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(DECISION ON APPEAL dated January 27, 2017 ref.CTA-0133

Ref.2014-0236AV & 2015-0140AV)

TO THE FOLLOWING:

Rachel Johnson
Tohono O'odham Justice Center
Emailed

Honorable Barbara Atwood
Tohono O'odham Justice Center
Emailed

Honorable Veronica Darnell
Tohono O'odham Justice Center
Emailed

Robert A. Rosette, Attorney for Appellants
Leigh D. Wink,Paralegal, Rosette, LLP
lwink@rosettelaw.com
Tohono O'odham Justice Center
Emailed

Robert F. Palmquist, Attorney for Appellees
RPalmquist@stricklandlaw.net
Stricland & Strickland, P.C.
Tohono O'odham Justice Center
Emailed

IN THE APPELLATE COURT OF THE TOHONO O'ODHAM NATION

COUNTY OF PIMA, STATE OF ARIZONA

STEPHANIE ESCALANTE and **NOLAN LOPEZ**,

Appellants,

v.

SELLS DISTRICT COUNCIL, et al,

Appellees.

APPELLATE COURT CASE NO. CTA-0133

Ref: 2014-0236AV;
2015-0140AV

DECISION ON APPEAL

Robert A. Rossette, Counsel for Appellants.

Robert F. Palmquist, Counsel for Appellees.

Before Judges Barbara Atwood, Veronica Darnell, and Rachel Johnson.

The Court, having reviewed the case files and appellate briefs in this consolidated appeal and having heard oral argument on October 11, 2016, reverses the Tohono O'odham Trial Court's Order of Dismissal and remands for further proceedings consistent with this decision.

Background

Plaintiff-Appellants Stephanie Escalante and Nolan Lopez are both enrolled Tohono O'odham tribal members. Appellant Lopez is a member of the Chukut Kuk District, and Appellant Escalante is a member of the Sells District. Until banishment orders were put into effect, they resided together on property within the Sells District assigned to Appellant Escalante's family.

Appellants signed a Community Conduct Agreement with the Sells Community in June 2011 after tribal police received numerous reports of illegal activity involving the Escalante property. 1st Am. Compl. Ex. C, *Escalante v. Sells Dist. Council*, No. 2015-0140AV (Trial Ct.); 1st Am. Compl. Ex. C, *Lopez v. Sells Dist. Council*, No. 2014-0236AV (Trial Ct.). On May 17,

2014, the Sells Community passed Resolution SC-073-14, formally requesting that the Sells District Council initiate banishment proceedings against Appellants and others associated with the Escalante property. 1st Am. Compl. Ex. D, *Escalante*. On August 21, 2014, the Sells District Council issued District Resolution SD-62-14, supporting the Community Resolution to start banishment proceedings against Appellants. 1st Am. Compl. Ex. E. *Escalante*. A hearing on the banishment resolution against Appellants was held on October 18, 2014, and the Sells District Council voted to permanently banish Appellants from the District, provided that Appellant Lopez would be allowed "to travel to and from and remain at his place of employment with the Department of Health Transportation." 1st Am. Compl. Ex. G (Sells Dist. Resolution S.D.-73-14), *Escalante*. The banishment went into effect as to Appellant Escalante on December 7, 2014. Appellant Lopez requested and received a second hearing before the Sells District Council at which he was represented by counsel. The Sells District Council reaffirmed the banishment order against Appellant Lopez on April 18, 2015. 1st Am. Compl. Ex. O (Sells Dist. Council Resolution S.D.-39-15), *Lopez*.

Appellant Escalante, according to her Declaration, was arrested and incarcerated in a tribal detention center on January 5, 2015 after entering the Sells District that day to retrieve her grandchildren's medical records and to check on her mail at the Post Office. The period of incarceration attributable to her violation of the banishment order was sixty days. Decl. of Stephanie Escalante ¶¶ 23-28, *Escalante*.

As a result of the banishment resolutions, Appellants are permanently barred from entering the Sells District, the capital of the Nation, with the exception of entries required for Appellant Lopez to carry on his employment with the Department of Transportation. At oral argument, counsel for Appellants stated that the banishment order deprived Appellants even of the right to

attend oral argument in their own appeal. We note that this Court is unaware of any request from Appellants for permission to attend oral argument.

Procedural History

Appellants Escalante and Lopez each filed suit against Appellees contesting the validity of the banishment orders. The Defendants-Appellees are the Sells District Council and individual Council members in their official capacity. *See* 1st Am. Compl., *Escalante*; 1st Am. Compl., *Lopez*. Appellants allege that the banishment proceedings deprived them of due process in violation of the Tohono O'odham Constitution and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(8). In general, Appellants allege that they were given inadequate notice of the charges against them, were not afforded a meaningful opportunity to defend themselves in the banishment proceedings, and were wrongly punished for the illegal conduct of others. *See* 1st Am. Compl. ¶¶ 44-60, *Lopez*; 1st Am. Compl. ¶¶ 62-75, *Escalante*. Appellants and Appellees entered into a stipulated stay of the banishment pending resolution of their cases in the Trial Court.

