APPENDIX A*

THUNDERCLOUD V. HCN EXECUTIVE BRANCH, SU 20-05, AT 15–23 (HCN S. CT. DEC. 15, 2021) (MATHA, C.J., CONCURRING)

A plaintiff must articulate in an initial pleading "the facts and circumstances giving rise to the action, and a demand for any and all relief that the party is seeking."[1] Additionally, "[w]hen . . . the Nation is named as a party, the [plaintiff] should identify the unit of government, enterprise or name of the official or employee involved."[2] And, in regard to the latter class of defendants, the plaintiff "should indicate whether the official or employee is being sued in his or her individual or official capacity."[3] This designation carries constitutional significance since the Court can grant specific equitable remedies in official capacity suits.[4]

Taken together, these prerequisites establish that a plaintiff must allege the manner in which an official has acted "beyond the scope of [his or her] authority" in order to potentially obtain "declaratory and non-monetary injunctive relief."[5] *Id.* The majority concludes that the initial pleading lacks this minimal degree of specificity,

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* Editor's Note: This Appendix has been lightly edited to conform with the *Journal*'s editorial conventions. The edits are nonsubstantive, and text in this opinion otherwise appears as in the original.

1. HCN R. CIV. P. 3(A).

2. *Id.* 27(B).

3. *Id.*

4. HCN CONST. art. XII, § 2; *see also id.* art. VII, § 7(b) ("The Supreme Court shall have the power to establish written rules for the Judiciary . . . , provided such rules are consistent with the laws of the Ho-Chunk Nation.").

5. *Id.* art. XII, § 2.

and, therefore, I join the result.[6] I author this concurrence to address the unnecessary integration of official (absolute or qualified) immunity into the case law and advocate abandoning resort to foreign common law defenses that do not derive from Ho-Chunk tradition and custom.[7] The predecessor constitution did not contain a single reference to any type of immunity,[8] and the Judiciary did not emerge until 1995, so authoritative, and binding, declarations on this particular subject may not have arisen during the Business Committee era.[9]

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6. Thundercloud v. HCN Executive Branch, SU 20-05, at 5, 7, 9 (HCN S. Ct. Dec. 15, 2021) (majority opinion).

7. *See* HCN CONST. art. VII, § 5(a) (identifying parameters of judicial authority).

8. CONST. & BYLAWS OF THE WISCONSIN WINNEBAGO TRIBE (ratified Jan. 19, 1963). More generally, the U.S. Supreme Court acknowledged that tribes "possess[ ] the common-law immunity from suit traditionally enjoyed by sovereign powers," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), and, in *dicta*, noted that such immunity offers no protection to tribal officers. *Id.* at 59 (citing, in part, *Ex parte* Young, 209 U.S. 123 (1908)). The Court offered the latter proposition in the context of a suit in which the plaintiff sought "declaratory and injunctive relief against enforcement of a tribal ordinance." *Id.* at 51. Justice Byron R. White confirmed the availability of an official capacity action since "[u]nder the Santa Clara Constitution, the Governor [wa]s charged with the duty of enforcing the Pueblo's laws." *Id.* at 73 n.2 (White, J., dissenting). The majority, however, declined to consider a challenge to the tribal law because the Indian Civil Rights Act of 1968 ("ICRA") did not explicitly permit "a private cause of action for injunctive and declaratory relief . . . in the federal courts." *Id.* at 69; *cf.* ICRA, Pub. L. No. 90-824, § 203, 82 Stat. 73, 78 (codified at 25 U.S.C. § 1303 (2018)) (indicating, in contrast, that "the writ of habeas corpus shall be available . . . , in a court of the United States, to test the legality of . . . detention by order of an Indian tribe"). Consequently, the plaintiff could have instead chosen to pursue her claim, although somewhat problematically, before the Santa Clara Pueblo Council, which exercised "both legislative and judicial powers." 436 U.S. at 82 (White, J., dissenting); *see also id.* at 66 ("Nonjudicial tribal institutions have . . . been recognized as competent law-applying bodies.").

