remedies. (Doc. 39, at 16).

[1] Pursuant to the Court's February 14, 2024, Order (ECF Doc. 45), the page limit for this memorandum is extended to 40 pages, exclusive of table of contents and authorities.
[2] Channing, Fisher and Crow will be referred to collectively as the "Plaintiffs" where appropriate.

Under Rule 12(b)(6), the Tribal Defendants assert that the Plaintiffs have failed to state a cognizable cause of action. (Doc. 39, at 22). Specifically, they claim that banishment is not detention and can never trigger the right to petition for a writ of habeas corpus. (Doc. 39, at pp 22-23). Next, the Tribal Defendants assert that because they banished the Plaintiffs through resolutions but did not use physical force to remove them from the Nation's land and have not used force to restrain them from entering the Nation's lands, the Plaintiffs' banishment cannot constitute confinement. (Doc 39, at pp 23-24.) Finally, the Tribal Defendants claim that the Tribal Defendants did not violate the ICRA as the Plaintiffs were afforded process concerning their banishment. (Doc. 39, at pp. 2-3, 30-36). Notably, the Tribal Defendants do not address Counts VII-IX and grant their support to the Federal Defendants in representing their interest. (Doc 39, at 3, n. 2).

For the reasons set forth herein, the Tribal Defendants Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) lacks merit and should be denied.

II. STANDARDS OF REVIEW

A. Standard of Review of Motion to Dismiss 12(b)(1)

Under Rule 12(b)(1), "[t]he burden of establishing subject matter jurisdiction is on the party asserting jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citing *Kokkonen v. Guardian Life Ins. Co. Of Am.*, 511 U.S. 375, 377 (1994)). Rule 12(b)(1) motions can take the form of a facial attack, whereby "the movant merely challenges the sufficiency of the complaint, requiring the district court to accept the allegations in the complaint as true," or the form of a factual attack, whereby "the movant goes beyond the allegations in the complaint and challenges the facts upon which subject matter jurisdiction depends." *Paper, Allied–Indus., Chem. and Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005)

(citation omitted). *Lenker v. Haugrud*, No. 16-CV-0532-CVE-PJC, 2017 WL 539599, at *2 (N.D. Okla. Feb. 9, 2017). The Federal Defendants' Motion to Dismiss 12(b)(1) is a factual attack.

B. Standard of Review of Motion to Dismiss 12(b)(6)

In addition to moving to dismiss under Rule 12(b)(1), the Federal Defendants also move for dismissal under Rule 12(b)(6). Dismissal under Rule 12(b)(6) is inappropriate when a complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Under *Iqbal*, plausibility means that the plaintiff pled facts that allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. If the allegations state a plausible claim for relief, the claim survives the motion to dismiss. *Id*. at 1950.[3]

Likewise, in the Tenth Circuit, to survive a motion to dismiss, a complaint must allege facts that, if true, "state a claim to relief that is plausible on its face." *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013) (internal quotation marks omitted). A claim is facially plausible when the allegations give rise to a reasonable inference that the defendant is liable. *Id*. In reviewing a motion to dismiss, the District Courts and the Tenth Circuit accept the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016).

[3] The Tribal Defendants insinuate that the Plaintiffs' referral to Resolutions 05-060323 and 05-060521 are identified, but not otherwise included. Those Resolutions are unavailable to the Plaintiffs in their entirety, as they are retained exclusively by the Tribal Defendants. Plaintiffs anticipate the production these documents and others, like official attendance records and minutes for Tribal Defendants' meetings they put into issue in their Motion to Dismiss.

III. ARGUMENT & AUTHORITIES

A. Rule 12(b)(1) is not available to the Tribal Defendants as a grounds for dismissal.

The Tribal Defendants seek dismissal under Rule 12(b)(1) on three grounds. First, Tribal Defendants argue that the Court lacks jurisdiction because the Plaintiffs are somehow ignorant of the holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Second, the Tribal Defendants misstate the holding in *Santa Clara Pueblo* to argue that the Plaintiffs' relief under to *Ex Parte Young*, 209 U.S. 123 (1908) is unavailable. Third, the Tribal Defendants challenge the Plaintiffs' *Habeas Petition* that provides this Court with jurisdiction because that the Complaint fails to satisfy the jurisdictional prerequisites in *Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv*., 28 F.4th 1051, 1060 (10th Cir. 2022). Last, the Tribal Defendants suggest (without any support) that the Plaintiffs have failed to exhaust their tribal remedies and are not in detention because they are neither physically confined nor restrained, nor do they suffer from stoning. All of the Tribal Defendants' positions, however, fail to address that their unlawful actions depriving the Plaintiffs of their liberties were done *ex parte* and without a shred of due process.

1. 25 U.S.C. § 1303 abrogates the Nation's immunity.

Generally, common law immunity from suit is one of the core aspects of tribal sovereignty. *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788, (2014), quoting *Santa Clara Pueblo*, at 58. Accordingly, there are generally two recognized exceptions to tribal immunity: (1) when a tribe voluntarily waives its immunity and (2) where, in the exercise of its plenary authority, Congress has abrogated tribal immunity. Of course, as the Tribal Defendants concede, "[t]o abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *Santa Clara Pueblo*, at 58. Similarly, when a tribe voluntarily waives its immunity, the purported waiver must

be clear and unambiguous. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla*., 498 U.S. 505, 509, (1991).

It must be noted that Congress has rarely expressly abrogated tribal immunity. Yet, as the Tribal Defendants repeatedly acknowledge, Congress expressly abrogated tribal immunity with respect to habeas corpus when it enacted the ICRA. (Doc. 39, at pp 2, 11, 13-15). In pertinent part, the ICRA provides that "[t]he writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. That Section 1303 waives tribal immunity to writs of habeas corpus is beyond dispute. *See Santa Clara Pueblo*, at 61 ("the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one."); *id*., at 70 ("These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303."); *see also Valenzuela v. Silversmith*, 699 F.3d 1199, 1203 (10th Cir. 2012) ("tribal members have only one avenue to relief in federal court for violations of § 1302—filing a petition for writ of habeas corpus pursuant to 25 U.S.C. § 1303); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1311 (10th Cir.1984) ("The only remedy in federal courts expressly authorized by Congress in the ICRA is a writ of habeas corpus.")

