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10 *Attorneys for the Plaintiffs*

11 **IN THE DISTRICT COURT OF THE NAVAJO NATION**  
12 **JUDICIAL DISTRICT OF WINDOW ROCK**

13  
14  
15 NORMAN BEGAY, HARRY D. BROWN,  
16 SR., WALLACE CHARLEY, MICHAEL  
COAN, LENORA FULTON, FRAN  
17 GEORGE, JONATHAN TSO, RUTH  
WATSON AND TOM WHITE, JR.,

18 Plaintiffs,

19 vs.

20  
21 NAVAJO NATION SUPREME COURT,  
22 NAVAJO NATION, NAVAJO NATION  
ELECTION ADMINISTRATION,  
23 NAVAJO OFFICE OF HEARING AND  
APPEALS , HERBERT YAZZIE,  
24 ELEANOR SHIRLEY, EDISON J.  
WAUNKA, AND RICHIE NEZ, SR.,

25 Defendants.  
26

Case No. \_\_\_\_\_

**COMPLAINT**

**Demand for Jury Trial**

27 Norman Begay, Harry D. Brown, Sr., Wallace Charley, Michael Coan, LeNora Fulton,  
28 Fran George, Jonathan Tso, Ruth Watson and Tom White, Jr., (“**Plaintiffs**”) bring these claims

1 against former Chief Justice of the Navajo Nation Supreme Court Herbert Yazzie, current  
2 Associate Justice Eleanor Shirley, the Navajo Nation Supreme Court, Edison J. Wauneka, the  
3 Navajo Nation Election Administration, Richie Nez, Sr., the Office of Hearing and Appeals, and  
4 the Navajo Nation (collectively, “**Defendants**”) as follows:

5 **NATURE OF THE CASE**

6 1. Plaintiffs are all former members of the Navajo Board of Election Supervisors  
7 (“**NBOES**”), who were removed from their elected positions by the Navajo Supreme Court in  
8 October 2014.

9 2. Plaintiffs bring suit for violations of their right to due process pursuant to the Navajo  
10 Bill of Rights, 1 N.N.C. §3, and the Indian Civil Rights Act of 1968, 25 U.S.C. §1301(a)(8).

11 3. In an attempt to dictate the outcome of the 2014 Presidential Election, the Navajo  
12 Supreme Court wrongfully held Plaintiffs in contempt of court without meaningful notice, an  
13 opportunity to adequately defend themselves, or the ability to confront the witnesses against.

14 4. Without taking any evidence, the Navajo Supreme Court found Plaintiffs in  
15 contempt and proclaimed that they had willfully violated Navajo election laws.

16 5. As a result of the illegal contempt order, Plaintiffs were stripped of their elected  
17 position at the NBOES and precluded from holding elected office in the Navajo Nation for eight  
18 years.

19 6. As a result of the illegal contempt order, Plaintiffs’ reputations as pillars in their  
20 communities were sullied.

21 7. In holding Plaintiffs in contempt, the Navajo Supreme Court lacked both the  
22 authority and jurisdiction to make such a finding, undermined the separation of powers by illegally  
23 directing the activities of a co-equal branch of government, and usurped the Navajo Nation voters’  
24 right to select their representatives.

25 8. The Navajo Election Administration, Richie Nez, Sr., Edison Wauneka and the  
26 Navajo Office of Hearing and Appeals also violated Plaintiffs’ right to due process when, without  
27 a hearing, they upheld the Supreme Court’s unlawful contempt order removing Plaintiffs from  
28 office and preventing them from holding elected office for eight years.



1 OHA expects the Navajo Elections Administration to follow 11 N.N.C. § 44 by  
2 automatically placing the candidate who received the next highest votes in the primary  
3 election preceding the general election as the new candidate on the official ballot in the  
4 general election. All parties shall have ten days to appeal this final order to the Navajo  
5 Nation Supreme Court.

