No. 15-71772; 15-71909

IN THE
United States Court of Appeals
for the Ninth Circuit

THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY RESERVATION, MONTANA,
Petitioner,
v.

U.S. DEPARTMENT OF THE INTERIOR,
Respondent

SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR,
Respondent

KEN ST. MARKS,
Respondent

On Appeal from the United States Department of the Interior

BRIEF FOR THE CHIPPEWA CREE TRIBE

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TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE.....3

I. The Significance of Tribal Sovereignty 3

II. The Chippewa Cree Tribe is a Sovereign Nation Governed by a Constitution 4

III. The Tribe Removed St. Marks Pursuant to its Constitution 5

A. St. Marks's Neglect of Duty and Gross Misconduct 5

B. The 2013 Removal 7

IV. St. Marks's Ongoing Misconduct 10

V. The Department's Actions in this Case.....14

ISSUES PRESENTED FOR REVIEW 19

SUMMARY OF THE ARGUMENT 20

STANDARD OF REVIEW 22

ARGUMENT 24

I. The Department's Order Amounts to an Unlawful Intrusion on Tribal Sovereignty.....24

A. Bedrock Principles of Tribal Sovereignty 24

1. The Department Improperly Encroached on the Tribe's Sovereignty 27

2. The ARRA Does Not Authorize the Department's Evisceration of the Tribe's Sovereignty.....29

3. The Tribe Did Not Waive its Sovereignty by Agreeing to Receive ARRA Funds 31

Page

4. Any Ambiguities Must be Read in Favor of the Tribe..32

II. The Actions Taken by the Department Pursuant to ARRA §1553 Violate The Tribe's Constitutional Right to Procedural Due Process under the Fifth Amendment 33

A. The Tribe Holds Several Constitutionally Protected Interests, Which Demand that the Department Provide Meaningful Procedural Safeguards..35

1. The Tribe Has a Protected Interest in its Sovereign Status 35
2. The Tribe Has a Protected Interest in its Governmental Functions 35
3. The Tribe Holds a Protected Interest in its Funds the Department Now Requires it Pay St. Marks 36

B. The Department Has Deprived the Tribe of Several Protected Interests Without Providing Adequate Process 37

1. The Tribe's Private Interests Are Substantial 37
2. The Great Risk – and Reality – of Erroneous Deprivation through the Procedures Used and the Probable Value of Additional or Substitute Procedures 39

a. The Procedures Used Were Unclear, Highly Prejudicial, Contradictory, and Offered No Meaningful Opportunity for the Tribe to be Heard 39

(1) The Department's Order Indicates that it Used Questionable and Biased Evidence Not Shared with the Tribe..........44

(2) Additional or Substitute Procedures Would Have Afforded the Tribe a Meaningful Opportunity to Confront the Purportedly Adverse Evidence 48

Page

b. The Department's Interests Fail to Tip the Scale 50

III. Alternatively, Even Assuming *Arguendo* that the ARRA Whistleblower Provision Applies to the Tribe's Internal Political Dispute and that it Passes Constitutional Muster, the Department Nevertheless Erred When Finding a Prohibited Reprisal Under the Provision And Entering an Award in Favor of St. Marks 52

A. St. Marks's Alleged Actions Do Not Qualify for Whistleblower Protection, as St. Marks is Not an Employee Under the ARRA 53

B. The Department Erred in Finding that St. Marks's Alleged Disclosures Were a "Contributing Factor" to His Removal 57

1. The Department's Conclusions Are Not Supported by the Record 58

C. The Department's Order Should Be Vacated, as the Department Erred in Calculating the Award 61

CONCLUSION 63

STATEMENT OF RELATED CASES 64

CERTIFICATE OF COMPLIANCE 65

ADDENDUM A-1

TABLE OF AUTHORITIES

Page(s)

CASES

Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife, BLM, 273 F.3d 1229 (9th Cir. 2001) 22

Arrow Enterprises v. Chippewa Cree Tribe, et. al., 2013-cvtt-1742 / 2013-cvtt-1743 / 2015-cvtt-2203 (Chippewa Cree Tribal Court)....... 11

ASSE Int'l, Inc. v. Kerry, 2015 U.S. App. LEXIS 17666 (9th Cir. Oct. 9, 2015) 42

Boddie v. Connecticut, 401 U.S. 371 (1971) 34

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) 38, 49, 51, 52

Business Commc'ns v. U.S. Dep't of Educ., 739 F.3d 374 (8th Cir. 2013)......passim

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 24, 25

Clackamas Gastroenterology Assocs., P.C. v. Wells 538 U.S. 440 (2003)....... 21, 53, 54, 55

Dickman v. Comm'r of Internal Revenue, 465 U.S. 330 (1984) 36, 49

Dusenbery v. United States, 534 U.S. 161 (2002) 34

EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529 (2d Cir. 1996)....... 56

Fichman v. Media Ctr., 512 F.3d 1157 (9th Cir. 2008)....... 54, 55, 56, 57

Fisher v. Dist. Ct., 424 U.S. 382 (1976)....... 26

Fletcher v. United States, 116 F.3d 1315 (10th Cir. 1997) 4, 30

Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364 (9th Cir. 1996)....... 22, 34

Goldberg v. Kelly, 397 U.S. 254, 269 (1970) 50

Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995)....... 34, 35

Page(s)

Harjo v. Kleppe, 420 F. Supp. 1110, (D.D.C. 1976), *aff'd sub nom, Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) 29

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) 49

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 3

Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951) 36

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) 26

Mathews v. Eldridge, 424 U.S. 319 (1976) 34, 37, 50, 51

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 32

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014) 3

Mingo v. Baxter, 2012 U.S. Dist. LEXIS 126802 (E.D. Mich. Sept. 6, 2012), *aff'd* 518 Fed. Appx. 444 (6th Cir. 2013) 38

Mont. v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 32

Nance v. Envtl. Prot. Agency, 645 F.2d 701 (9th Cir. 1981) 27

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) 29

Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993) 30

Rosales-Martinez v. Palmer, 753 F.3d 890 (9th Cir. 2014) 47

Sanderlin v. Seminole Tribe, 243 F.3d 1282 (11th Cir. 2001) 32

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 3, 4, 20, 26, 29, 31, 35

Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006) 22

Seminole Nation v. United States, 316 U.S. 286 (1942) 27

Sierra Club v. United States EPA, 346 F.3d 955 (9th Cir. 2003) 23, 58

Snoqualmie Indian Tribe v. FERC 545 F.3d 1207 (9th Cir. 2008) 22, 24, 52

Page(s)

Southland Royalty Co. v. Navajo Tribe of Indians, 715 F.2d 486 (10th Cir. 1983) 4

Taylor v. Beckham, 178 U.S. 548 (1900) 38

U.S. Postal Serv. v. Gregory, 534 U.S. 1 (2001) 22

United States v. Bean, 537 U.S. 71 (2002) 22, 53

United States v. Wheeler, 435 U.S. 213 (1978) 3

Vulgamore v. Tuba City Reg'l Healthcare Corp., 11-8087, 2011 U.S. Dist. LEXIS 89647 (D. Ariz. August 11, 2011) 32

Wheeler v. United States Dep't of Interior, Bureau of Indian Affairs, 811 F.2d 549 (11th Cir. 1987) 26

Williams v. Lee, 358 U.S. 217 (1959) 26

Zimmerman v. Oakland, 92 Fed. Appx. 451 (9th Cir. 2004) 34

Zinermon v. Burch, 494 U.S. 113 (1990) 34

STATUTES

5 U.S.C. §§ 701-706 ..... 22, 53, 58

American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115, 297 ..... passim

Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. § 4301(a)(6) 25

OTHER AUTHORITIES

Cohen's Handbook of Federal Indian Law (2012 ed.) ..... passim

Fed. R. Evid. 201 47

President Barack Obaman, Memorandum on Tribal Consultation, 74 Fed. Reg. 57, 881 (2009) 25

Page(s)

President George W. Bush, Exec. Order No. 13,336, American Indian and Alaska Native Education, 40 Weekly Comp. Pres. Doc. 713 (Apr. 30, 2004) 25

U.S. Secretary of the Interior Sally Jewell, Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries (Aug. 20, 2014) 25

U.S. Const. amend. V. 19, 20, 33, 37, 51, 52

U.S. Const. art. I, § 2 36

U.S. Const. art I, § 8, cl. 3....................3

Chippewa Cree Tribe Constitution, Article III....................4

Chippewa Cree Tribe Constitution Article VI....................5

Chippewa Cree Tribe Constitution Article V 5, 36

Chippewa Cree Tribe Constitution Article XII, § 2 8

Chippewa Cree Tribe Bylaws § 1(e) 8

STATEMENT OF JURISDICTION

This is an appeal from an Order by the Department of the Interior under the whistleblower provision of the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115, 297. Specifically, Section 1553 of the ARRA allows any person who believes they have been subjected to a prohibited reprisal to initiate an action in the appropriate agency. Mr. Kenneth Blatt-St. Marks ("St. Marks") initiated this matter in the Department of the Interior ("the Department"), claiming that the Chippewa Cree Tribe ("the Tribe") engaged in a prohibited reprisal when the Tribe's governing body removed St. Marks from his position as Chairman of the Tribe pursuant to the Tribe's Constitution. As articulated herein, the Tribe has maintained throughout these proceedings that the Department of the Interior lacks jurisdiction to proceed in this action due to the Tribe's sovereign status. Nevertheless, the Department issued its final Order on April 24, 2015, finding that a prohibited reprisal occurred and directing the Tribe to provide a remedy to St. Marks. [ER1068].

This Court has jurisdiction under ARRA §1553(c)(5), which provides that "[a]ny person adversely affected or aggrieved by an order . . . may obtain review of the order's conformance with this subsection . . . in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred." §1553(c)(5).

The alleged reprisal in this action occurred on the Rocky Boy Indian Reservation, Box Elder, Montana. As such, this Court is the appropriate United States Circuit Court of Appeals in which to seek review of Department's Order. The Department's Order was issued on April 24, 2015. The Tribe timely filed its Petition for Review of on June 11, 2015, within the 60-day timeframe set forth in §1553(c)(5). [ER0001].

STATEMENT OF THE CASE

I. The Significance of Tribal Sovereignty

This case involves the Department of Interior's infringement on the inherent status of a sovereign Indian nation – the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana (the "Tribe"). It is well established that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citation omitted). Indeed, "the most basic principle of all Indian law is that those powers lawfully vested in an Indian nation . . . [are] 'inherent powers of a limited sovereignty which have never been extinguished.'" *United States v. Wheeler*, 435 U.S. 213, 322-23 (1978). The Framers of the United States Constitution understood tribes to possess this inherent sovereignty. *See* U.S. Const. art I, § 8, cl. 3. The United States Supreme Court has likewise consistently recognized that American Indian tribes are "separate sovereigns pre-existing the Constitution" and "remain a separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (internal citations omitted).

