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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE DISTRICT OF ALASKA  
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9 JIM E. SCUDERO,

10 Petitioner,

11 vs.

12 JEFF MORAN, DANIEL MARSDEN, SR.,  
13 ALBERT SMITH, BYRON HAYWARD,  
14 WILLIAM WILSON, DANIEL WILLIAMS,  
15 LOUIS WAGNER, RICHARD HUDSON,  
16 SR., CONNIE DARLING, RACHAEL  
WILLIAMS,

17 Respondents.

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)  
) NO.: 5:16-cv-00005-JWS  
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)

**PETITIONER'S RESPONSE TO  
RESPONDENT'S MOTION TO DISMISS**

**Indian Civil Rights Act, 25 U.S.C. § 1303**

18  
19 COME NOW the Petitioner, Jim E. Scudero by and through counsel, Wheeler Firm,  
20 PLLC., and hereby petition the Court for a Writ of *Habeas Corpus* pursuant to the Indian Civil  
21 Rights Act of 1968, 25 U.S.C. §§ 1301-1303, for relief from the unlawful restraint on liberty  
22 imposed by the Respondents in the form of a resolution providing that the Petitioner bears all  
23 costs stemming from a tribal court case alleging election fraud. Petitioner has been effectively  
24 "banished" from the Community through improper and vindictive imposition of fines given to  
25 him by the Community Council stemming from an illegal election. The District Court of Alaska  
26 is the only forum in which the legality of the Respondents' actions may be tested.

1 **INTRODUCTION**

2 Petitioner asks the court to rule on both a unique and complicated issue that undoubtedly  
3 will have consequences throughout Indian Country. Petitioner respectfully requests that this  
4 Court deny the Respondent's Motion to Dismiss because Petitioner's due process rights have,  
5 and continue to be violated by the very people Petitioner has entrusted his livelihood in: the  
6 Metlakatla Indian Community Tribal Council.

7 **JURISDICTION AND VENUE**

8 25 U.S.C §1303 provides that the "privilege of the writ of habeas corpus shall be  
9 available to any person, in a court of the United States, to test the legality of his detention by  
10 order of an Indian Tribe," giving this Court jurisdiction and the power to grant this Writ and  
11 requested relief.

12 In order to establish jurisdiction, petitioners who seek relief under 25 U.S.C. §1303 must  
13 establish that: (1) the proceeding at issue is criminal in nature; (2) the Tribe is unlawfully  
14 restraining their personal liberty; and (3) they have exhausted all available tribal remedies.  
15 *Quair v. Sisco*, 358 F. Supp.2d 948 (E.D. Cal. 2004). These elements are satisfied by  
16 Petitioner's allegations.

17 Respondents' decision to force Petitioner to bear all costs of a Tribal Court case against  
18 the Community without providing Petitioner an opportunity to be heard amounts to a severe  
19 restraint on liberty. This restraint on liberty is unlawful under Section 1302 of the Indian Civil  
20 Rights Act which makes it unlawful to, among other things, abridge the freedom of speech,  
21 deny petitions for the redress of grievances, deny any person equal protection of the laws, or  
22 deprive any person of liberty without due process of law.

23 Petitioner has no other remedy. The Metlakatla Indian Community Constitution and By-  
24 Laws are silent as to the protection of individual rights as enumerated in Section 1302 Indian  
25 Civil Rights Act. Petitioner has no other tribal remedies to exhaust – the Tribal Court is not the  
26 proper forum to review an action of the Community Council, nor are there any processes

1 available to do so. In other instances when petitioners have been denied their liberty without  
2 access to a proper forum in which to dispute the legality of their banishment, courts have  
3 properly exercised jurisdiction. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874,  
4 895-98 (2d Cir. 1996) (Court held that the banishment of tribal members from their reservation  
5 is a sufficient restraint on liberty to permit habeas jurisdiction under 25 U.S.C. § 1303); *see*  
6 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that even an “enemy combatant” must be  
7 given judicial process to contest the validity of the restraint because “it would turn our system  
8 of checks and balances on its head to suggest that a citizen could not make his way to court with  
9 a challenge to the factual basis for his detention by his government, simply because the  
10 Executive opposes making available such a challenge.”)