Just as there is no dispute that Section 1303 waives tribal immunity to habeas corpus petitions, there is also no dispute that the Plaintiffs have petitioned the Court for a writ of habeas corpus. Indeed, the Petition explicitly alleges facts setting forth violations of the ICRA, 25 U.S.C. § 1303 (Doc. 2, ¶¶ 24-30, and ¶¶ 40-51). Specifically, the Plaintiffs allege that they have been

unlawfully detained (Doc. 2., ¶¶ 28-30, and ¶¶ 40-51), that their detention is continuing (Doc. 2, ¶¶ 89-94), and that Tribal Defendants failed to afford the Petitioners' any due process in relation to their detention. (Doc. 2, ¶¶ 40-45, and ¶ 50). Put differently, the Petitioners have unequivocally challenged the legality of the detention the Tribal Defendants have imposed upon them. (Doc. 2, ¶¶ 41-46, ¶48, and ¶ 51). Clearly, then, the Petitioners have adequately pled and exercised the privilege of the writ of habeas corpus.

The Tribal Defendants may disagree with the basis for the Petition. They may believe that their actions were not illegal, or that there is some other defense to the Petition. But that belief does not negate the propriety of the Petition because beliefs are not facts. To the contrary, the facts the Petitioners have alleged—facts that must be taken as true at this stage of the proceedings—establish their right to pursue their claims and their entitlement to relief.

2. *Ex Parte Young* is available to the Plaintiffs.

In an effort to shield the individual tribal officials, the Tribal Defendants suggest that tribal officials are always immune from suit as to claims brought against them for actions taken within their official capacities. (Doc 39, at 12-16), citing *Lewis v. Clarke*, 581 U.S. 155, 162 (2017) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165–166, (1985)). Additionally, the Tribal Defendants suggest that "[t]he ICRA forecloses 'actions for declaratory or injunctive relief against either [a] tribe or its officers—including claims styles as *Ex Parte Young* claims.'" (Doc. 39, at 13), citing *Santa Clara Pueblo*, 436 U.S. at 59, 72.

The Tribal Defendants' position is patently wrong. Contrary to their claim that *Santa Clara Pueblo* suggested that the ICRA foreclosed actions against tribal officials under *Ex Parte Young*, that case establishes the opposite. The Respondents in *Santa Clara Pueblo* were a female member of the tribe and her daughter who brought a limited suit seeking declaratory and injunctive relief

against Santa Clara Pueblo tribe and its Governor, Lucario Padilla, in federal court *only* for an alleged violation of 25 U.S.C. § 1302 (8). While the Court ultimately held that the provisions of 25 U.S.C. § 1302 may not be enforced as a private right of action in federal Court, *Santa Clara Pueblo* explicitly held that "[a]s an officer of the Pueblo, petitioner Lucario Padilla [the Santa Clara Pueblo Governor] is not protected by the tribe's immunity from suit." *Santa Clara Pueblo* at 59; *see also Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, at 171–172, (1977); cf. *Ex parte Young*, 209 U.S. 123 (1908)." To be sure, the Supreme Court addressed this exact point in *Bay Mills*, explaining that "[a]s this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Bay Mills*, at 796 (citing *Santa Clara Pueblo*, 436 U.S., at 59). Even *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011), a case the Tribal Defendants cite for their proposition (Doc 39, at 13), provides that the 10th Circuit "expressly recognize[es] *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity[,]" and makes clear that *Ex Parte Young* provides a basis for seeking relief from the ongoing unlawful conduct of tribal officials.

a) 25 U.S.C. § 1303 Provides the Necessary Basis for Relief

Continuing their effort to avoid liability for their actions, the Tribal Defendants argue that even if *Ex Parte Young* is available under *Santa Clara Pueblo*, the Plaintiffs failed to meet the required pleading standards. (Doc 39, at 13 fn.5). Specifically, circling back to their (mis)understanding of *Santa Clara Pueblo*, the Tribal Defendants argue that the Plaintiffs cannot meet the pleading requirements for an *Ex Parte Young* action because *Santa Clara Pueblo* expressly forecloses a private right of action against tribal officials. *Id.*

However, as discussed above, *Santa Clara* and *Bay Mills* torpedo that argument because both expressly recognize the propriety of seeking declaratory and injunctive relief against tribal officials for the ongoing violations of law. *Santa Clara Pueblo, at* 60 ("Although Congress clearly has the power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in § 1303[.]"); *Bay Mills*, at 796 ("tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct."). And critically, the Seneca-Cayuga Nation's Constitution incorporates the ICRA (Article XII), providing an explicit basis for the Plaintiff's claims. ("No member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States, including, but not limited to, freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law.") (Doc. 2-2, p 3). Furthermore, this inclusion is made without limitation to a tribal court of the Nation for review,—which does not exist in this case anyway. Further still, as the Supreme Court explained, when faced with an *Ex Parte Young* claim a court is to "conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002)." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1155 (10th Cir. 2011). If the claim meets this standard, it is proper and actionable. This case easily meets that standard.

b) The Tribal Defendants Who Passed the Resolutions are the Same as those Enforcing them.

The Tribal Defendants also assert that the Petitioners have not properly pled an *Ex Parte Young* claim because they do not allege that the individual tribal officials are responsible for enforcing the unlawful order they drafted. Specifically, the Tribal Defendants assert that they merely had some role in passing the unlawful orders but have not enforced the unlawful orders.

Doc. 39, at 13 fn. 5. This, the Tribal Defendants assert, renders the Petition ineffective under *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007). Incredulously, the Tribal Defendants are arguing, "no blood, no foul."