9. The Court remains unaware whether the Business Committee addressed—and resolved—issues relating to immunity, but any such action would have necessarily involved extra-constitutional matters. *See* HCN CONST. art. XIV ("All actions of the Nation, formerly known as the Wisconsin Winnebago Tribe . . . , shall remain in full force and effect to the extent that they are consistent with this Constitution."); *see also* Decorah v. Rainbow Casino, CV 95-18, at 8, 10 (HCN Tr. Ct. Mar. 15, 1996) (noting that the Business Committee conferred "its inherent judicial authority" upon a sub-agency, the Wisconsin Winnebago Personnel Review Commission, to adjudicate employment disputes roughly three years prior to the formation of the Judiciary (quoting WWPRC ORDINANCE § 1)).

Moving forward, the principal drafters of the successor constitution included Article XII, entitled "Sovereign Immunity."[10] The Court's first occasion to interpret and apply these provisions occurred in 1997.[11]

In relation to section 2, the Court suggested that the exception expressed therein "refer[red] to the official immunity of public officials and employees rather than sovereign immunity."[12] This proposition certainly

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10. Attorney Robert J. Lyttle (Cheyenne & Arapaho Tribes), Lewis & Clark Law School, J.D. (1988); Prof. Richard A. Monette (Turtle Mountain Band of Chippewa Indians of North Dakota), University of Oregon School of Law (1988). "In 1993 Robert Lyttle and I assisted in drafting the new current constitution for the Wisconsin Winnebago . . . ." *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 44 (2011) (statement of Assoc. Prof. Richard A. Monette, Univ. of Wis. Law Sch.); *see also Updates from Community Meetings*, OJIBWE INAAJIMOWIN, Nov. 11, 2009, at 3 (touting "more than 20 years of experience drafting tribal constitutions"); Rick Smith, *Constitution Committee Going through Stages*, THE SAULT TRIBE NEWS, Sept. 1, 2006, at 18 (emphasizing "17 years['] experience in helping tribes with constitutional revisions").

11. Lowe v. Ho-Chunk Nation, SU 97-01 (HCN S. Ct. June 13, 1997).

12. *Id.* at 4 n.2 (citing Rave v. Reynolds, 23 ILR 6150 (Winn. S. Ct. 1996)). In *Rave*, the Winnebago Supreme Court attempted to reconcile two tribal statutory provisions. The first provision, entitled "Sovereign immunity," seemingly extended such immunity to protect "officers and employees . . . from suit for any liability," provided these individuals were engaged in "the performance of their official duties." 23 ILR at 6163 (citation omitted). The second provision enabled judicial review of any action undertaken by an officer or employee who allegedly violated either tribal constitutional or statutory law or ICRA prohibitions. *Id.* The court regarded these provisions as "inconsistent" and determined that "[t]he only obvious way to reconcile the[ ] two provisions" required interpreting the former provision, despite its statutory title, as "really address[ing] two separate types of immunity—the sovereign immunity of the tribe and the official immunity of the tribal officers and employees." *Id.*

The *Rave* court seized upon the reference to "any liability" and deemed that it concerned only suits for monetary relief. As a result, the court chose to identify the alternative type of immunity in the first provision as qualified immunity, "an *official* immunity not a derivative of sovereign immunity." *Id.* at 6164. Also, the court deemed actions attempting "to reach assets in the tribal treasury, adjudicate title to property, or interpret or enforce tribal contractual obligations" as suits against the sovereign regardless of a plaintiff's designation of an individual party defendant. *Id.* In its estimation, the court "adopt[ed] the emerging consensus of tribal court decisions that tribal sovereign immunity does not extend to suits against tribal officers and employees, an interpretation consistent with *Martinez*." *Id.*

The court's effort to resolve a perceived inconsistency instead fostered many more, including, quite unintentionally, this Court's jurisprudence. To

constituted non-binding *dicta*,[13] but, nonetheless, the Court had signaled the direction in which it would likely proceed. As a result, the trial court attempted to conduct subsequent analyses of Article XII within this framework.[14] The two-tiered examination that emerged has proven largely unworkable (at times nonsensical), and this jurist counsels against perpetuating its use.