On Appellees' motion, the Trial Court dismissed the actions on the basis of sovereign immunity. *See* Order [Granting Defendants' Motion to Dismiss], *Escalante,* (Trial Ct. Feb. 4, 2016); Order [Granting Defendants' Motion to Dismiss], *Lopez*, (Trial. Ct. Feb. 4, 2016). The Trial Court held that the Tohono O'odham Nation had not waived its sovereign immunity from suit, and that the exception under Section 2102(A) of the Tohono O'odham Code did not apply since Appellants were not challenging the "validity of a law, rule, or regulation of the Nation." *Id.* The Trial Court concluded that it lacked subject-matter jurisdiction over the actions. When the actions were dismissed, Appellees ended the stipulated stay, and the banishment orders went into effect. Appellants moved for a stay of the Trial Court's decision pending their consolidated appeal of the Trial Court's dismissal. The Trial Court denied that motion on April 1, 2016, and this Court

affirmed the denial of the stay. *See* Order Denying Motion for Stay of Lower Court Judgment Pending Appeal, *Escalante and Lopez v. Sells District Council*, No. CTA-0133, Aug. 6, 2016.

Analysis

The only issue on this appeal is whether sovereign immunity bars the courts of the Tohono O'odham Nation from reviewing the permanent banishment orders against Appellants to determine whether Appellants received due process of law. No evidentiary hearing in the Trial Court has been held to determine the truth of the factual allegations in Appellants' pleadings. Thus, the merits of the constitutional and ICRA claims are not before us. The Trial Court's dismissal of the actions for lack of subject-matter jurisdiction turned solely on sovereign immunity and presents a question of law. As an appellate court, we exercise de novo review over questions of law, and we accept as true all alleged material facts. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 15 (Ct. App. 1989) (court of appeals is not bound by trial court's conclusions of law); *United States v. Kaplan*, 836 F.3d 1199, 1208 (9th Cir. 2016) (court of appeals reviews questions of statutory construction de novo).

Sovereign immunity is an essential element of tribal sovereignty and self-determination. The shield of immunity protects the autonomous political existence of the tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-58 (1978). Tribal sovereign immunity is subject to express abrogation by Congress and waiver by the tribe itself. *Id.* A waiver must be a clear and unequivocal expression of intent to relinquish the immunity. *Id.* at 59-60. The United States Supreme Court recently reaffirmed the principle that tribal immunity remains intact, absent congressional authorization or a clear waiver. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).

In 2010, the Tohono O'odham Nation codified the doctrine of sovereign immunity. Title

1, Section 2101 of the Tohono O'odham Code provides, in pertinent part:

> (A) The government of the Tohono O'odham Nation ("Nation") and any person acting within the scope of his or her capacity as an office, employee, or agent of the Nation are absolutely immune from suit, court process or liability.
> (B) The Nation's sovereign immunity extends to the Nation's districts, enterprises, entities, and the officials, employees, and agents thereof.
> (C) Sovereign immunity cannot be waived except by a resolution or other official action of the Tohono O'odham Legislative Council expressly waiving, or authorizing a waiver of, sovereign immunity; provided that such a waiver shall be limited in accordance with its terms. . . .

1 T.O.C. § 2101.

Section 2102(A) provides, in pertinent part:

> (A) Exception: Unless provided otherwise by law, sovereign immunity does not preclude properly framed lawsuits brought against the Nation exclusively in the Tohono O'odham Judicial Court and solely for injunctive or declaratory relief to determine the validity of a law, rule, or regulation of the Nation.

1 T.O.C. § 2102(A).

Section 2101(A) recognizes that the Nation and its officers are immune from suit, and that broad immunity extends to the Sells District Council and its members under Section 2101(B). In addition, Section 2101(C) restates the common law principle that any waiver must be express and specific. Thus, absent a waiver or applicable exception, Appellants' lawsuits would be barred.

The Sells District Council has not expressly waived sovereign immunity from suit arising out of the banishment proceedings. The Tohono O'odham Prosecutor's Office drafted guidelines for banishments that indicate by their terms that banishments will be subject to judicial review. *See* Procedures for Banishment Action, Tohono O'odham Nation Office of the Prosecutor (Revised April 9, 2013) (*Prosecutor's Procedures for Banishment*). The Prosecutor's Procedures for Banishment state, for example, that "[t]he Nation's Constitution and the Indian Civil Rights

Act . . . require that due process procedures be observed before substantive rights of the individual are taken away. *Therefore, all banishment actions must be conducted as if the action will eventually be heard in tribal court.*" (Emphasis added.) While the Prosecutor's Procedures for Banishment provide useful guidelines for conducting banishment proceedings, they are not positive law and do not constitute an express waiver of the District's immunity.