6 (emphasis added)

7 17. Within the appeal time, Mr. Deschene filed his Notice of Appeal. However, the  
8 Supreme Court did not reach the merits of his appeal and instead dismissed it on technical grounds  
9 for failing to attach a certified copy of the October 9 Order to the Notice of Appeal. *See* Final  
10 Order Disqualifying Respondent in *Tsosie v. Deschene*, SC-CV-69-14 (October 22, 2014)  
11 (“Disqualification Order”), attached hereto as **Exhibit “B”**.

#### 12 Petition for Writ of Mandamus

13 18. On October 14, 2014, while the time to appeal the October 9 Order was still  
14 pending, Hank Whitethorne and Dale Tsosie filed a Petition for Writ of Mandamus (the “Petition”)  
15 directly with the Supreme Court seeking an order requiring the NBOES and the Navajo Election  
16 Administration to comply with the October 9 Order “by removing [Mr. Deschene] from the ballot  
17 [and] placing the third place finisher on the ballot....” *See* Petition for Writ of Mandamus,  
18 attached hereto as **Exhibit “C”**.

19 19. At the time the Petition was filed, the ballots for the general election had already  
20 been printed and absentee ballots had been mailed with Mr. Deschene listed as a candidate. An  
21 estimated 10,000 votes were cast before the election was ultimately cancelled, including some  
22 from Navajo voters serving in combat zones overseas.

23 20. On October 17, 2014 at approximately 4:30 pm, the Navajo Supreme Court faxed to  
24 the Navajo Department of Justice an order requiring 15 pages of briefing on the Petition for Writ  
25 of Mandamus by 9:00 am on October 20, 2014 and setting a hearing on that same day at 1:00 pm.  
26 *See* Order in *Tsosie/Whitethorne v. NBOES*, SC-CV-68-14 (October 17, 2014) with fax stamp,  
27 attached hereto as **Exhibit “D”**.

28 21. No responses to the briefing were permitted. *Id.* at 1.



1           33. Also on October 23, 2014, the Tribal Council passed legislation that, if adopted,  
2 would have overturned the disqualification of Mr. Deschene and placed him back on the ballot.  
3 *See* Legislation CO-47-14, attached hereto as **Exhibit “G”**. That legislation was vetoed by  
4 President Ben Shelley on October 28, 2014. *See* Veto of CO-47-14, attached hereto as **Exhibit**  
5 **“H”**.

6           34. After receiving the Mandate, NBOES held a special meeting the following day,  
7 October 24, 2014, specifically to address the disqualification of Mr. Deschene. At that time, they  
8 were awaiting a legal opinion from the Department of Justice, which had yet to be provided.

9           35. Another special meeting of the NBOES was held on October 27, 2014, where some  
10 of the legal questions were answered, but several were still outstanding, including:

11           A. What happens to the votes that had been cast for President and how to handle  
12 them in light of the Mandate;

13           B. What is the timeline set by law for the election to be altered; and

14           C. What is the interpretation of the Election Code in reference to the selection  
15 of a running mate for the new presidential candidate and the timeline for that selection to  
16 be made.

17           36. Those questions were to be answered by the next scheduled NBOES special meeting  
18 set for October 31, 2014. However, that meeting never occurred due to the order removing  
19 Plaintiffs from office on that date.

20           37. To compound the NBOES’ problems, also on October 23, 2014, it was served with a  
21 letter and proposed lawsuit warning that it and Plaintiffs would be sued by several Navajo voters  
22 who had already cast their ballots in the general election, if the election was postponed or the  
23 ballot changed. *See* October 23, 2014 Letter from Attorney Andrew Gordon, attached hereto as  
24 **Exhibit “I”**.

25           38. The basis for the proposed lawsuit was that the NBOES had no authority pursuant to  
26 11 N.N.C. § 3(E) to cancel an election that had already commenced. *Id.* Rather, NBOES’  
27 statutory authority was limited to postponing an election before it began. *Id.*  
28

1 **Contempt Proceedings**

2 39. On October 27, 2014, a mere three days after the Mandate was issued, Complainants  
3 Hank Whitethorne and Dale Tsosie filed a motion demanding, among other things, that Plaintiffs  
4 be arrested, stripped of their elected offices and prevented from holding any elected office in the  
5 future. *See* Motion to Hold Respondents in Contempt and to Issue an Order to Show Cause  
6 (“Contempt Motion”), attached hereto as **Exhibit “J”**.