Yet, there is no question that the Tribal Defendants proposed and adopted the tribal orders, in the form of tribal resolutions, expressly banishing Channing and effectively banishing Crow and Fisher for indefinite periods of time. To be sure, it was the Tribal Defendants that acted to *reinstate* Resolution 02-062108 – forever banished Channing without due process and for the alleged actions of an entirely different person – and that adopted Resolution 025-072721 that stripped the Petitioners of their rights and indefinitely banished Channing, Crow, and Fisher. No one else is responsible for these acts.

More important than whether the Tribal Defendants proposed and adopted the unlawful orders, there is no question that the Tribal Defendants are *the* tribal officials charged with enforcing those unlawful orders. Indeed, the Nation's Constitution places that obligation squarely on the shoulders of these defendants. Article VI of the Nation's Constitution provides that "[t]he Business Committee shall have power to transact business and otherwise speak or act on behalf of the Seneca-Cayuga Nation in all matters on which the Nation is empowered to act.") (Doc. 2, at ¶ 13). And, as alleged in the Complaint, the Tribal Defendants are enforcing their unlawful orders. Examples of the enforcement are the Gaming Commissioner providing the banishment documents and informing Plaintiff Channing of the ongoing banishment by the actions of the Tribal Defendants (who hold governmental authority over the Gaming Commissioner). (Doc. 2, at ¶ 44); Defendant Diebold informing Plaintiff Channing that she should not personally provide the renewal documents for her vehicle tags but that she should mail them in. (Doc. 2, at ¶ 46); The Tribal Defendants issuing letters informing the Plaintiffs Channing, Crow, and Fisher of their

indefinite banishments and withholding of benefits, which are still unavailable to the Plaintiffs to date. (Doc. 2 at ¶¶ 49-50). Additionally, the referenced investigation that the Tribal Defendants used as a justification to support the indefinite banishments continues for nearly three years with no intentional end.

Much like the 10th Circuit found in *Prairie Band Potawatomi Nation*, the Tribal Defendants assertion rests on faulty reasoning. ("We are similarly unimpressed with Defendants' circular argument that § 8–138a is "unenforceable" because the statute does not contain any specific language stating how it is to be enforced. (*See* Appellants' Br. at 53–56.) Obviously, § 8–138a has been enforced through § 8–142 in that three citations have been issued to tribally tagged motor vehicles. ") *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828, fn.16 (10th Cir. 2007). Here, the Tribal Defendants have passed the unlawful Resolutions, are currently enforcing them, and in doing so, exercised the Nation's powers of self-government to violate and continue to violate 25 U.S.C. §§ 1303.

As a practical matter, the Tribal Defendants' act of adopting the offending resolutions belies any claim that there is no intention to enforce them. But, if it is, as the Tribal Defendants seem to claim now, that the offending resolutions were not intended to be enforced, it begs three critical questions: (1) Why were the resolutions enacted in the first instance; (2) why did the Tribal Defendants send letters to the Petitioners' announcing they have been stripped of all benefits; and (3) why have the Tribal Defendants not rescinded the resolutions and letters? The simple truth is that the Tribal Defendants intend to fully enforce every unlawful sanction they have imposed on the Petitioners. Of course, if the Tribal Defendants have no intent to enforce the offending orders and are willing to enter into a stipulated judgment to that effect, then the parties can quickly and easily resolve this matter. Assuming, however, that the Tribal Defendants are unwilling to take the

more reasonable approach, an action pursuant to *Ex Parte Young* is appropriate, and the Petitioners have properly sought relief against the Tribal Defendants to enjoin their continuing and ongoing violations of federal statutory law under 25 U.S.C. § 1302 [and] their unlawful detention as challenged under § 1303.

3. Exhaustion Requirements under *Chegup* have been satisfied by the Plaintiffs and they are detained so as to grant this Court jurisdiction.

In their final effort to avoid review of their unlawful actions under Rule 12(b)(1), the Tribal Defendants assert that the Petitioners have failed to satisfy the requirements for a habeas corpus petition established in *Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv*., 28 F.4th 1051, 1060 (10th Cir. 2022), which requires "[a]ll federal courts addressing the issue mandate that two prerequisites be satisfied before they will hear a habeas petition filed under ICRA: [t]he petitioner must be in custody, and the petitioner must first exhaust tribal remedies." *Id.*, at 1061 (citations omitted). The Tribal Defendants assert that the Petitioners fail to satisfy either of the *Chegup* requirements. (Doc. 39, pp 16-21). The Tribal Defendants are wrong.

a) Plaintiffs have exhausted all Tribal Remedies.

Tribal exhaustion is "a 'prudential rule,' based on comity." *Chegup*, at 1060 (citations omitted.). As the Tribal Defendants contend, tribal exhaustion serves to preserve tribal sovereignty. The 10th Circuit has added that "[i]n addition, to adhere to the principles of *Santa Clara Pueblo,* the aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility. This is not merely a requirement that the exhaustion of tribal remedies is a prerequisite to federal jurisdiction, but instead, that tribal remedies, if existent, are exclusive." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). *White* makes it clear that in order to exhaust the tribal remedies, they have to exist. The Supreme Court has added that "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the

opportunity to review the determinations of the lower tribal courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). The law, however, does not require the Plaintiffs to create a tribal remedy out of whole cloth as the Tribal Defendants would have them do here.

i. Tribal Council & Grievance Committee are unavailable for want to judicial power.

In arguing that the Plaintiffs have failed to exhaust their tribal remedies, the Tribal Defendants suggest that the Nation's General Council and Grievance Committee were proper tribal forums in which the Plaintiffs could have and should have sought relief. However, nothing in the Nation's Constitution supplies the General Council or the Grievance Committee with the authority to address the Plaintiffs' claims and provide them with any relief.