Accordingly, unless an exception to sovereign immunity applies, Appellants' lawsuits are barred. Appellants contend that their lawsuits fall within Section 2102(A) since they seek solely declaratory and injunctive relief to determine whether the banishment resolutions complied with due process of law. There is no dispute that Appellants are asking only for injunctive or declaratory relief.[1] The issue for this Court to decide is whether Appellants are challenging the validity of a "law, rule, or regulation of the Nation." 1 T.O.C. § 2102(A). Appellants maintain that the phrase "law, rule, or regulation of the Nation" includes the banishment resolutions issued by the Sells District Council.[2] Appellees disagree, contending that "law, rule, or regulation" is a precise listing that does not include a district council resolution.

Under the circumstances of this case, the Court concludes that Appellants' constitutional challenge to the banishment resolutions passed by the Sells District Council do fall within the exception to sovereign immunity recognized in Section 2102(A).[3] While Section 2102 does not

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[1] While an initial claim for damages was included in Appellants' Complaints, the amended complaints for each appellant now include only claims for declaratory and injunctive relief.

[2] Appellants opposed the motion to dismiss in the Trial Court on multiple grounds, but it did sufficiently raise the argument that their challenge to the banishment resolutions fell within Section 2102 to preserve the argument on appeal. *See In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 992-93 (9th Cir. 2010) (exercising discretion to reach issues that had been adequately raised and briefed by appellants).

[3] In the lower court Appellants advanced a theory based on the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The lower court rejected that argument, noting that Appellants had not alleged

define "law, rule, or regulation," we read the exception as a codification of the established principle that an injunctive lawsuit challenging the constitutionality of tribal governmental action is not barred by sovereign immunity. *See, e.g., Jose v. Toro*, 3 TOR3d 31 (Trial Ct., July 27, 2011) (holding that sovereign immunity does not bar a claim for equitable relief against District Council members for prospective relief for acts allegedly beyond their constitutional authority); *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 60 (Trial Ct., Apr. 25, 2005), *appeal dism'd*, 3 TOR3d 21 (Ct. App., Sept. 4, 2008) (holding that sovereign immunity does not bar declaratory or injunctive relief against a governmental agent for unconstitutional conduct).

In other words, Section 2102 recognizes the key role of the Tohono O'odham Judiciary in adjudicating claims by tribal members challenging tribal governmental conduct. The Tohono O'odham Constitution provides that the government of the Tohono O'odham Nation "shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law." T.O. CONST. art. III, § 1.[4] The Constitution further provides that "the judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances or applicable to the Tohono O'odham Nation, and the customs of the Tohono O'odham Nation." T.O. CONST. Art. VIII, §2. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 17 (Ct. App. 1989) (emphasizing the key role of the Tohono O'odham Judiciary in enforcing the

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any actions by the Appellees "that rise to the level of violations of the Tohono O'odham Constitution and the ICRA." Order, *Escalante,* (Trial Ct. Feb. 4, 2016); Order, *Lopez*, (Trial. Ct. Feb. 4, 2016). In light of our holding that Appellants' lawsuits fall within the exception under Section 2102(A), we need not address the continued viability of the *Ex Parte Young* doctrine or its applicability to this case.

[4] Similarly, ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8).

Tohono O'odham Constitution, and noting that any law "purporting to divest the judiciary of its power of constitutional inquiry is void.").

The Tohono O'odham Legislative Branch explicitly recognized the banishment authority of districts by when it enacted the Removal and Exclusion of Nonmembers Code in 1997: "Nothing in this ordinance shall be construed to prohibit actions to banish tribal members residing within any district of the Tohono O'odham Nation based on the custom and tradition of the district." 4 T.O.C. Ch. 2, § 1.9. In these consolidated cases, the Sells District was exercising the banishment power recognized in Section 1.9, indisputably a "law" of the Nation. Moreover, the banishment resolutions in this case were voted on and issued by the Sells District Council – an arm of the Nation as defined by Section 2101(B). While district councils may pass many resolutions that do not have the force of law, the banishment resolutions in these consolidated cases carry the force of law and are enforceable through criminal sanctions, as experienced by Appellant Escalante.[5] Because the banishment resolutions carry the force of law and are the exercise of a customary power recognized by law, Appellants' constitutional challenges fall within the exception to sovereign immunity codified in Section 2012(A).