7 40. Again, Plaintiffs were not identified as parties to the proceeding in which the  
8 Contempt Motion was filed and their names do not appear anywhere in it.

9 41. An Order to Show Cause (“OSC”) issued from the Supreme Court the following  
10 day, October 28, 2014, setting a hearing on the Contempt Motion for October 31, 2014. *See* Order  
11 to Show Cause, attached hereto as **Exhibit “K”**.

12 42. The Supreme Court specifically indicated in the OSC that Plaintiffs did not need to  
13 appear for the October 31, 2014 hearing, which was a clear indication that there would be no  
14 evidence taken and that they would not be permitted to testify.

15 43. Plaintiffs were not individually represented by counsel at the October 31, 2014  
16 contempt hearing. Attorney Steven Boos represented the NBOES as a whole at the hearing. He  
17 was given 15 minutes to argue the NBOES’ position.

18 44. At the beginning of the October 31, 2014 OSC hearing, defendant Yazzie informed  
19 Plaintiffs that one of the possible sanctions was imprisonment. *See* Transcript of October 31, 2014  
20 hearing at 4, attached hereto as **Exhibit “L”**.

21 45. At the conclusion of the October 31, 2014 OSC hearing, two judges of the Supreme  
22 Court found all the members of the NBOES in contempt and ordered them disqualified from  
23 holding future elected office. *Id.* at 28-29.

24 46. The Supreme Court found Plaintiffs in contempt because “the government did not  
25 show cause why they should – the government should not be held in contempt.” *Id.* at 28.

26 47. However, it was not Plaintiffs’ burden to prove they were not in contempt. It was  
27 the petitioners’ burden to prove Plaintiffs were in contempt.  
28

1           48. The Supreme Court is required to use the least restrictive means to enforce  
2 compliance with its orders. Instead, it issued sanctions that were neither necessary nor intended to  
3 ensure compliance with the Mandate, but instead were meant to punish Plaintiffs for political  
4 reasons.

5           49. By an opinion dated November 4, 2014 and effective October 31, 2014, the two-  
6 judge panel explained the basis for their ruling. *See* November 4, 2014 Opinion, attached hereto  
7 as **Exhibit “M”**.

8           50. Without taking any evidence, the Supreme Court concluded that each NBOES  
9 member “violated the Election Laws” and “knowingly and willfully failed or neglected to perform  
10 its duties under the Election Code, a violation of 11 N.N.C. §365.” *Id.* at 8.

11           51. The Court went on to recognize that “government lawyers incorrectly informed the  
12 Board that how the NEA should deal with the disqualification is up to the Board.” *Id.* at 9.

13           52. Curiously, the Supreme Court actually rescinded the Mandate it claimed Plaintiff  
14 violated, and for which they were held in contempt, by permitting the November 4, 2014 general  
15 election to go forward with the same ballots, but that the votes for President should not be counted.  
16 *Id.* at 10. This was exactly the procedure Plaintiffs had already been contemplating to protect the  
17 interests of those members of the Navajo Nation who had already voted, while honoring the  
18 Supreme Court’s order.

19           53. Neither the Navajo Election Administration (“NEA”) nor its executive director  
20 Edison Wauneka were held in contempt, although the Mandate was directed only to them and the  
21 NEA was ordered to change the ballots and postpone the election, but failed to do so by the  
22 October 31, 2014 hearing.