As stated by the majority, the Court presumptively performs a plain language interpretation of constitutional and statutory text.[15] First and foremost, the "sovereign immunity" article does not refer to

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begin, while the court acknowledged, and somewhat lamented, that the doctrine of "sovereign immunity . . . constitute[s a] distinctly Anglo-American legal doctrine[ ], having no parallel[ ] in traditional Indian life," *id.* at 6161, it nonetheless grafted the equally, if not more, foreign theory of official qualified immunity onto a statutory provision that made no reference to any other type of immunity, apart from sovereign immunity. Furthermore, although the plaintiffs "only named various members of the tribal council as defendants," *id.* at 6164, the court dispensed with considering the application of absolute legislative immunity (albeit similarly problematic) due to its construing "any liability" to implicate complete protection against requests for money damages and, hence, qualified immunity—a non sequitur. Given that qualified immunity may extend more appropriately to other "officers and employees," this choice could appear logical, but the court, in effect, bestowed absolute immunity upon every officer and employee by virtue of its opinion. A defense of qualified immunity can generally be raised in hopes of avoiding the imposition of a money judgment in an individual capacity action. The court, in contrast, instituted a system whereby the defense, according to the statute, would require that "officers and employees *shall be immune* from suit for any liability arising from the performance of their official duties." *Id.* at 6163 (citation omitted). This, quite simply, does not comport with any known legal understanding of qualified official immunity.

The *Rave* court could have instead adopted a more nuanced interpretation of *Santa Clara Pueblo*. *See supra* note 84. The Nebraska Winnebago statutory provisions do bear significant resemblance to Article XII, justifying the analogy. But, this Court no longer regards *Rave v. Reynolds* as correctly decided or persuasive authority.

13. *Obiter dictum*, Lat. "something said in passing," i.e., "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." BLACK'S LAW DICTIONARY (11th ed. 2019).

14. *See, e.g.*, Cleveland v. Garvin, CV 08-36, at 13–19 (HCN Tr. Ct. Feb. 2, 2009).

15. *See, e.g.*, HCN Legislature v. Cleveland, SU 18-06, at 4 (HCN S. Ct. Jan. 17, 2019); Lowe v. HCN Legislature Members, SU 00-17, at 6 (HCN S. Ct. Mar. 13, 2001); HCN Election Bd. v. Hopinkah, SU 98-08, at 4 (HCN S. Ct. Apr. 7, 1999).

"official immunity"; its constituent types, "absolute immunity" and "qualified immunity";[16] or the following forms of absolute immunity: judicial, legislative, prosecutorial,[17] and—depending on the situation—executive.[18] The constitutional text was not likely intended to incorporate these various common law immunities, each with unique provenance and purpose, and none of which, standing alone, could cover all "officials and employees of the Ho-Chunk Nation" within each expressed scenario.[19]

Given its relevance here, absolute legislative immunity, a longstanding external doctrine, could extend to encompass acts undertaken in the performance of a purely legislative capacity.[20] Yet, significantly, this

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16. As explained by the Fifth Circuit Court of Appeals:

> Official immunity may be either absolute or qualified, depending on the functions performed by the particular official at issue. Qualified immunity shields only that conduct not violative of clearly established constitutional [or statutory] rights of which a reasonable person would have known. Absolute immunity, in contrast, precludes any action for damages, so long as the challenged conduct falls within the scope of the immunity.

Austin v. Borel, 830 F.2d 1356, 1358–59 (5th Cir. 1987) (alteration in original). In *Austin*, the court resolved that state child protection workers could not claim absolute executive immunity in connection with filing an allegedly fraudulent removal petition. *Id.* at 1363. The court, however, "express[ed] no opinion regarding defendants' right to dismissal on the ground of qualified immunity" upon remand. *Id.*

17. Harlow v. Fitzgerald, 457 U.S. 800, 810–11 (1982) ("recogniz[ing] that the judicial, prosecutorial, and legislative functions require absolute immunity"); *see also* United States *ex rel.* Burlbaw v. Regents of N.M. State Univ., 324 F. Supp. 2d 1209, 1217 (D. N.M. 2004) ("[O]fficials or employees sued as individuals are entitled to at most qualified immunity, rather than absolute immunity, unless they are acting in a prosecutorial, judicial, or legislative capacity.").