11 Venue is proper in this District because all of the events or omissions giving rise to the  
12 actions complained of have herein occurred within this District. Respondents are residents  
13 within this District. Petitioner’s personal liberty is being restrained in this District.

14 No other application for this Writ has been made to any other Judge or Court.

### 15 ARGUMENTS

16 **I. Respondent’s Counsel Must Recuse Himself from This Case Because He is Acting**  
17 **on Behalf of Petitioner While Working for the Tribal Council in Their Individual**  
18 **Capacities, and Representing the Tribe Whom Petitioner is a part of, Thereby**  
19 **Creating a Direct and Concurrent Conflict.**

20 The Respondent’s counsel provided several Exhibits in a Declaration in support of his  
21 own Motion to Dismiss. These Exhibits included the acknowledgment of a “closed meeting,”  
22 where only the Tribal Council and the Tribe’s Attorney were present. (Dec. of Lundberg at 1-2).  
23 Petitioner recognizes that the role of general counsel for a tribe can become complicated.<sup>1</sup>

24 <sup>1</sup> Attorneys representing an Indian tribe must determine early on “who is the client.” This question can be difficult  
25 to determine, especially if the attorney faces competing demands within the client governing body. For instance, at  
26 any given time the tribal client could be construed to be one of the following: (1) the Indian tribe, *qua* tribe; (2) the  
Tribal Council as a whole; (3) the Chairman of the Tribal Council; (4) other members of the Tribal Council; (5) a  
Tribal Enterprise or other political subdivision; (6) tribal members; or (7) a political faction of the governing  
body. For example, if an action involves the head of the Tribe’s Health Clinic, either the Tribe’s Health Board  
(which oversees the clinic) or the Tribal Council (which oversees the Health Board) might be the client. Tribal law

1 However, in this case, it is clear that Christopher Lundberg acts as general counsel for the  
2 Metlakatla Indian Community as a whole, not just the Metlakatla Community Council. As such,  
3 it is presumed that Mr. Lundberg is paid from the Metlakatla Indian Community directly and  
4 therefore serves Petitioner in a legal capacity as well because Petitioner is a member of the  
5 Metlakatla Indian Community. As an attorney, it is an established inherent and concurrent  
6 conflict when the very person you are going against in any adversarial proceeding pays you for  
7 legal services. *ARPC 1.7 – Conflict of Interest: Current Clients*. In this case, Mr. Lundberg is  
8 representing the Respondents’ – individuals who are or have been Metlakatla Community  
9 Council Members, while continuing his service as general counsel for the Metlakatla Indian  
10 Community. These two roles have inherent conflict, and as such, Mr. Lundberg should recuse  
11 himself. (Please see *Hicks v. Edwards*, 75 Wn. App. 156, Court of Appeals of Washington,  
12 Division 2 (1994) for persuasive authority, where the Attorney, acting as counsel for a  
13 corporation, as well as counsel for two majority shareholders constituted joint representation  
14 and was disqualified by the Court. In that case, on appeal, sanctions were not proper, but  
15 attorney disqualification remained).

16 Mr. Lundberg should have advised the individual Tribal Council members in this case  
17 listed as Respondents to seek separate counsel for these proceedings, and Mr. Lundberg must  
18 recuse and remove himself immediately. Without Mr. Lundberg’s removal, Petitioner’s restraint  
19 on liberty remains severely diminished due to the fact that he is paying, through the tribe, for his  
20 own defense counsel in a suit that he brought against the Tribal officials for violations of due  
21 process.