23           54. In holding Plaintiffs in contempt, the Supreme Court made the following findings:

24           A. The members of the NBOES committed indirect civil contempt by failing to comply  
25 with the Mandate, although the NBOES members had only five business days to comply with it  
26 and changes to the elections laws and a legislative appropriation to pay for it were required;

27           B. The members of the NBOES violated the Navajo Election Laws, although  
28 complying with the Mandate would have also violated Navajo Election Laws; and

1 C. The members of the NBOES “knowingly and willfully failed or neglected to  
2 perform their duties under the chapter of the Election Code in the manner prescribed therein, in  
3 violation of 11 N.N.C. § 365”, although no evidence was presented as to Plaintiffs’ intent or the  
4 actions they took to comply with the Mandate.

5 *Id.* at 11.

6 55. In reaching these conclusions, the two members of the Supreme Court made specific  
7 factual findings without citation to any evidence, as follows:

8 A. “[T]here was absolutely no showing that the Respondents actually complied with the OHA  
9 and this Court’s order.” *Id.* at 6-7.

10 B. “[T]he Respondents took deliberate actions in violation of the Election Laws.” *Id.* at 7.

11 C. After Mr. Deschene’s appeal was denied on October 22, 2014, “the Respondents took no  
12 action having commenced absentee voting with an unaltered ballot bearing the name of the  
13 disqualified candidate....” *Id.* at 8.

14 D. “The Respondents deliberately took no action to reprint ballots or postpone the election ....”  
15 *Id.*

16 56. Contrary to the Supreme Court’s fact finding, Plaintiffs took significant action  
17 following the Mandate to attempt to comply with the Election Laws and the Court’s Order.

18 57. The Supreme Court also erred in finding that Plaintiffs commenced absentee voting  
19 after the October 22 Order was entered. In fact, absentee voting began on October 6, 2014 and  
20 early voting on October 9, 2014.

21 58. Also on October 31, 2014, the eligibility of the third place finisher in the  
22 Presidential primary Russell Begaye was challenged. His eligibility was not confirmed until  
23 December 16, 2014. *See* December 16, 2014 Memorandum Decision, attached hereto as **Exhibit**  
24 **“N”**.

25 59. In wrongfully holding Plaintiffs in contempt, the Supreme Court stripped Plaintiffs  
26 of their authority to supervise the 2014 General Election, removed them from their elected  
27  
28

1 positions, and ordered the NEA to prevent those Plaintiffs who were elected to public office in the  
2 2014 General Election from taking their seats.

### 3 The Aftermath

4 60. At the November 4, 2014 general election, plaintiffs Norman Begay and Tom M.  
5 White, Jr. were on the ballot for election to the Tribal Council.

6 61. Plaintiffs LeNora Fulton and Ruth Watson were also on the ballot for re-election to  
7 the NBOES.

8 62. The votes they received were not counted. The number of votes cast in their favor  
9 has not been disclosed.

10 63. On November 12, 2014, NEA Executive Director Edison Wauneka sent each  
11 Plaintiff a letter notifying them that they had been removed as members of the NBOES pursuant to  
12 the Supreme Court's October 31 Order and that they are ineligible to run for elected office for  
13 eight years. *See* Wauneka letter to LeNora Fulton dated November 12, 2014, attached hereto as  
14 **Exhibit "O"**.

15 64. On November 24, 2014, Plaintiffs filed grievances with the OHA asserting that the  
16 NEA letter removing them from office and disqualifying them from future elected office was  
17 illegal.

18 65. The grievances were summarily dismissed without a hearing based on the contempt  
19 finding. *See* Order Dismissing Grievance dated December 8, 2014, attached hereto as **Exhibit**  
20 **"P"**.

### 21 The Supreme Court Thwarted a Fair Resolution

22 66. On December 30, 2014, the Tribal Council adopted, and on January 10, 2015  
23 President Shelley signed, legislation pardoning Plaintiffs and reinstating them to the NBOES (the  
24 "Pardon Resolution"). *See* Resolution 0391-14, attached hereto as **Exhibit "Q"**.