18. Coleman v. Frantz, 754 F.2d 719, 726 (7th Cir. 1985) ("Certain high level executives may enjoy an absolute immunity in particular circumstances . . . ."); *see also* Cleavinger v. Saxner, 474 U.S. 193, 202 (1985) (employing a multi-faceted inquiry to determine whether an executive official deserves absolute immunity for actions deriving from a uniquely deliberative function).

19. HCN CONST. art. XII, §§ 1–2.

20. In 1997, the Seventh Circuit Court of Appeals summarized U.S. Supreme Court jurisprudence in this regard:

> Courts have granted absolute legislative immunity to legislators for various activities which include: (1) core legislative acts such as introducing, debating, and voting on legislation; (2) activities that could not give rise to liability without inquiry into legislative acts and

inquiry does not always align with the basic constitutional distinction: "within [or beyond] the scope of their duties or authority."[21] Moreover, legislative immunity, unlike other absolute immunity forms,[22] would disallow an official capacity suit, provided such suit involved matters touching upon a quintessential legislative act. "[T]he Supreme Court . . . resolved the issue of the application of absolute legislative immunity to claims for prospective relief and answered that question in the affirmative."[23] Consequently, the constitutional drafters could not have intended that section 2 incorporate legislative immunity, given that persuasive case law in 1993 would have rendered the interplay of its provisions inconsistent, if not impossible.

Conversely, as assumed in *Santa Clara Pueblo*, while sovereign immunity offers protection to the sovereign and its sub-entities,[24] it does not automatically

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the motives behind them; and (3) activities essential to facilitating or preventing the core legislative process.

Biblia Abierta v. Banks, 129 F.3d 899, 903 (7th Cir. 1997); *cf.* Gravel v. United States, 408 U.S. 606, 618 (1972) (affording legislative immunity "not only to a Member but also to his [or her] aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member him[- or her]self").

21. HCN CONST. art. XII, §§ 1–2.

22. *See, e.g.*, Pulliam v. Allen, 466 U.S. 522, 536 (1984) ("We never have had a rule of absolute judicial immunity from prospective relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence.").

23. Larsen v. Senate of Penn., 152 F.3d 240, 252 (3d Cir. 1998) (citing Sup. Ct. of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 732–33 (1980)).

24. Tribes often enact limited waivers of sovereign immunity in employment settings, but a plaintiff will succumb to an asserted immunity defense if, for instance, she seeks monetary relief for an alleged improper termination solely from an individually named official. *See, e.g.*, Employment Relations Act of 2004, 6 HCC § 5.37(a)–(d) (2021). The plaintiff must assert legal claims against the tribe; otherwise, the official could legitimately defend on the basis of sovereign immunity from suit. *See* Twin v. Greengrass, CV 03-88 (HCN Tr. Ct. May 24, 2004) (refusing to award lost wages in an employment action due to failure to name the Nation), *appeal denied*, SU 04-08 (HCN S. Ct. Dec. 29, 2004). *But see* Kelty v. Pettibone, CV 98-49 (HCN Tr. Ct. Feb. 22, 2006) (recognizing ability of named officials to raise defense of sovereign immunity on behalf of the Nation, which did not occur, leading to a grant of lost wages in an employment action); *see also* Williams v. HCN Ins. Review Comm'n, SU 98-01, at 16 (HCN S. Ct. Oct. 29, 2008) ("Where a party fails to assert a defense of sovereign immunity in a case, such a defense is waived."); *cf.* HCN R. CIV. P. 27(B) (obligating service of

extend to protect an official from a suit for prospective injunctive relief.[25] At the time of the Constitution's formation, the U.S. Supreme Court understood that "[i]n an official-capacity action, the[ ] defenses[, referring to absolute and qualified immunity,] are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess . . . ."[26]

More recently, the U.S. Supreme Court offered a comprehensive examination of the law relating to official capacity suits as it existed pre-1993, beginning with *Kentucky v. Graham*.

> [L]awsuits brought against employees in their official capacity "represent only another way of pleading an action against an entity of which an officer is an agent," and they may also be barred by sovereign immunity. 473 U.S. at 165–66.
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> The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's

summons upon the Department of Justice in cases involving either the Nation or its officials or employees).