Neither the original Resolution 02-062108 (originally passed in 2008) nor Resolution 30-040621 mentions that tribal members sanctioned under that ordinance may ask the General Council for reconsideration of the sanctions imposed on them. The *only* notion of this notice is the letter from one of Tribal Defendants, Kim Guyett, sent to Plaintiff Channing's husband (not to her), informing *him* that *he* is banished, with a highlighted portion and sentence that draws attention to the application to tribal member spouse(s). Nothing in any of the Resolutions related to the Defendants (or the communications sent to them directly) informs them of a General Council option for relief. But even if the Tribal Defendants intended Resolution 30-040621 to provide that the sanction instituted under it could be brought to the General Council, it did not provide how such petitions could be made or how they could be made promptly to avoid the inherent negative impacts of the Tribal Defendants' actions. While the Nation's Constitution at Art. XII provides that "[n]o member shall be denied … the right to petition for action or the redress of grievances," it does not limit the Plaintiffs to the General Council. Indeed, an interpretation of this Article in particular appears to provide a waiver of the Nation's immunity for this action itself.

Moreover, it is unlikely that the Plaintiffs could have obtained any meaningful review in a timely fashion. Under the Nation's Constitution, the General Council meets *only* once a year and then only *if* a quorum is established. (Nation's Constitution at Art. IV, § 2, Art. VIII). In 2022, the next General Council meeting after the Tribal Defendants adopted Resolution 30-040621 did not occur because the quorum requirements were unmet. (Doc. 2-13, at 2). This begs the question: if the General Council does not meet, and under the Constitution is prohibited from meeting, how are the Plaintiffs to bring their claims before the General Council? How also can Plaintiffs reconcile when they are instructed that they are banished but have to make their own interpretation on whether to attempt to breach that instruction in order to seek relief?

Even more, to the extent that the Tribal Defendants demand that the Plaintiffs put their claims for relief before the General Council, it cannot equitably do so, because the Tribal Defendants and General Council are the actors who have passed these Resolutions against the Plaintiffs banishing them. Additionally, the Tribal Defendants demand as much while the General Council would simultaneously act in the position of the prosecutor and the judge as to each challenge. Such a situation establishes a system so inherently unfair that it violates due process. *See Wounded Knee v. Andera*, 416 F. Supp. 1236, 1241 (D.S.D. 1976) (granting petition for writ of habeas corpus where petitioner was to serve five-day jail sentence; concluding that system in which tribal judge acts in dual capacity as prosecutor and judge is inherently violative of due process); *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 892 (2d Cir. 1996). In such a system, requiring the Plaintiffs to exhaust questionably and inherently inequitable remedies is unreasonable.

Just as the General Council is not a reasonable venue in which the Plaintiffs could seek relief from the Tribal Defendants' unlawful action, the Grievance Committee of the Nation is

equally an unreasonable option. Indeed, the Grievance Committee is even less of an option than the General Council. Significantly, the Committee has previously acknowledged that it is unavailable to interpret the Constitution on the actions of the Tribal Defendants. *Mott v. Fisher*, Seneca-Cayuga Grievance Committee (Jan. 29, 2016). ("The Nation has no Supreme Court to sort out Constitutional interpretations. The Constitution does not grant the Grievance Committee the power to interpret its articles and clauses. The only way to resolve conflicts within the Constitution is to amend the document, which requires prior approval by the BIA and passage by the General Council, all of which must be done in accordance with a strictly proscribed procedure."). *See* Fisher Declaration in Support of Response to Tribal Defendants Motion to Dismiss, Exh. 2. Thus, because the Grievance Committee, by its own interpretation of its authority, has no power to review the Plaintiffs' claims and provide them with relief, it cannot then be considered an available tribal forum qualified to entertain the Plaintiffs claims. "That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies. That ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of habeas corpus." *Wounded Knee*, at 1239 (D.S.D. 1976).

ii. The Court of Indian Offenses is not a proper forum for Habeas Corpus.

In addition to claiming that the Plaintiffs had internal tribal remedies available to them, the Tribal Defendants also claim that the Plaintiffs were required to seek relief and exhaust remedies available to them before the Court of Indian Offenses. (Doc. 39, at 19-20). Noting that the 10th Circuit recognized that Courts of Indian Offenses operate as tribal courts, the Tribal Defendants contend that the "Plaintiffs cannot brush this forum aside just because they want a shortcut to federal court." (Doc. 39, at 19) (citing *Tillet v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991)).

While the Tribal Defendants' assertion that Courts of Indian Offenses operate as tribal courts is accurate, their suggestion that the Court of Indian Offenses is a court of general jurisdiction having authority to hear any and every case presented to it is not. The jurisdictional limitations of Courts of Indian Offenses are set forth in 25 C.F.R. § 11.118. Under section 11.118, jurisdiction does not extend to suits against a tribe unless a tribal resolution expressly grants such jurisdiction to the Court *and* the resolution waives tribal immunity. Moreover, nothing in the regulations governing Courts of Indian Offenses purports to give them jurisdiction over habeas corpus petitions arising from the actions of Tribes or tribal officials.

Here, the Nation's resolution authorizing the Court of Indian Offenses to operate as a tribal court does not give the Court of Indian Offenses such authority. (*See* Fisher Declaration in Support of Response to Tribal Defendants Motion to Dismiss, Exh. 1). In fact, Resolution 69-060212 limits the authority of the Court of Indian Offenses to hear "governmental disputes," including election disputes. *Id.* A petition for writ of habeas corpus is not a "governmental dispute" that is, as presented by this action, a challenge to the legality of the Nation's application of its laws. Instead, habeas is a personal remedy that does not challenge the legitimacy of the government, it does not challenge membership or enrollment, nor does it challenge the results of an election. Habeas corpus is limited to evaluating whether the confinement imposed on a petitioner is legal under laws existing at the time of the confinement. Consequently, a habeas corpus petition arising from something other than a Court of Indian Offenses criminal actions, does not fall within the civil jurisdiction of those courts.

iii. The Futility exception is available to the Plaintiffs.

"As a prudential rule based on comity, the exhaustion rule is not without exception." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011). "We have recognized that

exhaustion of tribal remedies is unnecessary '(1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the tribal court action is patently violative of express jurisdictional prohibitions; (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; (4) when it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by the main rule established in *Montana v. United States*, 450 U.S. 544 (1981); or (5) it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay.'" *Norton v. Ute Indian Tribe of the Uintah & Ouray Rsrv*., 862 F.3d 1236, 1243 (10th Cir. 2017) (alteration omitted) (quoting *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006))." *Chegup*, at 1061.