The federal government accordingly maintains a "longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). In this regard, a government-to-government relationship exists

between tribes and the federal government, wherein the federal government has a *duty* "to protect tribal rights to exist as self-governing entities." *Cohen's Handbook of Federal Indian Law* §5.04[3][a] (2012 ed.) ("Cohen"). This duty holds particularly true in the context of the tribe's right to determine its leadership and form of government – two critical aspects of tribal sovereignty. *See, e.g., Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486, 489 (10th Cir. 1983) (finding that "[t]he choice of government is in itself an act of self-government and consonant with Congressional policies" and concluding that "[t]he self-sufficiency of the Navajo Tribe could be impaired by the imposition of a requirement" that the Secretary of the Interior approve Navajo taxes).

II. The Chippewa Cree Tribe is a Sovereign Nation Governed by a Constitution

The Tribe is a federally-recognized sovereign nation, and is properly regarded as an autonomous political community with inherent power over its "internal and social relations." *Fletcher v. United States*, 116 F.3d 1315, 1326-27 (10th Cir. 1997). Included among these inherent powers is the Tribe's right to govern its own internal electoral processes and its form of government. *Santa Clara Pueblo*, 436 U.S. at 55.

To this end, the Tribe is governed by its Constitution, which was adopted on November 23, 1935. [ER1034]. The Chippewa Cree Constitution sets forth the form and mode of governance for the Tribe. Article III establishes a

Business Committee composed of eight members and a Chairman, which serves as the Tribe's governing body. [ER1036]. Article VI details procedures for electing individuals to serve on the Business Committee and specifies the role of the Business Committee in governing the Tribe. [ER1038]. Significantly, Article V of the Tribe's Constitution also empowers the Business Committee with the authority to expel an individual member of the Business Committee for "neglect of duty or gross misconduct." [ER1037]. Under this provision, the "accused member shall be given full and fair opportunity to reply to any and all charges at a designated Committee meeting" and "any such member shall be given a written statement of the charges against him at least five days before the meeting at which he is to appear." [ER1037].

III. The Tribe Removed St. Marks Pursuant to its Constitution

A. St. Marks's Neglect of Duty and Gross Misconduct

On March 25, 2013, after providing notice to then-Chairman St. Marks, the Tribe's Business Committee held a hearing to remove St. Marks from office due to his extensive "neglect of duty" and "gross misconduct" according to the procedures outlined in the Tribe's Constitution. [ER0994]. St. Marks was elected to the Chairman position in November 2012, and during his short tenure in office, St. Marks harassed tribal employees, defrauded the Tribe and federal government, and acted unlawfully.

St. Marks' misconduct in office was not only serious and concerning, but unbecoming of an elected leader. Indeed, St. Marks yelled at, intimidated, and threatened various members of the Tribe. For example, from his November 2012 election to the Chairman position through February 2013, several staff members at the Tribe's Rocky Boy Health Clinic left their positions due to the pervasive abuse and harassment by St. Marks. [ER0942-ER0951]. The supervisor of each clinical department at the Health Clinic, feared "a walk-out or continuous exodus of medical staff at this clinic" based on the "environment of threats and intimidation" that St. Marks created. [ER0942-ER0951]. The Tribe's Account Manager, Ona Gopher, and the Chief Financial Officer for the Chippewa Cree Construction Corporation, Georgie Russell, both endured extensive verbal harassment and intimidation. For example, Ms. Russell explained that St. Marks told her to "shut up" and "I'll take care of you later" when Ms. Russell spoke up at Construction Corporation meetings. [ER0952-ER0953]. Ms. Russell described how St. Marks was "threatening me and my job" and "was scared he was going to do something to me" such that Ms. Russell "did not feel safe in his presence." [ER0952-ER0953].

Fawn Tadios, the Chief Executive Officer of the Rocky Boy Health Clinic, described "several incidents during work hours and after hours" where St. Marks had been "making disgusting, offensive and inappropriate remarks directly to me" – including incidents of sexual harassment that included inappropriate

touching. [ER0942-ER0951]. On March 12, 2013, Tribal Judge Melody Bernard-Whitford executed an affidavit indicating that on February 28, 2013, Ms. Tadios confided in her that St. Marks sexually harassed her and that she feared traveling with St. Marks. [ER0956-ER0957]. Judge Whitford later executed a second affidavit, stating that St. Marks "did threaten me by saying he was going to take me down, and report me to feds for reasons that I believe were after he found out I signed an affidavit of support for our Chief Executive Officer, Fawn Tadios." [ER0955].

Additionally, St. Marks's charge of misconduct included significant abuse, waste, and misuse of tribal funds that included making unauthorized payments to individuals shortly upon taking office. [ER0842-ER0843; ER0958-ER0974]. St. Marks also violated the Tribe's Constitution by unilaterally appointing a Tribal Court Judge, [ER0976-ER0980] and voting to hire a prospective employee [ER0986-ER0988], although the Tribe's Bylaws permit him to do so only in the event of a tie vote by the remaining members of the Business Committee. [ER1040]. St. Marks has acknowledged taking these actions and maintains that he was authorized to do so – he was not. [*See* ER0981-0985].

B. The 2013 Removal

Pursuant to the procedures outlined in the Chippewa Cree Tribe's Constitution, the Business Committee notified St. Marks by letter dated March 15,

2013, that it was bringing seven charges against St. Marks and that there would be a removal hearing on March 25, 2013. [ER0878]. The notice indicated that the March 25, 2013, meeting would serve to afford St. Marks "a full and fair opportunity to respond to the charges as required by the Constitution." [ER0878]. The charges described in the March 15, 2013 Notice of Removal Hearing are as follows:

> Charge 1: In violation Article XII, § 2 of the Chippewa Cree Tribe's Constitution, St. Marks' removed the acting Chief Judge, Micelle Ereaux, and unilaterally appointed Duane Gopher to the position;
>
> Charge 2: In violation of § 1(e) of the Chippewa Cree Tribe's By-Laws, St. Marks voted to hire a prospective employee, although he was only permitted to do so in the event of a tie vote by the remaining members of the Business Committee;
>
> Charge 3: In violation of Tribal Law and during the course of his official duties, St. Marks verbally assaulted numerous employees;
>
> Charge 4: In violation of Tribal Law and during the course of his official duties, St. Marks made inappropriate sexual advances toward an employee;
>
> Charge 5: In violation of § 1(e) of the Chippewa Cree Tribe's By-Laws and Code of Ethics, St. Marks traded in two cars that belonged to the Tribe in order to purchase a $68,000 Cadillac Escalade for his own personal use and enjoyment;
>
> Charge 6: In violation of Tribal Law, St. Marks approved payments of $2,000 to three members of the Tribe; and

> Charge 7: In violation of Tribal Law, St. Marks used a Chippewa Cree credit card for $890 in unauthorized expenses.

[ER0878]. The charges detailed in this March 15 notice "establish[ed] a knowing and willful violation of legal duty, lack of ethical responsibility, and callous disregard for the duties, responsibilities and obligations [St. Marks] assumed under oath upon [his] election." [ER0878]. Also on March 15, the Chippewa Cree Tribal Court granted a Temporary Restraining Order prohibiting St. Marks from contacting the other members of the Business Committee. The Chief Judge found that, based on the evidence presented to her, "there [was] a credible threat that [St. Marks] may or could cause harm [to the other members of the Business Committee] if [the] Temporary Restraining Order [was] not immediately issued." [ER0989-ER0993].

During the hearing of March 25, 2013, St. Marks refused to answer the charges. The Business Committee urged St. Marks to respond to the charges on three occasions; however, St. Marks refused to respond to the charges and explain his position regarding the charges and the overwhelming evidence obtained to support the charges. [ER0994-ER0995]. The Business Committee moved forward with its consideration of the charges against St. Marks, determined that St. Marks exhibited gross misconduct and a neglect of duty, and removed him from the position of Chairman and from the Business Committee. [ER0994-ER0995].

This extraordinary step was taken based on St. Marks's extensive neglect of duty and gross misconduct – *not* because of St. Marks's communication with the federal government regarding the fraudulent use of federal funds. [ER0994-ER0995]. Indeed, it was known in September 2012, *prior to his election to office*, that St. Marks had been communicating with the federal government. ER0171-ER0173]. St. Marks's behavior during his tenure in office—particularly his verbal threats and inappropriate harassment—violated his ethical duties and was, at a minimum, an abuse of his position. It was solely these violations underlying each of the charges against him, individually and collectively, that caused the Business Committee to remove St. Marks from office. [ER0994-ER0995].

IV. St. Marks's Ongoing Misconduct

Despite being removed from his position as Chairman in March 2013, St. Marks reassumed the Chairman position after winning an interim election. [ER1071]. However, St. Marks still refused to answer the initial charges against him, and continued to engage in the wrongful behavior, which necessitated the Business Committee to again remove St. Marks. [ER0881].

Specifically, St. Marks and his construction company, Arrow Enterprises, engaged in a conspiracy to defraud the Tribe and the federal government of several hundred thousand dollars. St. Marks obtained these federal

funds through a fraudulent scheme and by paying bribes. [ER0881; ER0884-ER0941]. This conduct amounted to two additional charges – Charges 8 and 9 – against St. Marks:

> Charge 8: St. Marks falsely misrepresented that his company completed all work on the North Central Pipeline and that he paid each of his employees proper Davis Bacon wages in accordance with federal law and his contractual obligations.
>
> Charge 9: St. Marks invoiced the Tribe $490,800 for equipment rentals on the Sewer Lagoon Project pursuant to fake equipment leases that were not authorized or approved by the Tribe and that he received $354, 550 in payment of these invoices by offering kickbacks to individuals in exchange for payment of the invoices.

[ER0881]. The conduct underlying these charges is reflected in the counterclaims filed against St. Marks's wholly-owned company Arrow Enterprises and St. Marks in the Tribal Court case *Arrow Enterprises v. Chippewa Cree Tribe, et. al.*, 2013-cvtt-1742 / 2013-cvtt-1743 / 2015-cvtt-2203. [ER0884-ER0941]. Ultimately, these claims went to a jury trial where the jury found that St. Marks engaged in a conspiracy to defraud the Tribe. [ER1121].

Again pursuant to the Chippewa Cree Constitution, the Business Committee notified St. Marks on November 21, 2014, that a removal hearing had been scheduled for December 1, 2014, where St. Marks would have an opportunity to be heard on these nine charges. [ER0881]. During the hearing of December 1, 2014, the Business Committee, through its attorneys, attempted to read the charges

against St. Marks, but St. Marks again failed to refute the charges against him and the Business Committee again voted to remove St. Marks from office pursuant to the Tribe's Constitution. [ER0996-ER0997].