22  
23 may also specify who directs the attorney. Thus, when the client is a governmental organization, a delicate balance  
24 must be struck between maintaining confidentiality and assuring that a potentially wrongful act is prevented or  
25 rectified. To address these concerns, an Idaho attorney representing an Indian tribe should try to identify the client  
26 within the scope of the legal services agreement. As part of this process, the attorney can work to identify who will  
act as the speaking agent or point of contact between the tribe and the attorney. To narrow who the client is, the  
attorney should ask: (1) who will authorize letters and court filings?; (2) will the authorization come from different  
persons if the representation involves a political subdivision of the tribe?; and (3) during an intra-tribal dispute,  
who will direct attorney action? This excerpt is taken from “The Council’s Counsel: The Ethics of Representing  
Tribal Councils.” By Rob Roy Smith. [http://www.msaj.com/papers/ISBCLEJuly2006\\_06.htm](http://www.msaj.com/papers/ISBCLEJuly2006_06.htm).

1 Finally, the declaration of Mr. Lundberg is improper and should not be considered as  
2 part of Respondents' Motion to Dismiss because in providing this declaration, Mr. Lundberg is  
3 acting as a witness, not an advocate. Rule 3.7 of the Alaska Rules for Professional Conduct  
4 clearly state that an attorney cannot act as a witness in a proceeding that they are representing a  
5 party in with three exceptions: (1) the testimony relates to an uncontested issue; (2) the  
6 testimony relates to the nature and value of legal services rendered; and (3) disqualification of  
7 the lawyer would work substantial hardship on the client. *ARPC 3.7(a)*. None of the exceptions  
8 apply in this case. Mr. Lundberg's declaration attached to the Respondents' Motion to Dismiss  
9 clearly states that this declaration was made based on his personal knowledge and includes  
10 information that is at the very heart of this dispute. (Dec. of Lundberg at 1).

11 The issue Mr. Lundberg speaks to is not related to an uncontested issue, nor does it  
12 speak to the nature and value of Mr. Lundberg's legal services. Additionally, the Respondents  
13 have not shown that a substantial hardship would happen if Mr. Lundberg were no longer the  
14 attorney for the Respondents. The rationale behind not having attorneys act as witnesses is very  
15 clear – to ensure that the tribunal and the other party are not prejudiced by the blurring of lines  
16 by one attorney. *ARPC 3.7 Comment*.

17 In this case, Mr. Lundberg has blurred the lines between attorney and witness.  
18 Petitioner's object to Mr. Lundberg's declaration and it should not be considered. Moreover,  
19 Mr. Lundberg should recuse himself completely from this case.<sup>2</sup>

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21 **II. Petitioner's Claim is Ripe and Ready for Adjudication Because Petitioner's Liberty**  
22 **is Restrained Regardless of the Pending Motion for Petitioner to Pay for Court**  
23 **Costs.**

24 In Respondents' Motion to Dismiss, Respondents argue that, "*Pro Tem* Magistrate  
25 Steckel has not yet ruled on Respondent's Motion for Costs, and Petitioner does not have a

26 <sup>2</sup> Attorney Josh Stellmon personally represented Petitioner on a separate matter and was paid from the Metlakatla Indian Community to help Petitioner. Mr. Stellmon has a direct conflict in this case as well because he has acted as Petitioner's separate counsel while being paid by the Metlakatla Indian Community.

1 money judgment against him in any amount.” Response at 11. Respondents are trying to  
2 convince this court that a Judge ruling on a motion on whether or not that same Judge is paid is  
3 NOT a violation of due process because it is not ripe. Petitioner contends that the very act of  
4 bringing the motion to the same judge that must rule on whether or not to pay himself IS a  
5 violation of the due process rights of Petitioner (emphasis added).

6 Furthermore, any looming court costs, fines or fees may be considered to be a restraint  
7 on liberty.<sup>3</sup> Therefore, this looming bill for costs, that must be paid whether now, or in the  
8 future, does in fact require adjudication immediately. These court costs, equivalent to a fine,  
9 also determine the voting rights of the tribal members pursuant to the Metlakatla Indian  
10 Community Codes that state that “Any member of the Metlakatla Indian Community eighteen  
11 (18) years of age or older on the date of the election, who is not in arrears for payment of taxes,  
12 fines, or fees for permits to occupy land, shall be eligible to vote.” TITLE 5, CHAPTER 17.<sup>4</sup>