Here, the futility exception applies to each of the "tribal forums" the Tribal Defendants propose because none of them have the authority to hear and adjudicate the Plaintiffs' habeas corpus petition. As explained immediately above, it would have been futile because none of the forums in which the Tribal Defendants suggest the Plaintiffs needed to bring this case has jurisdictional authority to hear and decide the Plaintiffs' claims. "If a tribal remedy in theory is non-existent in fact or at best inadequate, it might not need to be exhausted." *Wounded Knee v. Andera*, 416 F. Supp. 1236, 1239 (D.S.D. 1976) (quoting *Schantz v. White Lightning*, 502 F.2d 67, at 70 n. 6. (8th Cir. 1974)). The Tribal Defendants' demand that the Plaintiffs first present their claims to the Court of Indian Offenses, the General Council, or the Nation's Grievance Committee is nothing more than a bad faith attempt to harass the Plaintiffs. In short, the Plaintiffs have exhausted their *tribal* remedies, this Court has jurisdiction, and the Tribal Defendants Motion must be dismissed.

///

b) The Plaintiffs are in Detention.

In addition to their other arguments, the Tribal Defendants claim that the Plaintiffs have not properly established jurisdiction under 25 U.S.C. § 1303 because they have not adequately alleged they are under detention. (Doc. 39 at 22). In so doing, the Tribal Defendants suggest that banishment can never constitute detention because that particular sanction does not include an element of physical force. (Doc. 39, at 26).

i. Banishment is for this Court to Decide.

The 10th Circuit has not definitively decided whether banishment, permanent or temporary, constitutes detention for purposes of a habeas corpus petition. Nor has it had the opportunity. *Oviatt* and *Chegup*, arguably the most relevant 10th Circuit decisions, involved petitioners who failed to exhaust tribal remedies and focused only on temporary banishment. *Oviatt v. Reynolds*, 733 F. App'x 929 (10th Cir. 2018); *Chegup*, at 1067. In *Oviatt*, Petitioners, who were only lay advocates and not tribal members, did not exhaust tribal remedies and did not raise the banishment argument at the district court level. They only asserted banishment on appeal. However, the 10th Circuit rejected their claims because the Petitioners were not detained or banished at the time of filing their habeas and because, at most, they were only from certain tribal administrative buildings. *Oviatt*, at 932. That minimal restriction, the 10th Circuit found, did not constitute a permanent banishment sufficient to support review. *Id.*

In *Chegup*, the 10th Circuit directly reviewed a district court's decision that temporary banishment did not qualify as detention under the ICRA. It ultimately reversed the district court, stating that the temporary banishment at issue was detention for purposes of the ICRA habeas provision. *Chegup*, at 1071. However, instead of making a definitive determination, the court provided guidance on approaching banishment as detention. The Court acknowledges the complex

conceptual questions surrounding banishment, including the relationship between "detention" under ICRA and "custody" under federal case law. The court also highlighted the challenges between temporary and permanent banishment and determining whether banishment from one area could constitute confinement. In noting the challenges, the court emphasized the federal courts' duty to address these unresolved legal issues rather than shying away from them. *Chegup*, 1067.

ii. The Plaintiffs have alleged a Colorable Basis for detention.

The 10th Circuit interprets "detention" based on whether individuals face a severe actual or potential restraint on liberty at the time of filing their habeas. *Oviatt*, at 932 ("We consider the plaintiffs "detained" only if they were subject at the time to "a severe actual or potential restraint on liberty."). In this case, the Plaintiffs were, at the time of filing and continue to be, *subject to* the Tribal Defendants' banishment actions that restrain their liberty. Critically, all of the deprivations of liberty suffered by the Plaintiffs occurred without due process. Moreover, the banishment(s) at issue here are not temporary.

The Plaintiffs' Complaint establishes their detention in two instances. First, Plaintiff Channing is detained by Tribal Defendants Resolution 30-040621, permanently banishing her from all Tribal lands and properties based on her marriage. (Doc. 2, ¶ 40). The Tribal Defendants do not, and cannot, contest this. In the second instance, all three Plaintiffs are detained by Tribal Defendants Resolution 025-072721, as "authorized" by General Council Resolution 05-060521. (Doc. 2, ¶¶ 49-50). This Resolution imposes actual, immediate, and now permanent restraints by revoking "all Tribal Benefits" from the Plaintiffs. While the Tribal Defendants try to characterize this restraint as temporary, pending the outcome of an investigation into the Plaintiffs' alleged wrongdoing, the restraint is effectively permanent in that the investigation began over three years ago, with little or no progress, and is not subject to time limitation. Moreover, the restraint is

expansive because the offending Resolution explicitly denies the Plaintiffs **all** benefits and services available to other members as a matter of right.

The Tribal Defendants refer to *Poodry* and *Shenandoah* to argue the absence of physical restraint or ejection; this is flawed logic. They suggest that Plaintiffs who live away from the reservation are not affected by the restraints placed upon them because they have not attempted to enter upon any Tribal property to test the methods the Tribal Defendants might use to enforce their undenied banishment. Additionally, they contend that as members living remote from the reservation, the Plaintiffs, in a theoretical sense, are not being denied services one must be present to receive. This, of course, is an argument of convenience that holds little substance as the banishment from tribal property and services is undeniably in effect and attaches to the Plaintiffs irrespective of their location. Furthermore, it prohibits them from living on the reservation or traveling to the reservation to take advantage of any of the denied services and benefits.

It is undeniable that the Plaintiffs have been unjustly expelled from Tribal lands. To assert otherwise is risible. Are the Tribal defendants suggesting that the Plaintiffs are required to risk their health and safety should the Plaintiffs try to access tribal property to test how the Tribal Defendants may attempt to enforce their banishment? That is not only nonsensical, but it is clearly not a requirement of *Poodry* or *Shanandoah*. In short, the Plaintiffs have exhausted their tribal remedies. Therefore, following *Chegup's* guidance, this Court should find that the Plaintiffs' permanent banishment constitutes detention under 25 U.S.C. § 1303 and grant the Writ of Habeas Corpus.