25. In *Santa Clara Pueblo v. Martinez*, the appellee principally sought to enjoin Governor Padilla from enforcing a membership ordinance, which she maintained violated principles of equal protection due to its codification and imposition of ancestral and sex discrimination. 436 U.S. 49, 51 (1978); *see also* ICRA, Pub. L. No. 90-824, § 202(8), 82 Stat. 73, 77 (codified at 25 U.S.C. § 1302 (2018)) ("No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws . . . ."). Point being, a plaintiff, at a minimum, must allege a violation of overarching constitutional or statutory law. Otherwise, sovereign immunity would still protect a defendant official or employee despite the presence of a purely equitable claim. For example, an employee could seek to enjoin a supervisor from promoting a co-worker rather than herself. In such a case, the defendant could certainly assert sovereign immunity from suit if she possessed discretion to make the employment decision at issue, and the plaintiff articulated no constitutional or statutory infraction, i.e., the employee merely disagreed with the decision to bypass her in favor of another. *See* Decorah v. Rainbow Casino, CV 95-18, at 5 (HCN Tr. Ct. Mar. 15, 1996) ("There are no standards of law or rules that would provide the Court with a method of measuring discretionary decisions.").

26. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (citations and footnote omitted).

> office and thus the sovereign itself. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989); *Dugan v. Rank,* 372 U.S. 609, 611, 620–22 (1963). This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. *Hafer v. Melo,* 502 U.S. 21, 25 (1991). The real party in interest is the government entity, not the named official. *See Edelman v. Jordan,* 415 U.S. 651, 663–65 (1974). "Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law." *Hafer,* 502 U.S. at 25 (emphasis added); *see also id.* at 27–31 (discharged employees entitled to bring personal damages action against state auditor general); *cf. Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971).[27] "[O]fficers sued in their personal capacity come to court as individuals," *Hafer,* 502 U.S. at 27, and the real party in interest is the individual, not the sovereign.
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> The identity of the real party in interest dictates what immunities may be available.[28] Defendants in

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27. *See Decorah*, CV 95-18 at 10–11 (citing *Bivens*, 403 U.S. 388) (recognizing ability to proceed against an official for monetary relief in an individual capacity action).

28. A great degree of indecision and imprecision surrounding the proper manner in which to craft a petition for prospective injunctive relief largely derives from the following seminal passage:

> [I]n every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case *stripped of his official* or representative *character and* is *subjected in his person to the consequences of his individual conduct*. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Ex parte Young, 209 U.S. 123, 159–60 (1908) (emphasis added). Legal scholars and jurists from varying jurisdictions have interpreted this passage—the *Ex*

> an official-capacity action may assert sovereign immunity. *Graham,* 473 U.S. at 167. An officer in an individual-capacity action, on the other hand, may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. *Van de Kamp v. Goldstein,* 555 U.S. 335, 342–344 (2009). But sovereign immunity "does not erect a barrier against suits to impose individual and personal liability."[29]

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parte Young fiction—to require the designation of an official in his or her individual capacity in order to proceed. *See, e.g.*, Carpenter v. Miss. Valley State Univ., 807 F. Supp. 2d 570, 582–84 (N.D. Miss. 2011) (tracing the still existing uncertainty). This confusion persists due to the difficulty of casting an official who has theoretically lost official stature, due to alleged illegality of action (present or imminent), as anything other than an individual, but these circumstances could prompt an official capacity, and not necessarily an individual capacity, suit. The nature of the relief sought dictates the case designation. *See* Michigan v. Bay Mills Indian Community, 572 U.S. 782, 796 (2014) (citing *Santa Clara Pueblo,* 436 U.S. at 59) ("As this Court has stated before, analogizing to *Ex parte Young* . . . , tribal immunity does not bar such a suit for injunctive relief against *individuals,* including tribal officers, responsible for unlawful conduct."). To reiterate, one would most always file an individual capacity action if he or she wished to secure financial relief from the individual, wholly disconnected from the sovereign (apart from possible indemnity). *See* Lewis v. Clarke, 137 S. Ct. 1285, 1292 (2017) ("We hold that an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak."). One could obtain equitable relief as well, but the order would only impact the named individual, in his or her personal undertakings, and not the sovereign entity, including any successor to the position occupied by the defendant. *See* Gingras v. Think Fin., Inc., 922 F.3d 112, 123 (2d Cir. 2019) ("[T]he only material difference between individual and official capacity suits for prospective, injunctive relief is that a judgment against the latter is enforceable against future successive officers whereas judgments against the former are not."), *cert. denied*, 140 S. Ct. 856 (2020).