In connection with St. Marks's December 1, 2014, removal, the Tribe sought and obtained a temporary restraining order against St. Marks based on his further egregious misconduct. [ER1021-ER1033]. Specifically, immediately upon taking office the second time, St. Marks unlawfully attempted to fire the judges of the Tribal Court and, in the process, terrorized the judges and members of the Tribal Court staff. On November 25, 2014, St. Marks directed tribal law enforcement to hand deliver termination letters to certain judges on the Tribal Court. [ER0998-ER1017]. St. Marks later arrived at the Court, demanded that everyone immediately leave, and was extremely loud and aggressive. The Chief Judge reported this incident to the Business Committee, explaining that St. Marks's "threatening verbal and physical intimidation" created "a violent interruption" in the Court. [ER0999-ER1001]. She noted that St. Marks's behavior created "an overall atmosphere of hatred and violence" that has caused "extreme physical, emotional and mental fear for my safety in the workplace and in [her] position as Chief Judge of the Chippewa Cree Tribal Court." [ER0999-ER1001].

Additionally, immediately after being sworn into office, St. Marks misled the Finance Department and attempted to cause an unauthorized check to be

issued to himself in the amount of $199,466.40. [ER1018]. St. Marks also attempted to freeze the Tribe's bank accounts by contacting the Tribe's banks and demanding that no withdrawals be allowed without his written consent and demanded that the bank not permit payment of salaries to Tribal employees, who are dependent on their weekly paychecks for food and shelter. [ER1019-1020]. Under the Tribe's Constitution, the Tribe's Chairman does not have the power to take this action. [ER1034-ER1042].

Based on these events, the Chippewa Cree Tribal Court found that St. Marks was constitutionally removed from office and that his "actions have caused and will continue to cause immediate and irreparable damage in the absence of a Court order." [ER1021]. The Court accordingly barred St. Marks from entering the Tribal Offices, prohibited St. Marks from unilaterally demanding payment from the Finance Department, and prohibited St. Marks from representing to anyone, including financial institutions, that he is the Chairman of the Tribe. [ER 1022].[1]

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[1] Following his December 1, 2014, removal, St. Marks reassumed the Chairman position during another interim election. [ER1071]. However, based on the conduct described above, he was again properly removed on March 2, 2015, after the Business Committee brought fifteen charges against St. Marks – the initial nine charges, in addition to the following:

> Charge 10: St. Marks unlawfully attempted to terminate judges of the Chippewa Cree Tribal Court.

(continued...)

V. The Department's Actions in this Case

St. Marks initiated the underlying proceedings pursuant to Section 1553 of the ARRA, claiming that he was removed from office not for his extensive wrongdoing, but in retaliation for his communications with the federal government. [ER1068]. The Tribe first received notice of this ARRA matter on or around July 19, 2013, when the Department sent the Tribe a one-page letter,

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(continued...)

> Charge 11: St. Marks unlawfully threatened, intimidated, and harassed members of the Chippewa Cree Judiciary. By terrorizing the Judges and Tribal Court staff, St. Marks made Tribal Court employees fear for their safety and brought several employees to tears.
> Charge 12: St. Marks threatened and harassed tribal employees, including employees Janice Myers and Ona Gopher in the Finance Department.
> Charge 13: St. Marks deceived, harassed, and intimidated the Finance Department in attempts to issue himself an unauthorized payment in the amount of $199,466.40.
> Charge 14: St. Marks by and through his attorney, attempted to freeze the Tribe's bank accounts, and demanded that no withdrawals or other drawdowns be allowed without his express written consent.
> Charge 15: Prior to being sworn into office, St. Marks purported to act as Chairman of the Tribe and attempted to interfere in an ongoing bankruptcy proceeding involving individuals known to have defrauded the tribe.

[ER1049-ER1067].

indicating that it was investigating St. Marks's removal from office and noting that it would like to interview members of the Business Committee.[2] [ER0723].

On August 11, 2013, the Tribe responded and stated that the Department's interference with its internal political decisions amounts to an infringement on its sovereignty. [ER0726]. Nevertheless, the Tribe's response outlined its decision to remove St. Marks pursuant to its Constitution, offered to "provide further support for this decision if need be," and invited the Department to reach out with any additional questions or concerns. [ER0728]. Two weeks later, on August 25, 2013, the Tribe followed up further, again encouraging the Department to reach out for additional information. [ER0747]. It was not until

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[2] Section 1553 of the ARRA protects against reprisals for employee whistleblowing and prohibits employers from taking adverse employment actions against employees who disclose information they believe evidences misappropriation of ARRA funds. Under the ARRA, when a person submits a complaint alleging a prohibited reprisal, he or she "shall be deemed to have affirmatively established the occurrence" by demonstrating the disclosure was a "contributing factor in the reprisal." §1553(c)(1)(A)(i). The inspector general of the respective agency must investigate the complaint and report its finding to both the employee and the employer as well as the head of the agency, who issues the final disposition. §1553(b)(1). Notably, the ARRA also provides the employer an "opportunity" to rebut the finding by "clear and convincing evidence" that it would have taken the adverse action absent the disclosure. §1553(c)(1)(B). If the head of the agency finds the employer met its burden of producing clear and convincing evidence, the agency head "may not find the occurrence of a reprisal." §1553(c)(1)(B) (emphasis added). But if the head of the agency determines a sufficient basis exists to conclude a prohibited reprisal occurred, the agency head "shall" order a remedy. §1553(c)(2)(A)-(C) (emphasis added).

December 2014, *one and a half years* after the Tribe first heard about the investigation, that the Department's agent asked to speak with members of the Business Committee about, among other things, the Tribe's referral of St. Marks's criminal conduct to the United States Attorney's Office for the District of Montana. [ER1043-1048]. The Tribe and its lawyers scheduled a meeting with the agent, but the agent then abruptly cancelled the scheduled meeting. [ER1043-1048]. Consequently, the Department failed to pursue interviews of the Business Committee members despite the Tribe's attorneys' repeated expressions of cooperation and offers to arrange any such interviews. [ER1043-1048].

After informing the Tribe of its ARRA investigation in July 2013, and despite receiving the Tribe's objections due to its sovereignty, the Department never invited the Tribe to participate in the investigation, did not seek any "rebuttal" evidence from the Tribe as contemplated under §1553(c)(1)(B), and did not accord the Tribe a hearing or another meaningful opportunity to challenge any adverse evidence that the Department amounted against the Tribe. Instead, on December 19, 2014, the Department sent the Tribe its determination that St. Marks's removal from office was a prohibited reprisal, noting that the basis for this decision "is limited only to consideration of the removal of St. Marks by the Business Committee on March 25, 2013, and of the facts in the OIG [Report of Investigation ("ROI")]." [ER0012]. The Department determined that it would

order the Tribe to provide St. Marks a remedy, such as reinstatement to the Chairman position and monetary compensation. [ER0012]. At this time, *after* finding that St. Marks experienced a prohibited reprisal and was entitled to a remedy, the Department gave both the Tribe and St. Marks leave to file submissions on the narrow issue of what compensation the Department should award St. Marks. [ER0013].

On January 12, 2015, St. Marks requested that the Department order that the Business Committee be restrained, that St. Marks be reinstated, and that other monetary and injunctive penalties be imposed against the Tribe. [ER0829-ER0830]. On February 13, 2015, the Tribe filed its submission, urging the Department to retract its determination, reject St. Marks's requests, and decline to order any remedy because, among other reasons, the Department's determination amounts to an improper infringement on the Tribe's sovereignty and the Department's actions under the ARRA failed to provide adequate process before depriving the Tribe of significant protected interests. [ER0835-ER0877]. Notwithstanding the Tribe's position, on April 24, 2015, the Department issued its "final Order," invalidating the Tribe's constitutional removal of St. Marks and ordering that the Tribe:

- "[A]bate any and all reprisals against St. Marks"
- Pay St. Marks $277,333.50 in "back pay"
- Pay St. Marks "front pay" in the amount of $10,666.66 per month from May 2015 through November 2016

- Pay St. Marks travel costs in the amount of $2,955.60
- Pay St. Marks attorneys fees in the amount of $165.474.91

[ER1084-ER1089].

Pursuant to the ARRA, within sixty days of the Department's Order, the Tribe filed the underlying Petition for Review. [ER0001]. The Tribe likewise filed with the Department of the Interior a Motion to Stay the enforcement of the Department's Order, [ER1101-ER1115], which the Department granted after noting that public policy favored a stay based on the "importance" of the issues raised in the instant appeal. [ER1119].

As the Department noted when granting the Motion to Stay, this appeal raises important issues that seriously implicate the Tribe's status as a sovereign nation. The Tribe agrees and further requests that the Department's order be vacated.

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether the Department's actions amount to an unlawful infringement on tribal sovereignty.

Issue 2: Whether the Department's actions pursuant to ARRA §1553 violate the Tribe's constitutional rights to procedural due process under the Fifth Amendment of the United States Constitution.

Issue 3: Whether, assuming the Department's actions did not unlawfully infringe on the Tribe's sovereignty and also assuming that §1553 of the ARRA passes constitutional muster, the Department erred in its interpretation and application of §1553 of the ARRA.

SUMMARY OF THE ARGUMENT

1. The Department's Order must be vacated, as its actions in this matter amount to a gross infringement on tribal sovereignty, in contravention of the longstanding federal-tribal trust relationship. The Order invalidates the Tribe's internal political and constitutional decision regarding its leadership and mandates that the Tribe compensate an individual who the Tribe removed from office pursuant to its Constitution. The Department's actions could not have been more intrusive on the Tribe's fundamental right to function as a sovereign nation with autonomy over its electoral processes. *See Santa Clara Pueblo*, 436 U.S. at 55. The Department's Order must accordingly be vacated.

2. Though the Court need not reach this question if it decides in the Tribe's favor on sovereignty grounds, the Tribe nevertheless maintains that the Department's actions have violated the Tribe's Fifth Amendment procedural due process rights. The Tribe holds several protected interests – ranging from its sovereignty to its monetary funds – that the Department stripped away without providing the Tribe any meaningful opportunity to present its case or confront adverse evidence. The only other Circuit Court to have considered an ARRA §1553 appeal found a Fifth Amendment procedural due process violation based on a nearly identical set of facts. *Business Commc'ns v. U.S. Dep't of Educ.*, 739 F.3d 374 (8th Cir. 2013). The Tribe also maintains that ARRA §1553 is

unconstitutional on its face – the statute contains an inherent lack of procedural safeguards that impose an undue risk of erroneous deprivation for *all* employers that receive funds under the ARRA. *See id.* at 383.