25 67. The Pardon Resolution noted that the October 31 Order was troubling because:

26 A. The Disqualification Order was not directed to the NBOES, only the NEA;

27 B. Plaintiffs were denied due process by failing to make any specific findings  
28 about how they did not comply with the Disqualification Order;

1 C. Plaintiffs were denied an opportunity to have individual hearings where they  
2 could defend themselves; and

3 D. The OHA order disqualifying Mr. Deschene and ultimately leading to the  
4 need to postpone the presidential election was not valid, as the OHA hearing officer who  
5 made that determination was not qualified to hold that position.

6 *Id.* at 2-3.

7 68. Tsosie and Whitethorne challenged the legislation resetting the presidential primary  
8 and pardoning and reinstating Plaintiffs directly to the Supreme Court. *See* Brief of Petitioners,  
9 attached hereto as **Exhibit “R”**.

10 69. In a sweeping opinion in which the Supreme Court explicitly usurped the power of  
11 the legislative and executive branches and continued its political campaign of bullying and  
12 persecuting Plaintiffs, Supreme Court nullified the legislation pardoning and reinstating Plaintiffs.  
13 *See Tsosie v. NBOES* , slip op. No. SC-CV-68-14 (February 20, 2015), attached hereto as **Exhibit**  
14 **“S”**.

15 70. In doing so, Supreme Court bypassed the District Court, ignored the legal  
16 requirement that all legislation is presumed valid, took no evidence, and gave Plaintiffs no  
17 opportunity to participate in the proceedings in any way, although they were directly affected.

18 71. In the opinion striking down the Pardon Resolution, Justice Yazzie wrote:  
19 The election laws are organic and they are to be protected with a higher standard once they  
20 are enacted. If these laws are to be changed, it should be and must be done in consultation  
21 with the People. They cannot be unilaterally, single-handedly changed because to do so  
22 would change the basic rights of our people to choose their leaders.

22 *Id.* at 8.

23 72. The hypocrisy of this statement is staggering in light of the fact that through  
24 the Mandate and Contempt Order, the Supreme Court essentially rewrote the election laws  
25 without the consent of the President or the Tribal Council.

26 73. As a result of the Supreme Court striking down the Pardon Resolution,  
27 Plaintiffs were returned to a state of disharmony, which persists to this day.  
28





1 opportunity to be represented by legal counsel of their choosing, a reasonable time to prepare a  
2 defense, and an opportunity to be heard and present evidence.

3 90. While the contempt here was labeled civil, it was in reality criminal contempt. The  
4 contempt order was not to coerce Plaintiffs into complying with the Mandate. It was simply to  
5 punish them for them failing to comply as quickly as the Supreme Court would have liked. Thus,  
6 the contempt was indirect criminal contempt rather than indirect civil contempt.

7 91. In a criminal proceeding, Plaintiffs are also entitled to confront the witnesses against  
8 them, to have compulsory process for obtaining witnesses in their favor, to have the claims  
9 against them decided by a jury of not less than six persons, and to have the protections of the  
10 Navajo Rules of Criminal Procedure.

11 92. As set forth in detail above, Plaintiffs were denied all of the due process protections  
12 they were entitled to under Navajo customary law, the Navajo Bill of Rights, and the Indian Civil  
13 Rights Act of 1968.

14 93. The due process violations include, but are not limited to:

15 A. The failure to provide adequate notice of the contempt proceeding by service of  
16 process and sufficiently in advance of the contempt hearing to allow Plaintiffs reasonable time to  
17 prepare and retain counsel of their choosing;

18 B. The failure to hear any witnesses or take any evidence prior to finding Plaintiffs in  
19 contempt;

20 C. The failure to allow Plaintiffs to confront the witnesses against them;

21 D. The failure to use a three-judge panel as required by 7 N.N.C. § 301;

22 E. The failure of the NEA or the OHA to hold a hearing before denying stripping  
23 Plaintiffs of their elected positions and precluding them from holding elected office for eight  
24 years.