29. *Lewis*, 137 S. Ct. at 1291 (footnotes added) (quoting Hafer v. Melo, 502 U.S. 21, 30–31 (1991)). This case does not present any claim for personal liability, and this jurist shall accordingly withhold rendering any opinion on the ultimate viability of such actions. As noted, the trial court has indicated the potential availability of these claims, *see supra* note 103, but it presented this possibility prior to this Court's *Lowe* decision, which relied upon the reasoning of a sister tribe's appellate court. *See supra* note 88. As a result, the Judiciary may interpret section 2 to preclude individual capacity suits if it perceives the phrase, "subject to suit in equity *only* for declaratory and non-monetary injunctive relief," to foreclose this option. HCN CONST. art. XII, § 2 (emphasis added). However, as expressed throughout this opinion, since section 2 refers neither to absolute nor qualified official immunity, but rather an exception to the doctrine of sovereign immunity, the phrase has no bearing on an individual capacity suit. This jurist interprets "only" to represent a limitation on the

Returning to Article XII, a plaintiff must allege the commission of an illegality (a constitutional or statutory violation) by an official or employee, i.e., "act[ing] beyond the scope of . . . duties and authority,"[30] in order to maintain an action for prospective, non-monetary

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manner of equitable relief available in an official capacity suit, precluding remedies in equity that have an intended, primary monetary impact, e.g., restitution.

The manner of relief offered in courts of equity "refer[s] to those categories . . . that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." Mertens v. Hewitt Assoc., 508 U.S. 248, 257 (1993); *see also* Cigna Corp. v. Amara, 563 U.S. 421, 440–42 (2011) (identifying other forms of equitable relief, including estoppel, reformation of contract, and surcharge). "[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002). Clearly, "a court in equity may award monetary restitution as an adjunct to injunctive relief . . . ." Tull v. United States, 481 U.S. 412, 424 (1987).

This jurist does not believe that the constitutional drafters would have denied an ability to the Nation, in regrettable instances, to rectify egregious attacks upon the sovereign and its People. *See, e.g.*, United States v. Whiteagle, 759 F.3d 734, 750 n.7 (7th Cir. 2014) (identifying former legislator's guilty plea to bribery); United States v. Decorah, 46 F.3d 26 (7th Cir. 1995) (affirming former Business Committee member's guilty verdict for bribery). Section 2 cannot plausibly serve as a shield to protect such actions, and the Nation should not solely rely upon a separate sovereign to punish this type of behavior. Moreover, "[a]ny . . . case or controversy arising within the jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other court." HCN CONST. art. VII, § 5(a).

30. Post-1993, some courts began to diminish perceived formalities in pleading an official capacity suit. Notably, the Fifth Circuit Court of Appeals created an equitable exception. *See, e.g.*, Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas, 261 F.3d 567, 570 (5th Cir. 2001) (likening tribal and state officials; declining to extend sovereign immunity to shield against an equitable action; and affording no importance to tribal assertion that officials acted within the scope of their authority, i.e., not in violation of constitutional or statutory requisites). *But see* Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271–72 (9th Cir. 1991) ("[W]hen tribal officials act in their official capacity and within the scope of their authority, they are immune."). Regarding this issue, "[t]here [remains] a circuit split on th[e] question." Stifel v. Lac du Flambeau Band of Lake Superior Chippewa Indians, No. 13-cv-372-wmc, 2014 WL 12489707, at *4 (W.D. Wis. May 16, 2014). In this jurisdiction, the constitutional text resolves the matter: a plaintiff must allege in the initial (or amended) pleading the manner in which the official has "act[ed] beyond the scope of their duties and authority." HCN CONST. art. XII, § 2.

injunctive relief.[31] The official or employee could be performing or intending to perform such duties in good faith and pursuant to prevailing obligations. However, if the impending or resulting activity offends, or will offend, a predominant law,[32] then a plaintiff can seek cessation of conduct or performance of corrective measures.[33]