3. Alternatively, assuming *arguendo* that Section 1553 applies to the Tribe's electoral processes and passes constitutional muster, the Department nevertheless erred in both its legal and factual conclusions regarding the application of the provision: the Department incorrectly concluded that St. Marks is an "employee" under the statute, in contravention to the Supreme Court's directive in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003); erred in finding that the Tribe engaged in a prohibited reprisal that was a "contributing factor" to St. Marks's removal; and also erred in its valuation of the award.

STANDARD OF REVIEW

Section 1553(c)(5) of the ARRA provides that judicial review "shall conform to chapter 7 of title 5, United States Code," which sets forth the guidelines for judicial review under the Administrative Procedures Act ("APA"). See 5 U.S.C. §§ 701-706.

Relevant here, under the APA, an agency's interpretation or application of a statute is a question of law that this Court reviews *de novo*. *See Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008). Likewise, constitutional challenges to agency action – including whether an agency's procedures comported with due process – are also reviewed *de novo*. *See Gilbert v. Nat'l Transp. Safety Bd.,* 80 F.3d 364, 367 (9th Cir. 1996).

By contrast, an agency's substantive decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77 (2002). Under this standard, while a Court is not permitted to substitute its judgment for that of the agency, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001), the agency must nevertheless articulate "a rational connection between the facts found and the choice made." *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife, BLM*, 273 F.3d 1229, 1236 (9th Cir. 2001). Indeed, courts must consider whether the

agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Sierra Club v. United States EPA*, 346 F.3d 955, 961 (9th Cir. 2003) (internal citations, quotation marks, and alterations omitted). An example of such a "clear error of judgment" sufficient "to constitute arbitrary and capricious agency action is when the agency offers an explanation that runs counter to the evidence before the agency." *Id.*

ARGUMENT

I. The Department's Order Amounts to an Unlawful Intrusion on Tribal Sovereignty

This Court should vacate the Department's Order, as it impermissibly eviscerates the Tribe's fundamental right to govern itself. The Department's actions in this matter run afoul of the federal government's duty to defer to and encourage tribal self-government and the accompanying policy ensuring a federal-tribal trust relationship. Contrary to the Department's conclusions, the ARRA does not alter these fundamental principles– nothing in the statute renders the statute applicable to the Tribe in such a way to permit the Department to so grossly interfere with the Tribe's right to determine its leadership.

The Department's decision to apply the ARRA in flagrant disregard of the Tribe's inherent sovereign status is subject to *de novo* review by this Court. *Snoqualmie Indian Tribe*, 545 F.3d at 1212.

A. Bedrock Principles of Tribal Sovereignty

The federal government has a *duty* to foster and respect tribal sovereignty and self-government, an obligation that dates back to at least 1831. Specifically, in *Cherokee Nation v. Georgia*, Chief Justice John Marshall explained that tribes are "domestic dependent nation[s]," noting that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . marked by peculiar and cardinal distinctions which exist

nowhere else." 30 U.S. 1, 16 (1831). Chief Justice Marshall's 1831 opinion "provid[ed] the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities." *Cohen, supra* at §5.04[3][a].

This federal-tribal trust relationship has become "one of the cornerstones of Indian law" *Cohen, supra* at §5.04[3][a]. Today, nearly every piece of federal legislation dealing with tribes reaffirms the federal-tribe trust relationship. *See, e.g.,* Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. § 4301(a)(6) ("[T]he United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes."). Presidents Obama and Bush have likewise reaffirmed this trust relationship. *See, e.g.,* President Barack Obama, Memorandum on Tribal Consultation, 74 Fed. Reg. 57, 881 (2009) ("The United States has a unique legal and political relationship with Indian tribal governments"); President George W. Bush, Exec. Order No. 13,336, American Indian and Alaska Native Education, 40 Weekly Comp. Pres. Doc. 713 (Apr. 30, 2004) ("The United States has a unique legal relationship with Indian tribes and a special relationship with Alaska Native entities as provided in the Constitution of

the United States, treaties, and Federal statutes."). Executive bodies – *including the Department of the Interior* – have also stressed a commitment to fostering the federal government's respect for tribal sovereignty and self-government. *See, e.g.,* U.S. Secretary of the Interior Sally Jewell, Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries (Aug. 20, 2014) available at, http://www.doi.gov/news/loader.cfm?csModule=security/getfile& pageid=561791 ("Pursuant to the long-standing trust relationship between the United States, Indian tribes and individual Indian beneficiaries and in furtherance of the United States' obligation to fulfill the trust responsibility," issuing guidance instructing all bureaus and offices to "[r]espect tribal sovereignty and self-determination, which includes the right of Indian tribes to make important decisions about their own best interests.").

Federal deference in this regard is particularly crucial in matters related to tribal self-government, as a tribe's authority to govern itself is one of the most fundamental aspects of tribal sovereignty. *Wheeler v. United States Dep't of Interior, Bureau of Indian Affairs*, 811 F.2d 549, 550-51 (11th Cir. 1987). This self-governing authority includes, for example, a tribe's inherent right to determine its membership,[3] the right to regulate domestic relations among tribal members,[4]

[3] *See, e.g., Santa Clara Pueblo,* 436 U.S. at 72, n. 32.

the right to tax,[5] and the right to administer justice.[6] Critical among these attributes of sovereignty is a tribe's right to determine the form and composition of its own government, including a tribe's right to establish and control its electoral processes. *See, e.g.*, *Cohen*, *supra*, § 4.06[1][b][ii] ("When a tribe conducts elections and provides administrative or judicial processes for contesting the elections, it engages in a core governmental function related to internal tribal affairs.").

By invalidating St. Marks's constitutional removal, the Department has intruded upon the Tribe's internal political processes. The Department's actions amount to a gross infringement on the Tribe's longstanding status as a sovereign nation and flies in the face of fundamental principles of federal-tribal policy.

1. *The Department Improperly Encroached on the Tribe's Sovereignty*

Against the backdrop of tribes' inherent sovereign status and the bedrock federal-tribal trust relationship, the United States federal government, including the Department of the Interior, is without authority to interfere in tribal

(continued...)

[4] *See, e.g., Fisher v. Dist. Ct.*, 424 U.S. 382 (1976).

[5] *See, e.g., Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985).

[6] *See, e.g., Williams v. Lee*, 358 U.S. 217, 223 (1959).

self-governance in the way that the Department has eviscerated the Tribe's constitutional processes in this case. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (the federal government "has charged itself with moral obligations of the highest responsibility . . . [and] [i]ts conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."); *Nance v. Envtl. Prot. Agency*, 645 F.2d 701, 711 (9th Cir. 1981) ("[A]ny Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes."). The Department has wholly encroached upon the Tribe's status as a sovereign nation, in flagrant disregard of this longstanding federal policy: the Department opened a one-sided investigation into the Tribe's decision regarding its leadership, challenged the Tribe's political decisions, and eradicated Tribe's self-governing functions by determining that, despite the Tribe's finding that St. Marks was unfit to govern, the Tribe nevertheless improperly removed St. Marks and the Tribe should provide a remedy to St. Marks.

As detailed above, St. Marks was removed from office due to his "neglect of duty" and "gross misconduct," which included stealing from the Tribe and federal government, harassing tribal employees, and abusing his power. The Tribe's Constitution specifically contemplates the precise situation that the Business Committee encountered with St. Marks's wrongful behavior that

amounted to "neglect of duty" and "gross misconduct," and the Business Committee followed the proper Constitutional mechanisms in effecting his removal. [ER0881; ER1037]. Indeed, pursuant to the Chippewa Cree Constitution, the Business Committee provided St. Marks a "full and fair opportunity to reply to any and all charges," and also provided St. Marks a written statement of the charges against him within the constitutionally-mandated time period prior to the meeting. [ER0878; ER1037].

In this regard, the Business Committee's removal of St. Marks pursuant to the procedures set forth in the Chippewa Cree Constitution was a proper act of tribal self-governance and cannot be merely disregarded by a federal department, which is precisely what the Department did in this case. *Cf. Harjo v. Kleppe*, 420 F. Supp. 1110, at *1118 (D.D.C. 1976), *aff'd sub nom, Harjo v. Andrus*, 581 F.2d 949, 950, (D.C. Cir. 1978) (explaining that "the tribe has the right to determine its own destiny . . . and federal policy in fact now recognizes self-determination as the guiding principle of Indian relations").

2. *The ARRA Does Not Authorize the Department's Evisceration of the Tribe's Sovereignty*

While Congress *can* carve narrow exceptions to these bedrock underpinnings of the federal-tribal relationship, it is a fundamental principle of Indian law statutory construction that tribal sovereignty remains intact absent a *clear and unambiguous* expression of Congressional intent. *See, e.g, Santa Clara*

Pueblo, 436 U.S. at 59-60 (explaining that "federal statutes will not be interpreted to interfere with tribal autonomy and self-government . . . in the absence of clear indications of legislative intent"); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) (Federal laws are not to be construed " as working a divestment of tribal sovereignty and [should be so construed] only where Congress has made its intent clear [to] do so"). Accordingly, statutory construction must be guided by the "purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow." *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 496 (7th Cir. 1993).

Nowhere in the ARRA did Congress clearly and unequivocally express any intent for the ARRA's whistleblower provision to be used as a tool for a federal department to usurp a tribal recipient's inherent governmental functions. Indeed, by enacting the ARRA, Congress did not intend to strip tribes of their status as sovereign nations with a right to self-governance. Rather, through the ARRA, Congress intended to promote job preservation and creation, infrastructure investment, energy efficiency, and to provide assistance to the unemployed and stabilize state and local government budgets. ARRA §3 ("Purposes and Principles").

Further, in only a few instances has Congress *clearly* mandated a method of selecting tribal officials or dictated other aspects of a tribe's form of

government. *See, e.g., Fletcher*, 116 F.3d at 1328 n. 24 (citing *Cohen* and discussing two such instances: (1) "the 1906 Act, 45 Stat. 539," through which Congress prescribed the form of tribal government for the Osage Tribe as well as (2) "the Act of April 26, 1906, ch. 187, § 6, 34 Stat. 137, 139, [which is] a smaller intrusion on tribal sovereignty as it mainly confers upon the President of the United States the power to remove from office certain officials of five specified tribes for failure to perform official duties").

By contrast, Congress has unequivocally recognized the Tribe as a distinct political community and has not acted to divest the Tribe of its right to determine the makeup of its elected body. Accordingly, absent a *clear* expression from Congress in this regard, the Tribe retains its sovereignty and remains free from federal intrusion upon its right to determine its leadership. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 59-60. By meddling in the Tribe's internal processes and directing the Tribe to provide a remedy to St. Marks, the Department of the Interior has unlawfully infringed on the Tribe's sovereignty.