B. Rule 12(b)(6) is not available to the Tribal Defendants as a grounds for dismissal because the Plaintiffs have adequately stated sufficient facts against the Tribal Defendants to support their Habeas Petition and Claims for Relief.

Besides seeking dismissal under Rule 12(b)(1), the Tribal Defendants also seek dismissal under Rule 12(b)(6). The Tribal Defendants generally assert that the Plaintiffs have pled only conclusory allegation without adequate specificity as to the unlawful nature of the Tribal Defendants' actions. They delineate numerous key contentions. First, they claim that from a factual standpoint, the Resolutions at issue are not legislative acts and, therefore, cannot constitute bills of attainder or ex post facto laws. Second, the Tribal Defendants express their view that tribal banishment serves the public interest and, therefore, cannot be considered punitive. Third, they assert that the banishment aligns with legal provisions and was not imposed without a trial. Fourth, they claim the Plaintiffs have not adequately alleged the deprivation of procedural rights, double jeopardy, and their takings claims. For the reasons discussed below, the Tribal Defendants' Rule 12(b)(6) arguments miss the mark.

1. Plaintiffs have adequately alleged that the Tribal Defendants have violated the Indian Civil Rights Act.

The Nation's Constitution at Article XII provides:

> "[a]ll members of the Seneca-Cayuga Nation shall be accorded equal protection of the law under this constitution No member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States, including, but not limited to, freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77), against actions of an Indian entity in the exercise of its powers of self-government shall apply to the members of the Seneca-Cayuga Nation."

The Indian Civil Rights Act at 25 U.S.C. § 1302 establishes ten basic protections against activities of Indian tribes in exercising their powers of self-government. The Plaintiffs allege violations of at least six of those protections by the Tribal Defendants. (Doc. 2, at pp 26-33).

2. The Resolutions are [the] governing documents available to tribes; therefore, they are bills of attainder and ex post facto laws.

The Oklahoma Indian Welfare Act, 49 Stat. 1967 (June 26, 1936) provides, "[a]ny recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe." A tribe organized under this law may also, "enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984)[.]" 25 U.S.C.A. § 5203. The Act of 1934 (as amended), codified at 25 U.S.C. § 5123, provides at subsection (e), "all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments[;]" and at (h)(1), "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section[.]"

The Nation adopted its Constitution under the Oklahoma Indian Welfare Act which was approved by the Secretary of the Interior on April 26, 1937. (Doc. 2, at ¶ 54). Under the Constitution, the Tribal Defendants function as the governmental body of the Nation, wielding delegated powers from the Constitution to operate both legislatively and executively. (Doc. 2-2, at pp 1-2; Art. IV, Art. VI). Curiously, in their motion to dismiss, the Tribal Defendants seem to suggest that the Resolutions they executed through their constitutional authority somehow do not constitute legislative acts. Federal Regulations, however, concretely categorize these resolutions as legislative and fundamental to trial laws. For example, 25 C.F.R. § 290.2 provides that a resolution is defined as the formal document expressing the legislative will of the tribal governing

body. Similarly, 25 C.F.R. § 162.003 defines tribal authorization as a duly adopted tribal resolution, ordinance, or other tribal document authorizing a specific action.

The facts and the documents are plain to place the Tribal Defendants on notice. The Tribal Defendants passed these resolutions by a majority vote pursuant to the Nation's Constitution, at Articles VI and VIII, and did so at their regularly held General Council meetings and Business Committee meetings provided for in the Constitution, at Bylaws, Article III. Resolution 02-062108 was originally passed on June 21, 2008, at the Nation's General Council meeting. (Doc. 2 ¶¶ 24-29); Resolution 30-040621 that reinstated Resolution 02-062108 was passed pursuant to a Business Committee Meeting on April 6, 2021 (Doc. 2 ¶ 40); Resolution 05-060521 authorizing an investigation against the Plaintiffs to take place, not banishing or withholding benefits, was passed on June 5, 2021 (Doc. 2. ¶ 48); Resolution 025-072721 initiating the banishment and withholding of benefits was passed pursuant to a Business Committee Meeting, Doc. 2 ¶ 49). The minutes available to the Plaintiffs reflect that the Tribal Defendants passed other resolutions with legal effect to express the legal will of the Nation. (Doc. 2-3). The Complaint at ¶¶ 30 and 33 supports that the General Council acted beyond its constitutional authority in enacting Resolution 02-062108.

Furthermore, the Complaint reveals that the actions at issue by the Tribal Defendants in enacting Resolution 30-040621 and Resolution 025-072721 would also support that the Tribal Defendants are not protected by sovereign immunity because they acted beyond the scope of their duties. "An Indian tribe's "sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 n. 1 (10th Cir.1984); *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006). The letter regarding Resolution 30-040621,

provides that the General Council only gave the authorization to contact an investigator to perform an audit – nothing about withholding benefits. (Doc. 2-11).

Any assertion by the Tribal Defendants that the actions it took in its legislative capacity are mere pieces of paper with no legal consequence is patently unreasonable. Whether the Tribal Defendants acted with authority may be an issue for this Court to determine, but it is clear either way that the Tribal Defendants did act, and the effect is realized as intended. If, indeed, tribal resolutions do not constitute legislative acts, then every resolution the Tribal Defendants' have passed is meaningless, and has no legal effect, including those imposing punishment on the Plaintiffs, as well as those purporting to amend the Nation's Constitution and altering the Nation's form of government.