13 **III. Actual and Physical Custody is not Required for Establishing Relief Under the**  
14 **Indian Civil Rights Act, Only a Severe or Actual Potential Restraint on Liberty**  
15 **Such as the Denial of the Right to Vote.**

16 In Respondent’s Motion, Respondent’s write, “To establish jurisdiction under 25 U.S.C  
17 § 1303, a habeas petition must show that: (1) the petitioner is in custody; and, (2) the petitioner  
18 exhausted all tribal remedies. *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010). While  
19 actual physical custody is not a jurisdictional prerequisite for habeas review, to establish  
20 “detention” without physical custody, a petitioner must show that alleged “conditions and

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21 <sup>3</sup> In *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010), heavily relied on by Respondent’s, the 9th Circuit  
22 stated that, “the denial of access to certain facilities does not pose a severe actual or potential restraint on the  
23 Appellants’ liberty. Appellants have not been banished from the Reservation. Appellants have never been arrested,  
24 imprisoned, **fin**ed, or otherwise held by the Tribe. (emphasis added) *Id.* at 918. Specifically, whether or not  
25 Appellant was fined was a deciding factor in determining restraint. So, when there is a fine, there may be a restraint  
26 on liberty. See also Response at 5.

<sup>4</sup> Since filing this case, several Metlakatla Tribal Members have come forward with looming court fees, some in  
excess of \$10,000. Levying court fees on tribal members, after those same tribal members bring a cause of action in  
the Metlakatla Tribal Court is commonly used as a scare tactic by the Metlakatla Community Council to prevent  
Members of the Tribe to not pursue any legal remedy in the Metlakatla Tribal Court system. This is also evidenced  
by the email in Mr. Lundberg’s Declaration, Exhibit 2, cautioning Petitioner that he will be responsible for court  
costs and fees if he continued to seek justice.

1 restrictions . . . significantly restrain [petitioner's] liberty.” Id. at 919 (internal quotations  
2 omitted). In other words, a petitioner must show “a severe actual or potential restraint on  
3 liberty.” Id. Response at 4.

4 Respondents concede that actual and physical custody is not necessary for detention  
5 under the Indian Civil Rights Act, but that a petitioner must show “a severe actual or potential  
6 restraint on liberty.” Response at 4. The right to vote is paramount and sacrosanct to any  
7 governed society.<sup>5</sup> Without a right to vote, the tribe, its’ members, and the tribal community  
8 have no way to be governed, and for its’ members to have a voice in an already intimate and  
9 enclosed society. The federal case law remains silent on whether or not the right to vote rises to  
10 the level of restraint on personal liberty. Respondent’s argue that losing the right to vote in this  
11 case is a only “collateral consequence.” Response at 9. Losing the right to vote is the direct  
12 consequence. Furthermore, most recently, the proverbial door is open in *Tavares v. Whitehouse*.  
13 In *Tavares*, the court stated, “Petitioners' punishments in this case were, in many ways, not as  
14 severe a restraint on liberty as the punishments in *Jeffredo* and *Poodry*. Each Petitioner retained  
15 the right to vote through absentee ballot.” *Tavares v. Whitehouse*, No. 2:13-CV-02101-TLN,  
16 2014 WL 1155798, at 10 (E.D. Cal. Mar. 21, 2014). Retaining the right to vote is in fact a  
17 crucial factor in deciding and determining whether or not a restraint on personal liberty exists.  
18 In this case, the right to vote is circumvented thereby denying Petitioner the legitimacy of a vote  
19 and thereby intervening a severe restraint on Petitioner’s personal liberty.<sup>6</sup> The restraint may be  
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21 <sup>5</sup> Constitution and By-Laws of the Metlakatla Indian Community, Article II: “We, the people of the Metlakatla  
22 Indian Community of the Annette Islands Reserve, Alaska, do severally subscribe to the following principles of  
23 good citizenship: 1.) To be faithful and loyal to the Government of the United States of America. 2.) To be loyal to  
the local government of our Community, to obey its ordinances and regulations, and to obey all applicable laws of  
the Territory of Alaska and of the United States. 3.) To cooperate earnestly in all endeavors for the education of our  
children, for the advancement of the Community, and for the suppression of all forms of vice.”