3. *The Tribe Did Not Waive its Sovereignty by Agreeing to Receive ARRA Funds*

Contrary to the Department's conclusion that the Tribe somehow forfeited its sovereignty by contractually agreeing to receive ARRA funds, [*see* ER1072-ER1073], the Tribe's receipt of federal funds in this regard is inapposite to the present infringement on the Tribe's sovereign status. In fact, nothing in the

ARRA contracts evidences the Tribe's waiver of its status as a sovereign nation entitled to govern its own internal political affairs and follow its own Constitutional processes. As at least one United States District Court in this Circuit has recognized, a tribe's receipt of federal funds under the ARRA does not subject a tribe to certain federal laws or constitute a waiver of a tribe's sovereignty. *Vulgamore v. Tuba City Reg'l Healthcare Corp.*, 11-8087, 2011 U.S. Dist. LEXIS 89647, at *6 (D. Ariz. August 11, 2011) (finding that the plaintiff failed to show that the tribe's "acceptance of federal funds constitutes a waiver of tribal immunity"). *See also Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1286-89 (11th Cir. 2001) (finding that a tribe's contractual promises not to discriminate in exchange for receiving federal funds "in no way constituted an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court"). Accordingly, the Department's conclusions on this point are inapposite and the Department's Order should be vacated.

4. *Any Ambiguities Must be Read in Favor of the Tribe*

To the extent that there is any ambiguity with regard to the ARRA's whistleblower provision's applicability to questions of tribal self-governance, any such ambiguity must be "construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982). It is

a well-established Indian law cannon of construction mandates that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Thus, even if the ARRA is ambiguous on this point, the ARRA must not be read to allow the Department of the Interior to dictate to the Tribe how to govern itself and its political disputes.

For the foregoing reasons, this Court should vacate the Department's Order, finding that the Department's actions in this matter impermissibly interfere with the Tribe's longstanding right to determine who is fit or unfit to govern the Tribe.

II. The Actions Taken by the Department Pursuant to ARRA §1553 Violate The Tribe's Constitutional Right to Procedural Due Process under the Fifth Amendment

The Department's actions in this matter have violated the Tribe's procedural due process rights –the Tribe holds several protected interests that the Department stripped away without providing the Tribe any meaningful opportunity to present its case or confront allegedly adverse evidence. Under highly similar circumstances, the only other Circuit Court to have considered an ARRA §1553 appeal likewise found a procedural due process violation, ultimately concluding that a federal department must ensure that an accused employer has an adequate

opportunity to address any adverse evidence. *Business Commc'ns*, 739 F.3d at 379.

The Fifth Amendment guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.[7] Due process serves to "prevent[ ] government actors from depriving persons of liberty or property interests without providing certain safeguards." *Business Commc'ns*, 739 F.3d at 379 (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). While no fixed standard defines what threshold constitutes such adequate safeguards, *see Zimmerman v. Oakland*, 92 Fed. Appx. 451, 453, (9th Cir. 2004) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)), at a minimum, due process requires the fundamental opportunity to be heard "at a *meaningful time* and in a *meaningful manner*" when such liberty or property interests are at risk. *Mathews*, 424 U.S. at 333 (emphasis added). Critically, those whose property interests are at stake are entitled to "notice and an opportunity to be heard," *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (citation omitted), *prior to* the liberty or property depravation. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

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[7] This Court has recognized that these Due Process rights extend to Tribes. *See, e.g., Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995) (concluding that due process concerns demanded that Native American tribe receive formal hearing on matter of tribal recognition).

This constitutional inquiry mandates *de novo* review. *See, e.g., Gilbert*, 80 F.3d at 367.

As described herein, the Tribe holds several protected interests that necessitated meaningful procedural safeguards prior to the Department's issuing of its Order in this matter.

A. The Tribe Holds Several Constitutionally Protected Interests, Which Demand that the Department Provide Meaningful Procedural Safeguards

1. *The Tribe Has a Protected Interest in its Sovereign Status*

The Tribe undoubtedly holds an interest in its well-established status as a self-governing tribal nation. As described at length above, tribes such as the Chippewa Cree function inherently as independent political communities. *See Santa Clara Pueblo*, 436 U.S. at 55 (1978). Tribes exercise autonomous power over their own internal relations—they are entitled "to make their own substantive law in internal matters and to enforce that law in their own forums." *Id.* at 55−56. At the same time, the federal government holds a duty of deference toward tribal self-governance and likewise maintains constitutional obligations toward tribes and tribal members. *See, e.g., id.* Here, the Chippewa Cree Tribe accordingly has a protected interest in its right to exist as a sovereign nation and autonomously manage its internal governmental affairs. *Cf. Greene*, 64 F.3d 1266.

2. *The Tribe Has a Protected Interest in its Governmental Functions*

The Tribe possesses an additional interest in the specific constitutional mechanisms regulating its governing body. Emblematic of its fundamental sovereign status, the Tribe has a Constitution, which establishes the Tribe's elected governing body: the Business Committee. [*See* ER1036]. Parallel to the United States Constitution's impeachment clause, *see* U.S. Const. art. I, § 2, under Article V of the Tribe's Constitution, the Business Committee may expel an elected Business Committee member "for neglect of duty or gross misconduct." [ER1037]. Indeed, the Business Committee exercised this power when it voted to remove St. Marks for extensive misconduct. The Department now intrudes upon this constitutional mechanism, challenging both the adequacy of the Tribe's self-governance structures and usurping the Business Committee's internal decision-making processes.

3. *The Tribe Holds a Protected Interest in its Funds the Department Now Requires it Pay St. Marks*

The Tribe also maintains a cognizable property interest in its monetary funds. The Department mandates the Tribe pay St. Marks relief totaling $648,430.35: back pay of $277,333.30; front pay of $202,666.54; travel costs of $2,955.60; and legal fees and costs of $165,474.91. [ER1069]. The Tribe has an undisputable property interest in the monetary award the Department requires it to pay under §1553. *See Dickman v. Comm'r of Internal Revenue*, 465 U.S. 330, 336 (1984) (highlighting money as a property interest).

B. The Department Has Deprived the Tribe of Several Protected Interests Without Providing Adequate Process

"[T]he right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). To assess whether administrative procedures have provided an adequate opportunity to be heard, courts employ a tripartite balancing test and weigh the following:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Here, the Tribe's interests described above outweigh any conceivable interest of the Government or even those of St. Marks. Viewed against the potential for error in the procedures followed, the Department's inadequate application of §1553 deprived the Tribe of its Fifth Amendment procedural due process rights.

1. *The Tribe's Private Interests Are Substantial*

The Department's Order will deprive – and has deprived – the Tribe of several constitutionally-protected interests, including: its status as a sovereign nation, the constitutional mechanisms governing its Business Committee, and monetary funds it must pay to St. Marks. By interjecting itself into matters of local

tribal governance and mandating that the Tribe pay St. Marks relief totaling $648,430.35, the Department has impinged on the Tribe's ability to determine for itself who is fit or unfit to govern the Tribe. The Tribe's private interests are undoubtedly substantial – they speak to the very heart of the Tribe's existence as a sovereign nation.

Even were the Court to consider St. Marks's private interests in addition to the Tribe's, St. Marks is wholly unable to articulate any cognizable interest to counter the gravity of the Tribe's interests at stake. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263 (1987). Moreover, while individuals have an interest in their "means of livelihood" given a "substantial interest in retaining [one's] job," *id.*, as discussed below, one's position as an elected official is inapposite to being an employee within the meaning of §1553. Further, the Supreme Court has repeatedly held that an individual does not have a protected right to hold public office or to receive any attendant benefits. *See Taylor v. Beckham*, 178 U.S. 548 (1900). Because "public offices are mere agencies or trusts, and not property as such . . . the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." *Id.* at 577−78; *cf. Mingo v. Baxter*, 2012 U.S. Dist. LEXIS 126802 at *10 (E.D. Mich. Sept. 6, 2012), *aff'd* 518 Fed. Appx. 444 (6th Cir. 2013) ("It is well established that an individual has no property or liberty interest in an elected office."). Accordingly,

consideration of the private interests in this matter must focus on the Tribe's interests – the fundamental attributes of its sovereignty.

2. *The Great Risk – and Reality – of Erroneous Deprivation through the Procedures Used and the Probable Value of Additional or Substitute Procedures*

The procedures employed by the Department in this matter imposed a high risk that the Tribe would be erroneously deprived of protected interests – and in fact did deprive the Tribe of the aforementioned protected interests. The Department's procedures facilitated a wholly erroneous depravation in this case – the Department failed to even interview a single member of the Business Committee which the Department contends engaged in a prohibited reprisal against St. Marks. Furthermore, the Department failed to provide a meaningful opportunity for the Tribe to review and rebut the evidence alleged against it, failed to consider the Tribe's position, and failed to hold a hearing or otherwise provide a meaningful opportunity for the Tribe to confront the adverse evidence that the Department mounted against the Tribe. This factor necessitates a finding of a procedural due process violation.

a. *The Procedures Used Were Unclear, Highly Prejudicial, Contradictory, and Offered No Meaningful Opportunity for the Tribe to be Heard*

The Tribe is not entirely certain what procedures the Department used to render its decision to deprive the Tribe of its protected interests. The Tribe

remained in the dark while the Department – the same entity that purportedly investigated the alleged whistleblower retaliation – determined that a prohibited reprisal occurred. The Department wholly failed to consider the Tribe's position, provide a meaningful opportunity for the Tribe to be heard, or provide the Tribe with a meaningful opportunity to confront adverse evidence. This factor undoubtedly tips in favor of the Tribe.

Indeed, the Department's initial determination expressly stated that the Department "has not examined the actions of any party other than the CCT," indicating that it did not consider St. Marks' conduct that led the Tribe to properly remove him. [ER0003]. The Department further admitted that its "determination in this case . . . is limited only to consideration of the removal of St. Marks by the Business Committee on March 25, 2013, and of the facts in the OIG ROI." [ER0012]. The Department did not allow the Tribe a meaningful opportunity to present its case, rebut adverse evidence, convene a hearing on this matter, or otherwise allow the Tribe to confront adverse evidence.

Instead, as reflected in the ROI, when the Department notified the Tribe of an investigation on July 19, 2013, the Tribe sent an unsolicited letter in response, asserting its sovereignty, outlining its decision to remove St. Marks, and explaining that it could provide additional information. [*See* ER0726; ER0746]. Unbeknownst to the Tribe, this three-page letter would become the crux of the

Tribe's evidence before the Department. [*See* ER0022-ER0023]. At no time did the Department notify the Tribe that its letter – which the Tribe voluntarily offered in the first instance – would become the Tribe's *only* opportunity for any semblance of a "rebuttal."