3. Tribal banishment was not made in the interest of public safety.

The inherent sovereignty of the Nation does include the right to exclude, especially in the case of non-members, those who may enter upon the consent of the Nation. "Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). However, when the Nation's Bill of Rights in its Constitution makes clear that "[a]ll members of the Seneca-Cayuga Nation shall be accorded equal protection of the law under this constitution," that all of its members – including the Plaintiffs here – are afforded due process before excluding them from the reservation. (Doc. 2-2, at 3, Art. XII)

Tribal Defendants make a threadbare assertion that the purpose of the Resolutions is not punitive but rather protective of the Nation—as if this were somehow a civil liability holding imposed against the Plaintiffs. But even civil litigants get notice. The Tribal Defendants, however, make no showing of the need for protection to support their exclusions or actions. They rely on the language in Resolution 025-072721 that the Tribal Defendants' "finding it is in the best interest of the tribe" to not make any payments and withhold all tribal benefits pending an investigation. (Doc. 2-11). Similarly, the Tribal Defendants Resolution 30-040621 invites a constitutional interpretation it cannot resolve in reinstating Resolution 02-062108. (Doc. 2-10, at 2). While Resolution 02-062108 states that "certain non-tribal members and former employees have acted in detriment to the Tribe and its members[,]" it does not provide a basis of support for the conclusions, or why Plaintiff Channing, as a spouse, would be included. (Doc. 2-10, at pp 8-9). These Resolutions are by themselves conclusory; however, they are the only documents that tell the Plaintiffs that they are banished. Additionally, none of the Resolutions reveal a hearing, a law to support a conclusion of violation, rights of appeal, or any due process.

Perhaps discovery may reveal that the Nation needs protection from the Tribal Defendants. The facts and allegations of the Plaintiffs' Complaint provide that the Tribal Defendants have taken legal action to deprive them of their liberties without due process and unlawfully banish them because they do not like the Plaintiffs, and they do not like what the Plaintiffs had discovered regarding the Nation's enrollment. In reaction to the Plaintiffs' findings, the Tribal Defendants have usurped authority and passed unlawful Resolutions against targeted members of the Nation, including the Plaintiffs.

4. The punishment at issue here goes beyond what was provided by the law, or lack thereof, and was imposed without trial.

"Procedural due process requires fair notice that conduct is prohibited and, prior to a deprivation, meaningful notice and opportunity to be heard.… First, due process requires the government to 'give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden' before withdrawing a benefit." *United States v. Richter*, 796 F.3d 1173, 1188 (10th Cir. 2015) (internal quotation marks omitted). "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012). "Due process requires fair notice for two reasons. First, regulated parties need to know what is required of them so they may act accordingly. *Id*. Second, it prevents officers or agencies who enforce the law from acting in an arbitrary or discriminatory manner. *Id*." *Blanca Tel. Co. v. Fed. Commc'ns Comm'n*, 991 F.3d 1097, 1116 (10th Cir. 2021)

As provided above in review of the contents of the Resolutions, *supra*, the Tribal Defendants provided no notice at all in passing a series of Resolutions (without any basis or citation to a single law) solely to punish the Plaintiffs. There is nothing that the record reveals or that the Tribal Defendants establish in their motion to dismiss, that the Tribal Defendants provide a hearing, interviews, examinations of witnesses, production of evidence, service of documents, appellate rights – nothing. The common element of 'fair notice' is obsolete.

These are not mere conclusory allegations that the Plaintiffs have been deprived of their rights and liberties without due process. There is no due process because a lack of fair and adequate notice that deprived the Plaintiffs of their rights and liberties. Notably, the Tribal Defendants cannot point to any law to defend their unlawful actions. In short, the Tribal Defendants' irrational

logic is: since we have accused you, you are guilty, and we can punish you. Their 'tribal law and customs' is not cover for their unlawful actions. Rather, all of this reeks of bad faith.

5. Tribal Defendants Failed to Provide Due Process

The Indian Civil Rights Act includes the requirement of due process of law. 25 U.S.C. § 1302(a)(8). The Nation has adopted and incorporated due process of law into its Constitution at Art. XII. (Doc. 2-2, p 3). The inclusion of this Bill of Rights in the Constitution also extends and applies the rights or guarantees enjoyed by citizens under the Constitution of the United States, which would include the 5th and 14th Amendments. Due process here required actual and adequate notice—not token or constructive notice. Furthermore, it required an opportunity to present a defense *prior* to the actions of the Tribal Defendants. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950). The Supreme Court has described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original); *see Bell v. Burson*, 402 U.S. 535, 542 (1971). At a minimum, this principle requires "some kind of a hearing." *Board of Regents v. Roth*, 408 U.S., at 569–570 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599 (1972)." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

The Plaintiffs cannot invent due process that does not exist for the Tribal Defendants. As provided above, there was no notice and no hearing here. The original failure of the Tribal Defendants occurred in 2008 when Plaintiff Channing was first banished by Resolution 02-062108, and the Tribal Defendants failed to provide due process because there, like here, there

was no notice and there was no hearing before the action was taken. (Doc 2 ¶¶ 28-29). The Resolution 02-062108 passage was so extreme that the Tribal Defendants asked for a legal opinion after the fact on the matter, and it instructed them of their failings – including the lack of due process. (Doc. 2 ¶ 30). Aware that Resolution 02-062108 was still in effect in 2014, Plaintiff Fisher asked the Nation's counsel to review, and he agreed with the recommendation to rescind Resolution 02-062108. (Doc. 2 ¶ 33). They did so the following day. (Doc. 2 ¶ 34).

The more recent banishment Resolutions operate in the same manner. Plaintiff Channing had to investigate and construct her notice through third parties to determine that she was banished by Resolution 30-040621. (Doc. 2, at ¶¶ 41-42; Doc. 2-9). When she questioned Defendant Diebold about it, he lied. (Doc. 2, at ¶¶ 45-46; Doc. 2-9, at pp 2-3). Knowing they fail miserably on this point, the Tribal Defendants cite to the Complaint (Doc. 2, at ¶ 52) highlighting a letter sent from the Tribal Defendants that conveys a tribal exhaustion option through a message that "any tribal member sanctioned under this resolution are able to address the General Counsel on their own behalf to ask for reconsideration of the sanctions placed upon them." The Tribal Defendants maintain that this inclusion is their panacea. But the Resolution at issue there was 02-062108, which was previously rescinded and did not reference the active Resolution 30-040621, which reinstated it. The final perfunctory action of the Tribal Defendants did not come to Plaintiff Channing directly, but rather to her husband, where it informed *him* that he was banished again and a sentence of application to his tribal member spouse. The letter does not even specifically name Plaintiff Channing. (Doc. 2-12).