24 <sup>6</sup> The Petition for Writ of Habeas Corpus only skirted the underlying issue that the Metlakatla Indian Community’s  
25 Election held in 2015 that precipitated these events was done fraudulently in order to control the outcome of the  
26 Tribal Council elected officials. Several Metlakatla Tribal Members watched as a member of the Secretary’s office  
who was not a sworn ballot judge, but was supposed to collect ballots had thrown them in the trash instead of  
placing the ballots in the ballot box. Many Metlakatla Tribal Members have declined to come forward in fear of  
retribution by the current Tribal Council. If this case survives this Motion, Petitioner is confident community  
members will be more forthcoming.



1 potential, as well as actual. Petitioner's restraint on liberty through the denial of due process and  
2 the right to vote is both actual and potential, and severe because Respondent's infringement  
3 denies the right to vote.

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5 **IV. Petitioner Exhausted All Tribal Remedies When His Case Was Dismissed with  
Prejudice and the Mayor Denied Any Right to Appeal.**

6 Respondents state, "Dismissal is also proper because Petitioner failed to exhaust tribal  
7 remedies. Exhausting all tribal remedies is a prerequisite to jurisdiction under § 1303. *Jeffredo*  
8 *v. Macarro*, 599 F.3d at 918. The Petition is based entirely on the potential imposition of court  
9 costs on Petitioner. Ignoring for the time being that no costs have actually been imposed on  
10 Petitioner and that his claim is not ripe for adjudication, see Lundberg Decl. at ¶4, Exhibit 3,  
11 Petitioner never filed an opposition to Respondent's Motion for Costs in tribal court." Response  
12 at 10. Petitioner tried to submit an appeal to the *Pro Tem* Magistrate Steckel's opinion and made  
13 a formal request with the Mayor of the Metlakatla Indian Community but was denied the right  
14 to appeal and was told that all decisions had been final.<sup>7</sup>

15 **CONCLUSION**

16 Because Petitioner has no other forum for relief, and Petitioner has showed that there is  
17 an actual or potential severe restraint of liberty through the actions of the Metlakatla Indian  
18 Community Council, Petitioner respectfully requests that Respondent's Motion to Dismiss be  
19 denied so that this case may proceed to trial.

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<sup>7</sup> Only after the Council called Mr. Lundberg and asked Mr. Lundberg whether or not Petitioner could file an  
24 appeal did the Secretary call Petitioner and state that Petitioner could in fact file an appeal after being told he could  
25 not by the Mayor and Secretary of the Metlakatla Indian Community. It seems as though the Tribe wants to have  
26 the power associated with charging the court costs when they so choose and in order to keep community members  
in line, and have even held motions open in the past with other tribal members as a constant real and open threat to  
pay court costs, or to lose tribal benefits. The right to an appeal, and the confusion with the Council, coupled with  
the reliance on Mr. Lundberg is yet another example of the continuous due process violations stemming from the  
Metlakatla Indian Community Council.



1  
2 RESPECTFULLY SUBMITTED THIS 10th DAY OF OCTOBER, 2016  
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5 **WHEELER FIRM, PLLC.**

6 /s/ Joseph J. Wheeler, Jr.

7 Joseph J. Wheeler, Jr., WSBA # 49073

8 Pro Hac Vice for Petitioner

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**CERTIFICATE OF SERVICE**

I hereby certified that I have this 10th of October 2016, caused one (1) copy of the *Petitioner's Response to Respondent's Motion to Dismiss* to be delivered to the following in the manner described:

Christopher Lundberg, OSB No. 941084  
Email: [clundberg@hk-law.com](mailto:clundberg@hk-law.com)  
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- ☐ U.S. Mail  
☐ Hand Delivery  
☒ ECF  
☐ Telefax  
☐ E-mail

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 10th day of October 2016.

Abra J. Conitz

/s/ Abra J. Conitz  
Partner, Wheeler Firm, PLLC.