Rather, the Department's July 19, 2013, one-page letter providing notice of the investigation merely noted that the Department would like to interview members of the Business Committee, [ER0723] – a request that the Tribe welcomed, but the Department elected not to pursue. It was not until *a year and a half* later, in December 2014 that the Department's agent asked to speak with members of the Business Committee about, among other things, the Tribe's referral of St. Marks's criminal conduct to the United States Attorney. The Tribe and its lawyers scheduled a meeting with the agent, but the agent then abruptly cancelled the meeting. The key issue undermining the Department's conclusion that a reprisal occurred is whether the Business Committee members intended to retaliate against St. Marks – yet the Department refused to ever speak with or interview any of the Business Committee members who removed St. Marks from office for gross misconduct. Consequently, the Department failed to interview the Business Committee members despite the Tribe's attorneys' repeated invitations, expressions of cooperation, and offers to arrange any such interviews. [*See* ER1043-ER1048].

Instead, the Department issued its December 19, 2014, determination finding a prohibited reprisal after refusing to meaningfully hear the Tribe's position, failing to hold any hearing on this matter, and declining to provide any other real opportunity for the Tribe to "test adverse evidence and cross examine witnesses," which is "an essential element of due process." *See Business Communs.*, 739 F.3d at 380-82. *See also ASSE Int'l, Inc. v. Kerry*, 2015 U.S. App. LEXIS 17666, at *34-35 (9th Cir. Oct. 9, 2015) (noting that "fundamental fairness—the touchstone to determining whether a plaintiff received due process – requires that a party against whom an agency has proceeded be allowed to rebut evidence offered by the agency if that evidence is relevant" (internal citations omitted)). The Tribe had absolutely no opportunity to confront any adverse evidence before the Department rendered its determination. Notably, contrary to the ARRA's statutory mandate, the Tribe first received the heavily redacted ROI when the Department attached it to its initial determination letter, wherein the Department concluded that the Tribe engaged in a prohibited reprisal. *See* 1553(b)(1) ("[T]he inspector general shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation . . . to the person's employer . . .."). While the Department gave the Tribe leave to file a submission, it did so *only after* determining that St. Marks experienced a prohibited reprisal and solely because the Department sought the

parties' opinions on what to award St. Marks, not on whether a prohibited reprisal occurred. [ER0013].[8]

Following the Tribe's submission on February 13, 2015, wherein the Tribe challenged the Department's authority over this entire matter and contested the Department's failure to provide a meaningful opportunity for the Tribe to be heard, [*see* ER0835-ER0877], the Department issued a "final Order" that attempts to backpedal on these points. Yet the Department's retraction still offers little clarity as to what actually occurred behind the Department's curtain. While the Department states that it "*thoroughly considered CCT's submissions and all other evidence put before the Department,*" [ER1076 (emphasis added)], the same Order also explicitly states that the Tribe's evidence "*are given no dispositive weight*." [ER1071 (emphasis added)]. These contradictory statements not only fail to provide any clarity regarding the procedures actually employed to render the Department's decision, they are also emblematic of the inconsistencies and highly prejudicial findings that permeate the Department's Order.

[8] Notably, when issuing its determination in December 2014, and despite relying exclusively on the ROI, the Department even failed to disclose to the Tribe the majority of the attachments to the ROI: the ROI relied on 69 attachments, yet the Department provided the Tribe with only 17 of those documents that the Department somehow deemed to be "relevant." [ER0003].

(1) *The Department's Order Indicates that it Used Questionable and Biased Evidence Not Shared with the Tribe*

In addition to failing to provide the Tribe with a meaningful opportunity to be heard *or* to confront adverse evidence, the Department's utter failure to provide adequate process in this case is also demonstrated by its use of biased evidence, some of which was ascertained following its initial determination and, like all of the purported evidence in this matter, was not shared with the Tribe until after the Department made its determination.

Specifically, the Department's initial determination that St. Marks's removal was a prohibited reprisal rests on a claimed temporal link between an alleged tribe-wide letter that St. Marks purportedly sent on March 5, 2013, and the Business Committee's March 25, 2013, removal of St. Marks due to his neglect of duty and gross misconduct. [ER0011; ER1077-ER1078]. The Department expressly found that St. Marks' removal "within 20 days after issuing an open letter to the CCT membership concerning alleged misuse of ARRA funds" is "clearly" evidence that a protected reprisal occurred. [ER0011].

However, the Tribe noted in its submission that despite the Department's conclusion that the Business Committee "clearly" removed St. Marks on March 25, 2013, "*in evident response*" to St. Marks' purported letter of March 5, 2013, there is *no* evidence in the then-existing record that St. Marks even

sent this letter, let alone sent it on March 5, 2013, or sent it to any member of the Business Committee. [ER0866; ER0010].[9] The Tribe's submission further pointed out that even if St. Marks sent this letter and sent it on March 5, 2013, there was no evidence that anyone on the Business Committee was aware of the purported letter. [ER0866].

After receiving Tribe's submission, the Department backtracked on its initial conclusion regarding this claimed temporal link. The Department's final Order upholding its initial determination cites new self-serving "evidence" purportedly showing the existence of St. Marks's March letter, and then later downplays the importance of the letter that previously served as the linchpin to the reprisal decision. [ER1077-ER1078]. Specifically, the Department now cites to a redacted excerpt of an interview with Tribal Court Judge Duane Gopher. [ER1077; ER1091]. While the Department claims that this transcript confirms the details of the letter, a plain reading of the three-page excerpt reveals that Judge Gopher actually stated four times that that he never saw the alleged March letter. [ER1091]. The Department also attempts to establish the existence of this March letter by baldly stating that it had a conversation *with St. Marks's wife* just weeks

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[9] Indeed, both the Department's Letter and the ROI baldly state that St. Marks sent a letter on March 5, 2013, citing only to "Attachment 16" – an undated document with a facsimile transmittal stamp from "Arrow Enterprises" and dated May 16, 2013. *See* ER X [Letter at 5, 8; ROI at 3, Att. 16].

before issuing its final Order, and that St. Marks's wife confirmed the existence of the letter. [ER1077]. Not only is this unsupported statement incredibly biased coming from *St. Marks's wife*, but like all of the other materials attached to the ROI, including the ROI itself, the Tribe had no opportunity to address this purported "evidence" prior to the Department's rendering of its decision in this matter. Additionally, the Department wholly failed to ascertain the Tribe's position on this point -- had the Department sought interviews of Business Committee members, it would have learned that none of the Business Committee members received this purported letter.

The Department's failure to provide procedurally sound safeguards is further highlighted by its highly prejudicial and distorted consideration of the events surrounding the Tribe's relationship with St. Marks. Specifically, despite deciding that the Tribe's "*post hoc* evidence of alleged misconduct" would be "given no dispositive weight," [ER 1072], five pages of the Department's Order is dedicated to attacking the Tribe and the materials included with the Tribe's February submission. [ER1079-ER1084]. Further, the Department expressly stated that it would not consider any events following St. Marks's March 2013 removal, such as Charges 8 and 9 involving a dispute over St. Marks's construction work for the Tribe. [ER1071; ER0012]. However, following the issuance of its initial determination, the Department opened its own independent investigation

into these two Charges – an investigation that notably failed to include any participation by the Tribe. [ER1084]. The Department then used this unilateral investigation to further sandbag the Tribe, maintaining that the Tribe's continued assertion of Charges 8 and 9 "harms CCT's credibility in maintaining Charges 1-7 against St. Marks and bolsters our conclusion that St. Marks's communications . . . about possible ARRA-related corruption at CCT were a 'contributing factor' in his March 2013 removal." [ER1084].

The Department's attacks on the Tribe in this regard are not only highly inappropriate, but they are also factually unsound and have further prevented the Tribe from receiving any semblance of fair process. Charges 8 and 9 both include allegations that St. Marks defrauded the Tribe. After a week-long jury trial in Tribal Court, in a case that St. Marks initiated against the Tribe, the jury found that St. Marks engaged in a conspiracy to defraud the Tribe. [*See* ER1121].[10] As such, the Department's conclusions regarding Charges 8 and 9 are baseless, as a jury of St. Marks's peers found that he conspired to defraud the Tribe.

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[10] For ease of reference, the Tribal Court jury verdict sheet has been appended to the Excerpts of Record, and is available at ER1121. The Tribe requests that the Court take judicial notice of the jury verdict. *See* Fed. R. Evid. 201 ("The court may take judicial notice at any stage of the proceeding"); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014) ("It is well established that we may take judicial notice of judicial proceedings in other courts.").

It is clear that procedural inadequacies permeate the Department's involvement in this case and that these inadequacies greatly risked, and indeed resulted in, the erroneous depravation of the Tribe's protected interests.

(2) *Additional or Substitute Procedures Would Have Afforded the Tribe a Meaningful Opportunity to Confront the Purportedly Adverse Evidence*

Here, the Department should have given the Tribe a meaningful opportunity to submit rebuttal evidence, considered the Tribe's position, and provided a hearing at which the Tribe could have confronted adverse witnesses and evidence (or, at the very least, provide some other meaningful mechanism for the Tribe to confront adverse evidence). Indeed, the only other Circuit Court of Appeals to have considered this question concluded that a federal department violated an employer's rights when it declined to provide the employer "a hearing and because the post-deprivation procedures available under §1553 do not provide any opportunity for [the employer] to confront and cross examine adverse witnesses, thereby depriving [the employer] of an essential element of due process." *Business Commc'ns*, 739 F.3d at 382.

In *Business Communications*, the United States Court of Appeals for the Eighth Circuit agreed with an employer's challenge to the Department of Education's order requiring it to reinstate an employee with back pay after the Department of Education found that the employee suffered a prohibited reprisal.

739 F.3d 374. There, the Eighth Circuit found that the Department violated the employer's due process rights by failing to allow the employer to address the evidence lodged against the employer. *Id.* The Eighth Circuit emphasized the numerous fact witness accounts underlying the Department of Education's decision, and concluded that "cross examination must be available to minimize the risk of erroneous deprivation." *Id.* at 380.