The First Amended Complaints allege that the permanent banishment orders had a significant detrimental impact on the Appellants, including dislocation from the family home and inability to attend ceremonial, governmental, commercial, or social events in Sells, the Nation's capital. Importantly, enforcement of the order resulted in the incarceration of Appellant Escalante for sixty days. The First Amended Complaints thus contain material allegations that the banishment resolutions have deprived Appellants of "liberty or property." The First Amended

[5] The Court takes notice that the Tohono O'odham Legislative Council amended the Criminal Trespass law, effective January 20, 2017, to expressly include within the offense of criminal trespass the act of entering a district after receiving notice of banishment from that district. *See* Res. No. 17-021, codified at 7 T.O.C. § 3.4(B).

Complaints likewise allege due process violations regarding the content of the notice of banishment received by Appellants and the manner in which the banishment proceedings were conducted. The Nation has committed to providing fundamental due process to its members before depriving them of liberty or property.[6] T.O. CONST. Art. III, §1. The Nation's Due Process Clause likewise applies to the actions of District Councils. *See, e.g., Throssell v. Throssell,* 1 TOR3d 34 (Tohono O'odham Ct. App. 1992). Where a banishment resolution may be enforced by the Nation through criminal charges and incarceration for a violation, is permanent or long-term in nature, and inflicts significant harm on the banished tribal members, we hold that judicial review must be available to ensure that the banishment proceedings afford the tribal members due process of law as guaranteed by the Tohono O'odham Constitution.[7]

At its core, the due process guarantee requires reasonable notice and a meaningful opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990). Under widely-accepted constitutional standards, procedural due process is a flexible doctrine that takes into account the private and governmental interests at stake and the value of procedural protections in avoiding erroneous deprivations. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Shinault v. Hawks*, 776 F.3d 1027, 1032 (9th Cir. 2015). In this case Appellants have alleged that their property and liberty interests have been significantly impaired without due process of law. The District Council, as an arm of the Nation, has an obligation not only to protect its community, but also to ensure the fairness of banishment

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[6] We rely on the Nation's Constitution and need not address the applicability of the due process guarantee under the ICRA.

[7] The Tohono O'odham Constitution does not mention banishment proceedings, but does require that the government of the Nation comply with basic due process guarantees in its dealings with tribal members. This case is, therefore, unlike *Charles v. Mashantucket Pequot Tribal Nation*, 6 Mash. App. 40, 2015 WL 1926018 (Mash. Pequot Ct. App. 2015), where the court determined that the tribal constitution and laws expressly barred judicial review of banishments.

proceedings.

This Court respects the profound importance of custom and tradition within the Tohono O'odham Nation. Banishment is a remedy that predates the Tohono O'odham Constitution. The Court takes judicial notice of the deep significance of the customary banishment power to the maintenance of social order within the community. Moreover, the maintenance of social order is clearly within the District's authority over matters of local concern. *See* T.O. CONST. art. IX § 5. The District Council thus has broad discretion in determining when a tribal member's conduct justifies exclusion from the District.

Any judicial proceeding involving a challenge to banishment must be conducted in a manner that is sensitive to the District's traditional authority to exclude tribal members who create intolerable social problems. The Preamble of the Tohono O'odham Constitution states that the Constitution was established, among other reasons, "to preserve, protect and build upon our unique and distinctive culture and traditions." In other circumstances, Tohono O'odham courts have interpreted the Nation's Constitution in such a manner that respects customary powers exercised by Districts. *See, e.g.*, *Tohono O'odham Nation v. Narcho*, 2 TOR3d 31 (1998), *appeal dismissed*, 2 TOR3d 11 (2003). This Court is confident that Appellants' due process claims can be heard and resolved without undermining the District Council's power to impose the traditional remedy of banishment. In particular, the resolution of Appellants' claims should not interfere with the District Council's customary authority to define the grounds that justify the extraordinary sanction of banishment. Appellants, however, are entitled to reasonable notice of the alleged grounds and a meaningful opportunity to challenge the factual allegations against them.

On remand, the Trial Court should hold a factual hearing to determine whether the

banishment proceedings complied with the basic due process framework described above.[8] If the Trial Court finds that Appellants received due process of law, the Sells District Council may enforce the resolutions for the permanent banishment of Appellants from the Sells District. If the Trial Court finds that either Appellant did not receive due process, then the banishment resolution affecting that individual would be void.

The Trial Court's Order of Dismissal is reversed and the actions are remanded for further proceedings consistent with this opinion.

Dated this 27th day of January 2017.

Signing for the Court:

Barbara A. Atwood

Barbara A. Atwood, Judge Pro Tem
Chief Appellate Judge

[8] On remand, the parties may once again choose to stipulate to a stay of the banishment resolutions. Absent a stipulation, the Trial Court on motion may consider whether to stay the banishment resolutions, pending a final decision.