Therefore, in an equitable action brought pursuant to section 2, a plaintiff should "indicate" that a tribal "official or employee is being sued in his or her . . . official capacity."[34] A plaintiff must also identify a defendant against whom the trial court can grant equitable relief, i.e., "Can the Judiciary appropriately enjoin the named defendant?" The appellees contended at oral argument that they could not identify another proper party, but this seldom is the case.[35] The Court would offend notions

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31. HCN Const. art. XII, § 2; *cf.* Vann v. U.S. Dep't of Interior, 701 F.3d 927, 929 (D.C. Cir. 2012) (Kavanaugh, J.) ("The *Ex parte Young* doctrine allows suits for declaratory and injunctive relief against government officials in their official capacities—notwithstanding the sovereign immunity possessed by the government itself. The *Ex parte Young* doctrine applies to Indian tribes as well."); *see also id.* ("As a practical matter, therefore, the Cherokee Nation and the Principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief.").

32. Consequently, the Court cannot elevate one constitutional provision over another, but rather ensure against the undue subordination of competing authorities, which the majority finds occurred here. Thundercloud v. HCN Executive Branch, SU 20-05, at 11–12 (HCN S. Ct. Dec. 15, 2021).

33. *See* Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34 (2d Cir. 1995) ("The typical preliminary injunction is prohibitory [(negative)] and generally seeks only to maintain the status quo pending a trial on the merits. A mandatory [(affirmative)] injunction, in contrast, is said to alter the status quo by commanding some positive act." (citation omitted)); United Bonding Ins. v. Stein, 410 F.2d 483, 486 (3rd Cir. 1969) ("An injunction is a prohibitive writ issued by a court of equity forbidding a party-defendant from certain action, or in the case of a mandatory injunction, commanding positive action.").

34. HCN R. CIV. P. 27(B).

35. The appellees do not encounter a scenario where a failure to maintain an action against the named defendants would "gut[ ] constitutional protections and guarantee[ ] leaving no remedy for unlawful conduct." Appellee's Response Brief at 17, *Thundercloud*, SU 20-05 (Mar. 15, 2021). As in 1908, one's litigation strategy should normally follow a fairly apparent course. *See, e.g.,* Appropriations & Budget Process Act, 2 HCC § 4.9c(1) (2020) ("As legal counsel for the Nation, the Department of Justice shall prosecute all violations of this Act . . . ."); Legislative Org. Act of 2011, 2 HCC § 11.42 (2020) ("Any governmental documents, such as Resolutions or minutes, issued and approved

relating to separation of powers by sanctioning injunctive relief against individual legislators for engaging in actions of a uniquely legislative character.[36]

In summation, this jurist trusts that this opinion serves to provide ample direction in an area of the law that has confounded courts and litigants in this jurisdiction for nearly twenty-five years.

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by the Legislature shall only be executed by tribal member officials."); *cf.* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (debating proper party status in an official capacity *Ex parte Young* action).

36. HCN CONST. art. III, § 3. The Judiciary can "interpret and apply . . . laws," which presumes that a law must first be in effect. *Id.* arts. IV, § 2; VII, § 4. The Legislature can "make laws," *id.* arts. IV, § 2; V, § 2(a), but this does not occur until adoption by "[a] majority vote of the quorum" present. *Id.* art. V, § 12. The Court cannot presuppose that a particular law will pass, and, moreover, by a vote of particular legislators. For similar reasons, the Court declines to require legislative amendment to or annulment of enacted legislation. Oftentimes, a determination of constitutionality or illegality hinges upon a single provision and, sometimes, a single word. *See, e.g.*, Jones v. HCN Election Bd., SU 95-05 (HCN S. Ct. Aug. 15, 1995) (defining "majority"). The Judiciary cannot magically ascertain the necessary manner and scope of an incursion until presented with either an alleged imminent or ongoing violation deserving of injunctive relief. Finally, while the Judiciary can ably employ its equitable powers in the context of a justiciable case or controversy, it purposefully refrains from attempting to exercise powers that exist outside of a reasonable conception of judicial purview. *See, e.g.*, Twin v. Greengrass, CV 03-88, at 11 (HCN Tr. Ct. May 24, 2004) (declining to discipline a supervisor since a decidedly executive function).