Even more egregious in this matter, as described above, the Department's decision is grounded on bald statements contained in the ROI and the Department's own questionable findings, such as the lack of evidence that St. Marks sent a tribe-wide letter. Here, like in *Business Communications*, the Tribe has a protected interest in its money that it would have to expend to compensate St. Marks, *see Dickman v. Comm'r of Internal Revenue*, 465 U.S. 330, 336 (1984), and, further assuming *arguendo* that the Tribe is an employer under the statute – which, as described below, it is not – it has a protected interest in its ability to fire employees, *see Brock*, 260-61; *see also Business Commc'ns*, 739 F.3d at 379. Additionally, the Tribe maintains the undeniable interest in its inherent sovereignty and government functions. The Department should have provided a hearing – or, at the very least, some other meaningful mechanism through which the Tribe could have confronted the evidence that the Department has asserted against the Tribe, even in the wake of its initial determination. *See Hodel v. Virginia Surface Mining*

and Reclamation Ass'n, 452 U.S. 264, 299 (1981) (citing cases) ("due process ordinarily requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest"); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

Accordingly, there was a substantial risk – and reality – of an erroneous deprivation of such interest through the Department's procedures in this matter.

b. *The Department's Interests Fail to Tip the Scale*

Under the *Mathews* test, the Court must also consider the Department's interests, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Here, however, the probable value of "additional or substitute procedural safeguards," such as an evidentiary hearing or even a more adequate opportunity to respond and be heard, far outweighs any fiscal or administrative concern. This is particularly so when viewed against the Tribe's interests in its ability to function as a sovereign nation, which is precisely what the Department has jeopardized through its actions in this matter.

For the reasons articulated above, the Court should find that the Department's actions amount to a gross violation of the Tribe's due process rights, as the Tribe experienced an unconstitutional depravation of several protected interests without any meaningful opportunity to be heard or to test adverse evidence.[11]

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[11] And for the reasons articulated here, §1553 is unconstitutional on its face. The lack of procedural safeguards impose an undue risk of erroneous deprivation for *all* employers that receive funds under the ARRA. *See Business Comm'ns*, 739 F.3d at 383 (decreeing §1553's facial unconstitutionality in the 8th Circuit, given insufficient procedural mechanisms to ensure the employer's Fifth Amendment guarantee "to be heard at a meaningful time and in a meaningful manner." (citing *Mathews*, 424 U.S. at 333)). Section 1553 violates the Fifth Amendment due to deficient pre-deprivation notice and rebuttal opportunities. Section 1553 minimally engages an employer in the investigative process. Indeed, the ARRA whistleblower provisions involve an employer in proceedings in only two instances: First, the statute contemplates the employer's receipt of a report outlining the inspector general's findings. §1553(b)(1). This provision, however, does not specify the breadth of information or evidence the inspector general must provide to the employer. Second, the statute offers the employer a one-shot opportunity to rebut a finding of an unlawful reprisal through clear and convincing evidence, and even if the employer successfully rebuts an affirmatively-established reprisal, the Department is granted discretion to reject the rebuttal. *See* §1553(c)(1)(B). ("The head of an agency *may* not find the occurrence of a reprisal . . .") §1553(c)(1)(B). Further, no temporal limit bounds the amount of time between disclosure and discharge. § 1553(c)(1)(A)(i).

This framework does not codify minimum due process benchmarks, such as "notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses." *Brock*, 481 U.S. at 264. These opportunities instead rest entirely with the relevant agency's discretion. Just as the Tribe experienced, this discretion can yield unilateral, behind closed doors decision-making based on information the

(continued...)

III. Alternatively, Even Assuming *Arguendo* that the ARRA Whistleblower Provision Applies to the Tribe's Internal Political Dispute and that it Passes Constitutional Muster, the Department Nevertheless Erred When Finding a Prohibited Reprisal Under the Provision And Entering an Award in Favor of St. Marks

Assuming *arguendo* that Section 1553 applies to the Tribe's electoral processes and passes constitutional muster, the Department nevertheless erred in both its legal and factual conclusions regarding the application of the provision and vacate the Department's Order. Specifically, the Department erred in its conclusion that St. Marks is an "employee" under the statute. This conclusion is subject to *de novo* review by this Court. *See, e.g., Snoqualmie Indian Tribe*, 545 F.3d at 1212 ("An agency's interpretation or application of a statute is a question of law reviewed de novo.").

(continued...)

agency presents to itself. The employer's only opportunity to be heard is meaningless when it must rebut an incomplete record by clear and convincing evidence and the agency is given discretion to reject even successful rebuttal showings. *See Brock*, 481 U.S. at 265 (requiring, at minimum, "an avenue . . . through which the employer could effectively articulate its response").

As drafted, the statute's net effect creates a whistleblower landscape where employers, after receiving an agency report of uncertain evidentiary specificity, must demonstrate by near-unequivocal evidence that they did not commit an unlawful reprisal—a reprisal for which they are charged through circumstantial evidence occurring at any time in the past. Without a guarantee that employers will be heard at a meaningful time and in a meaningful manner, §1553 violates Fifth Amendment due process.

Additionally, the Court should vacate the Department's Order, as the Department erred in finding that the Tribe engaged in a prohibited reprisal that was a "contributing factor" to St. Marks's removal. Even if the Court were to uphold the Department's finding of a prohibited reprisal, the Court should nevertheless vacate the Departments' monetary order against the Tribe, as the Department's calculation of the monetary award is contradicted by the Department's own findings. These inquiries are subject to review under the arbitrary and capricious standard. *See* 5 U.S.C. 706(2)(A); *Bean,* 537 U.S. at 77 (2002).

A. St. Marks's Alleged Actions Do Not Qualify for Whistleblower Protection, as St. Marks is Not an Employee Under the ARRA

The ARRA does not apply to this dispute, as St. Marks is not an "employee" under the statute; rather, he was the elected Chairman of the Tribe's governing body. Under the ARRA, an "employee" is defined as "an individual providing services on behalf of an employer." *See* 1553(g)(3). Like the many other federal statutes to adopt such a vague definition of "employee," the ARRA's language amounts to a "nominal definition that is completely circular and explains nothing." *See Clackamas*, 538 U.S. at 444 (citation omitted).

While the Department contends that a "broad reading of 'employee' is warranted" based on this vague definition, [*see* ER1074], this position is inapposite. Indeed, faced with similarly vague and circular definitions of "employee" in federal legislation, the Supreme Court has structured a test to

ascertain whether an individual actually qualifies as such. The Court instructs that "when Congress has used the term 'employee' without defining it, . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* 444-45 (2003). To this end, courts evaluate a series of six factors relevant to the "employee" inquiry:

> . Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
>
> . Whether and, if so, to what extent the organization supervises the individual's work
>
> . Whether the individual reports to someone higher in the organization
>
> . Whether and, if so, to what extent the individual is able to influence the organization
>
> . Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
>
> . Whether the individual shares in the profits, losses, and liabilities of the organization.

Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008) (citing *Clackamas*, 538 U.S. at 449-50). These factors are not exhaustive; rather, "whether an individual is an employee depends on all of the incidents of the relationship, with no one factor being decisive." *Id.* (citation omitted).

In a situation analogous to the underlying dispute, a panel of this Court concluded that members of the Board of Directors of a non-profit

corporation were *not* employees under the Age Discrimination in Employment Act and the Americans with Disabilities Act – statutes that define "employee" in a way that is markedly similar to the ARRA. *See Fichman*, 512 F.3d 1157; *see also Clackamas*, 538 U.S. at 444 (noting that the Americans with Disabilities Act vaguely defines "employee" as "an individual employed by an employer"). In *Fichman*, this Court made such a finding after noting that the non-profit does not hire or fire its directors, as the Board selects its own members; the directors have full-time jobs separate from the non-profit; the directors are not compensated by the non-profit; the non-profit does not supervise or regulate the directors' work; that the Board is governed by bylaws, operates as a democracy, and has "created a system of self-governance [that] does not place any individual director in the position of subservience contemplated by the conventional master-servant relationship"; and that the directors do not report to someone higher in a traditional way. *Fichman*, 512 F.3d at 1160-61. Based on these considerations, this Court declined to consider certain directors as "employees." *Id.* This Court's findings in *Fichman* are directly applicable here – as noted in that opinion, "[m]ost courts consider the definition of 'employee' to be uniform under federal statutes where it is not specifically defined." *Fichman*, 512 F.3d at 1161 (citing *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1537-40 (2d Cir. 1996)).

Similarly, St. Marks is *not* an "employee" under the ARRA, just as the non-profit Board members were not "employees" under the ADEA in *Fichman*. Here, like *Fischman*, the Tribe's Business Committee did not hire St. Marks and cannot fire St. Marks; rather, St. Marks was *elected* and cannot be fired. Instead, the Business Committee must – and in this case has – effectuate his removal through the contours of the Tribe's Constitution and Bylaws. [*See* ER1037]. Further, the "work" that St. Marks undertook on behalf of the Tribe was neither assigned nor evaluated by a superior – St. Marks did not have a supervisor; St. Marks was *the Chairman* of the Tribe, he occupied the highest position possible on the Reservation. In this position he had influence over the organization by virtue of the powers delegated to the Chairman position by the Tribe's Constitution – power that St. Marks abused and was therefore removed.

Further, the plain language of the Tribe's Constitution and Bylaws evidence the lack of intent for the Tribe's Chairman to be considered one of its employees. Section 1(a)-(b) of the Tribe's bylaws provide:

> The officers of the committee shall be the Chairman, Vice Chairman, and such other officers as may be hereafter designated by the committee. The Chairman shall be elected at large. The Vice Chairman and any other officers shall be elected from within the committee by secret ballot. A nonvoting secretary shall be selected from outside the committee and retained on an employment contract.

Here, this language indicates that while the secretary shall be selected and retained on an employment contract, no such relationship governs the Chairmanship.

Thus, the Department inappropriately concluded that St. Marks is an employee for the sole reason that he receives a paycheck from the Tribe. [ER1074]. As discussed above, this is irrelevant. Indeed, this one factor is not – and cannot be – determinative of the inquiry. *See Fichman*, 512 F.3d at 1160 (noting that not one factor is decisive). As such, St. Marks does not qualify as an "employee" under the statute and the Court should vacate the Department's Order.

B. The Department Erred in Finding that St. Marks's Alleged Disclosures Were a "Contributing Factor" to His Removal

The ARRA's whistleblower protections only apply when a complainant demonstrates that his disclosure "was a contributing factor in the reprisal." §1553(c)(1)(A)(i). The Department erred in finding that St. Marks made such a showing, as such a determination is not supported by the ROI and is based on a mischaracterization of the applicable standard. Further, despite the unconscionable lack of due process accorded to the Tribe, the Tribe nonetheless adduced enough evidence to show that its decision to remove St. Marks from office in 2013 had nothing to do with his alleged disclosures. The Department's substantive conclusions in this regard must be reversed if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. 706(2)(A).