25 F. Striking down the pardon legislation without taking any evidence or inviting  
26 Plaintiffs to be heard on the issue;

27 G. Bypassing the District Court to strike down the pardon legislation;

28 H. Placing the burden of proof on Plaintiffs to prove they were not in contempt;

1 I. Removing Plaintiffs from office, although that authority was explicitly granted only  
2 to the Navajo people;

3 J. Dictating the actions of the NBOES, although that authority was explicitly granted  
4 only to the tribal council;

5 K. Holding Plaintiffs in contempt for violating an order that had been rescinded.

6 94. As a direct and proximate result of the unlawful violation of Plaintiffs' civil rights,  
7 they have each been harmed in an amount to be proved at trial.

8  
9 **COUNT TWO**  
10 **(Conspiracy to Violate Plaintiffs' Civil Rights)**

11 76. Plaintiffs reallege each of the preceding paragraphs as though fully set forth  
12 herein.

13 77. Former Chief Justice Herb Yazzie, Associate Justice Eleanor Shirley with  
14 others as yet unknown ("Conspirators") conspired to dictate the outcome of the 2014 Presidential  
15 Election by removing Chris Descehne from the ballot.

16 78. During the course of the conspiracy and in furtherance of it, the Conspirators  
17 unlawfully deprived Plaintiffs of their right to due process under the law and of their right to hold  
18 and seek elected office.

19 79. As a result of this unlawful conspiracy, Plaintiffs have been harmed in an  
20 amount to be proved at trial.

21 **COUNT THREE**  
22 **(Navajo Nation Customary Law and Common Law Doctrine of Nályééh)**

23 80. Plaintiffs reallege each of the preceding paragraphs as though fully set forth  
24 herein.

25 81. According to Navajo custom, if a Navajo is injured by the act of another, the  
26 victim can demand *nályééh*, which is a form of compensation for injury.

27 82. The Navajo traditional doctrine of *nályééh* – which the Navajo Nation  
28 Supreme Court has stated is the demand to "make right" for an injury – dictates that compensation

1 be paid by a wrongdoer, his family, or his clan for the injury to a person caused by the wrongdoer.

2 83. In Navajo tradition, *nályééh* means compensation for an injury, but also has a  
3 deeper meaning of a demand to “make right” for an injury and an invitation to negotiate fair  
4 compensation for injury and the procedure for arriving at *nályééh* involves the respectful talking  
5 out of a dispute.

6 84. Under Navajo law, the term *nályééh* is often used in the sense of an amount  
7 of payment, it actually expresses the mode of payment, *i.e.*, the respectful negotiation of the  
8 amount an offender should pay based upon the injured person’s needs and the offender’s ability to  
9 pay, including the ability of the offender’s relatives and clan members to pay.

10 85. *Nályééh* should be enough so that the injured parties will have “no hard  
11 feelings.”

12 86. According to Navajo law and custom and the Navajo traditional doctrine of  
13 *nályééh*, Plaintiffs are entitled to compensation for injuries caused by Defendants’ unlawful  
14 actions in an amount that sufficient to promote *hózhó*.

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17 **REQUESTED RELIEF**

18 Plaintiffs request judgment as follows:

19 A. For an Order directing Defendants to pay Plaintiffs monetary damages in an amount  
20 to be proved at trial sufficient to promote *hózhó*;

21 B. For an Order restoring those Plaintiffs who received a majority of the votes in the  
22 November 2014 election to the positions to which they were elected;

23 C. For an Order restoring those Plaintiffs whose terms on the Navajo Board of Election  
24 Supervisors had not expired in January 2015 to the Navajo Board of Election Supervisors.

25 D. For an Order requiring the Navajo Election Administration to disclose the vote count  
26 for all Plaintiffs who ran for elected office in the November 2014 election

27 E. For an Order that the Navajo Supreme lacked jurisdiction to issue the Contempt  
28 Order;

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- F. For an Order nullifying the Contempt Order;
- G. For an award of reasonable attorneys' fees and costs of suit, to the maximum extent permissible; and
- H. For such other and further relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiffs hereby demand a jury trial.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of September, 2015.

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