Tribal Defendants also attempt to rely on the insinuation that notice was given to the Plaintiffs informing them of their punishment as if somehow that was an admission in the Complaint. To be clear, the only notice to date that has been given to the Plaintiffs is that they are

banished, and their liberties have been restrained by the Resolutions of the Defendants without due process of law or right to appeal. The notice regarding Resolution 25-072721 that the Plaintiff received is also devoid of any due process – it only tells them that they are punished. (Doc. 2, at ¶50; Doc. 2-11). Neither the letter nor the Resolutions informs the Plaintiffs of a timeline for the investigation, any rights to defend themselves, request for information or appearance, does not mention a hearing, nor does the letter provide what penalties the Plaintiffs and others could face if found to have committed the alleged conduct, where to seek relief and/or rights for appeal. (Doc. 2, at ¶50).

Tribal Defendants go on to attack the legal memoranda provided by their own legal counsel, advising them that the actions taken in 2008 were unlawful and violative of the Indian Civil Rights Act. The fact that the Tribal Defendants themselves attached the memoranda as exhibits to the Resolutions they passed only further establishes their bad faith and frivolous behavior. (Doc. 2, ¶ 33).[4] Finally, they actually suggest that there were proceedings that led to the Tribal Defendants Resolutions and subsequent letters. This argument does not hold water either because a "proceeding is fundamentally unfair under the Due Process Clause if it is 'shocking to the universal sense of justice.'" *United States v. Russell*, 411 U.S. 423, 432 (1973). *Becker v. Cline*, No. 15-3036-JTM, 2016 WL 4141438, at *9 (D. Kan. Aug. 4, 2016). The Tribal Defendants' actions are, at a minimum, "shocking."

6. Plaintiffs have suffered Double Jeopardy

Plaintiff Channing suffers double jeopardy here in that by passing Resolution 025-072721 and restraining her liberties without due process, the Tribal Defendants have reinstated the previously rescinded Resolution 02-062108, where she was also restrained without due process.

[4] The notion that there is somehow an "unauthorized disclosure" as a basis for actions taken by the General Council is unfounded. There was no basis for the Tribal Defendants' actions in the first place.

Another way of putting this is that there may not have been a proceeding, civil or criminal, but there was certainly a punishment. (Doc. 2, ¶ 40). The Tribal Defendants hide that under the rug and parade this is as being akin to a reinstatement of a guilty verdict and that this is only a mere continuation of prior proceedings. (Doc. 39, at 35). Their included cases give them no support, like all of the others in their motion, because the parties in those cases were afforded ample due process and an opportunity to appeal their detentions. More importantly their rationale gives them no support in that they use the previously rescinded and reinstated Resolution 02-062108 as a mechanism to say that it is just a continuation of the first banishment proceedings. Fatally, there were no banishment proceedings in the original matter. (Doc. 2, ¶¶ 28-29).

Regarding Resolution 025-072721, all of the plaintiffs are punished without due process. Based on the behavior of the Tribal Defendants, it is more likely than not that the Tribal Defendants will abuse a judicial system of their own creation to continue to punish the Plaintiffs without any cause or due process. Plaintiffs voluntarily strike the paragraph ¶ 111, in Doc. 2.

7. The Nation's Constitution Protects the Plaintiffs from Unlawful Takings.

By their sheer existence and recognized lawful enrollment in the Nation, the Plaintiffs are entitled to all benefits, programs, payments, services, property, and other available opportunities enjoyed by the Nation's tribal members, and they are all protected by the Nation's Constitution at Article XII. To claim otherwise is truly arbitrary. While there is no price that can be placed on one's ability to participate in their own government, discovery will reveal the exact financially related services and benefits and an exact amount of the financial takings. Presently, the services that the Plaintiffs were and are entitled to are Eldercare, Dental, Glasses, Hearing, Meal and Food Distribution, Health & Fitness, and Death benefits in the event of passing. The total amount related to these services are allocated through personal accounts that have been seized by the Tribal

Defendants and are believed to be in the minimum estimated amount of $7,250.00 annually per individual elder, which all of the Plaintiffs are.

8. Tribal Defendants Contest Count VIII as a basis of dismissal, but they already waived that opportunity in their own Motion.

Tribal Defendants posit that the Plaintiffs' claim for relief is vague and ambiguous, and should be dismissed on that basis, so long as it is directed at the Tribal Defendants. This is an awkward position to take, given that the Tribal Defendants made the clear and concise affirmation that Counts VII-IX are immaterial, and they support the Federal Defendants' Motion to Dismiss. (Doc. 39, at p. 3 n. 2). This is a live issue for the Court to consider on vacating the Agency's decision.

IV. CONCLUSION

This court has subject matter jurisdiction to issue a *Writ of Habeas Corpus* and to grant the relief requested by the Plaintiffs because the Tribal Defendants are without sovereign immunity against actions filed under 25 U.S.C. § 1303, *Ex Parte Young* and because the Plaintiffs are in detention and have exhausted their tribal remedies. Additionally, the Plaintiffs have adequately stated sufficient facts against the Tribal Defendants to support their Habeas Corpus Petition and the Claims for Relief to survive dismissal under FRCP Rule 12(b)(6). For these reasons, the Defendants' Motion to Dismiss should be denied.

Respectfully submitted this 4th day of March 2024.

By: s/ Wm. Blake Follis
Wm. Blake Follis, OBA # 34842
PEEBLES KIDDER BERGIN & ROBINSON LLP
825 S. KANSAS AVE., SUITE 515
TOPEKA, KANSAS 66612
Phone: (785) 408-1192
Fax: (916) 441-2067
Email: bfollis@ndnlaw.com
Attorneys for Petitioners

CERTIFICATE OF MAILING

I hereby certify on the 4th day of March 2024; I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants with entries of appearance filed of record.

s/ Wm. Blake Follis
Wm. Blake Follis