1. *The Department's Conclusions Are Not Supported by the Record*

The Department's conclusions plainly run counter to the evidence before it and the final Order must therefore be vacated. *See Sierra Club*, 346 F.3d at 961 ("arbitrary and capricious agency action" occurs "when the agency offers an explanation that runs counter to the evidence before the agency" and ultimately vacating an EPA order because the underlying record did not support agency's conclusion). As described above, the Department's determination that St. Marks' removal was a prohibited reprisal rests on a claimed temporal link between an alleged tribe-wide letter that St. Marks purportedly sent on March 5, 2013, and the Business Committee's March 25, 2013, removal of St. Marks from the Chairman position due to his neglect of duty and gross misconduct. [ER0011; ER1077-ER1078]. The Department's apparent retraction of its initial focus on the alleged letter is of no moment, as the Department's Order *still* conveniently ignores its own record evidence that St. Marks disclosed his cooperation with the Department in September 2012 – six months prior to his alleged tribe-wide letter or the alleged threats of March 2013. The record submitted to the Department demonstrates that St. Marks publicized his cooperation with the federal government on multiple occasions and well before March 2013.

Specifically, the Investigative Activity Report dated July 9, 2013, indicates that the Business Committee was aware of St. Marks' cooperation with

the Department of the Interior starting in September 2012. [ER0171]. The report states:

> St. Marks requested "Confidential Source" status; **however, prior to the second interview on September 21, St. Marks disclosed to then CCT Chairman [REDACTED] that he (St. Marks) was cooperating with DOI-OIG.** After tribal elections, and his subsequent election as CCT Chairman in November 2012, St. Marks was publically vocal with his suspicions that federal and tribal funds had been embezzled . . .
>
> . . . I assumed that CCT Chairman [REDACTED] informed the other CCT Councilmen of St. Marks' disclosure/cooperation with this office in September 2012.
>
> On January 7, 2013, Chairman St. Marks directed CCT staff, including CCT Attorney General [REDACTED] to provide documents to DOI-OIG in connection with our investigation at the Chippewa Cree Construction Corporation. Again, I assumed this information was shared with other CCT elected officials.

[ER0171]. The report indicates that St. Marks informed the Business Committee of his cooperation with the Department in September 2012. In fact, the ROI notes that St. Marks "stated that the Business Committee knew of his disclosures to Federal agents" and "[i]n an interview with St. Marks, he stated that the acting CCT chairman [REDACTED] knew of the disclosure and initially wanted to also attend the meeting with OIG and other Federal agents." [ER0017; ER0176-ER0181]. The record therefore indicates that St. Marks' cooperation was known well before March 2013.

Critically, St. Marks's cooperation with the Department and the Business Committee's knowledge of this cooperation predates his election to Chairman. Curiously, St. Marks takes the position that "[u]pon taking office in 2012, Chairman St. Marks noticed discrepancies in the Water Project's finances" and began investigating in "November, 2012." [ER0817]. However, the record demonstrates that his "investigation," cooperation with the federal government, and disclosure of that cooperation all predated his November 2012 election to the Chairman position and are entirely unrelated to the Chairman position. [*See* ER0015 ("On August 14, 2012, St. Marks contacted OIG regarding the CCT Business Committee and questionable expenditures of tribal funds and Federal funds provided to C-4 and other tribal entities on Rocky Boy Reservation. He was interviewed by Special Agent (SA) [REDACTED] on August 17, 2012.")].

St. Marks does not claim any adverse action around the time of his September 2012 disclosure, or immediately following his election victory in November 2012 – he does not allege being "discharged, demoted, or otherwise discriminated against" at that time, as would be required to invoke the whistleblower inquiry under Section 1553 of the ARRA. [*See generally* ER0014-ER0028]. Rather, St. Marks won a tribal election in November 2012, and was empowered to lead the Business Committee as its Chairman until he repeatedly abused his power and committed fraud against the Tribe, thereby causing the

Business Committee to remove him from office. [ER0878-ER0880; ER0994-ER0995]. The Business Committee did not take any action against St. Marks for over half a year following St. Marks's September 2012 disclosures – when it became evident that St. Marks abused his power as Chairman, defrauded the Tribe and the federal government, and harassed tribal employees. [ER0878-ER0880; ER0994-ER0995]. The Business Committee then appropriately removed St. Marks from his position as Chairman pursuant to the Tribe's Constitution.

As evidenced by the foregoing, the Department's conclusions plainly run counter to the evidence before it and the final Order must therefore be reversed.

C. The Department's Order Should Be Vacated, as the Department Erred in Calculating the Award

Even if the Court were to uphold the Department's finding of a prohibited reprisal, the Court should nevertheless vacate the Departments' monetary order against the Tribe, as the Department's calculation of the monetary award is contradicted by the Department's own findings. Specifically, the Department ordered that the Tribe pay St. Marks hundreds of thousands of dollars in "back pay" and "front pay" based on calculations purportedly based on St. Marks's salary. [*See* ER1085-ER1086]. However, these calculations are plainly contradicted by the Department's own conclusions.

The Department's Order specifically notes that St. Marks took a $50,000 pay cut from his annual salary. [ER1081 ("St. Marks . . . asked for a $50,000 decrease in his own salary"); ER0802]. Accordingly, to the extent that the Court upholds the Department's reprisal determination, it should nevertheless vacate the monetary award, as any such award based on St. Marks's salary should be significantly decreased to reflect the Department's finding.

CONCLUSION

Based on the foregoing, the Tribe respectfully urges the Court to vacate the Department's Order.

Respectfully Submitted,

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Dated: November 4, 2015

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STATEMENT OF RELATED CASES

The Tribe is not aware of any related case other than the appeal in this Court that has already been consolidated with the instant appeal – *St. Marks v. U.S. Department of the Interior,* No. 15-71909.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) in that, according to the word-count feature of the word processing system in which the brief was prepared (Microsoft Word), the brief contains 13,673 words, excluding the portions exempted by Rule 32(a)(7)(B). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font.

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ADDENDUM

THE CHIPPEWA CREE TRIBE CONSTITUTION

Article III – Organization of Governing Body

SECTION 1. The governing body of the Chippewa Cree Tribe shall be known as the "Business Committee."

SECTION 2. The Business Committee shall consist of eight (8) members and a Chairman all of whom shall be elected on an at-large basis. The Chairman shall file for that particular office.

. . .

Article V – Vacancies, Removal, and Recall

SECTION 1. If any elective official shall die, resign, permanently leave the reservation, or shall be found guilty while in office of a felony or misdemeanor involving dishonesty in any Indian, State or Federal court, the Business Committee shall declare the position vacant and direct the Election Board to call a special election to fill such vacancy. The candidate receiving the highest number of votes shall be elected.

If six (6) months or less remain before the next primary election the vacated position shall remain vacant until it is filled at the general election following that primary, except as provided in Section 1(f) of the bylaws.

SECTION 2. The Business Committee may by an affirmative vote of at least five (5) members expel any member for neglect of duty or gross misconduct provided that the accused member shall be given full and fair opportunity to reply to any and all charges at a designated committee meeting. It is further stipulated that any such member shall be given a written statement of the charges against him at least five (5) days before the meeting at which he is to appear.

SECTION 3. Upon receipt of a valid petition signed by registered voters equal in number to forty (40) percent of those who voted at the last election, it shall be the duty of the Election Board to call and conduct, within sixty (60) days, a recall election on any individual who fills an elective position. The provisions of this section shall also apply to those election board members indicated in Article IV, Section 6. A majority of those who participate in such election must favor recall in order for it to become effective provided those who vote constitute at least fifty

(50) percent of the registered voters. Only one (1) recall attempt may be made for any tribal official during a given term of office. No recall petition shall be acted upon until at least six (6) months of the term has expired. No more than one (1) official at a time may be considered for recall. A recall election shall not be held if an election for that office is scheduled within ninety (90) days after filling the recall petition.

Should the recall be successful, the vacancy shall be filled as provided in Section 1 of this Article. Further details needed to carry out the intent of this Article shall be set forth in the tribal election ordinance.

Article XII – Judicial Branch

SECTION 2. There shall be established, the positions of Chief Judge and two (2) Associate Judges for the tribal court who shall be responsible to carry out the tribe's judicial functions in accordance with an approved tribal law and order code. The tribal appellate court shall consist of a Chief Appellate Court Judge who shall select appellate panel members from a pool of eligible candidates set by the appellate court.

The Business Committee shall appoint and contract with the Chief Judge and Associate Judges for the tribal court and the Chief Appellate Court Judge for the tribal appellate court. The Chief Judge and Associate Judges for the tribal court and the Chief Appellate Court Judge and Appellate Panel Judges for the appellate court must have extensive tribal judicial experience and be in good standing to preside over the tribal court and tribal appellate court.

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<u>THE CHIPPEWA CREE TRIBE BYLAWS</u>

Section 1(e)

The Chairman of the Committee shall preside over all meetings of the committee, shall perform all duties of a Chairman and exercise any authority delegated to him by the committee. He shall vote only in the case of a tie.

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THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, SEC. 1553.

PROTECTING STATE AND LOCAL GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.

(a) Prohibition of Reprisals.-- An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of-- (1) gross mismanagement of an agency contract or grant relating to covered funds;

(2) a gross waste of covered funds;

(3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;

(4) an abuse of authority related to the implementation or use of covered funds; or

(5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

(b) Investigation of Complaints.-- (1) In general.-- A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint regarding the reprisal to the appropriate inspector general. Except as provided under paragraph (3), unless the inspector general determines that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint, the inspector general shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the person's employer, the head of the appropriate agency, and the Board.

(2) Time limitations for actions.-- (A) In general.-- Except as provided under subparagraph (B), the inspector general shall, not later than 180 days after receiving a complaint under paragraph (1)--

(i) make a determination that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint; or

(ii) submit a report under paragraph (1).

(B) Extensions.-- (i) Voluntary extension agreed to between inspector general and complainant.-- If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A) and the person submitting the complaint agrees to an extension of time, the inspector general shall submit a report under paragraph (1) within such additional period of time as shall be agreed upon between the inspector general and the person submitting the complaint.

(ii) Extension granted by inspector general.-- If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A), the inspector general may extend the period for not more than 180 days without agreeing with the person submitting the complaint to such extension, provided that the inspector general provides a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for the decision, which shall be provided to both the person submitting the complaint and the non-Federal employer.

(iii) Semi-annual report on extensions.-- The inspector general shall include in semi-annual reports to Congress a list of those investigations for which the inspector general received an extension.

(3) Discretion not to investigate complaints.-- (A) In general.-- The inspector general may decide not to conduct or continue an investigation under this section upon providing to the person submitting the complaint and the non-Federal employer a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for such decision.

(B) Assumption of rights to civil remedy.-- Upon receipt of an explanation of a decision not to conduct or continue an investigation under subparagraph (A), the person submitting a complaint shall immediately assume the right to a civil remedy under subsection (c)(3) as if the 210-day period specified under such subsection has already passed.

(C) Semi-annual report.-- The inspector general shall include in semi-annual reports to Congress a list of those investigations the inspector general decided not to conduct or continue under this paragraph.

(4) Access to investigative file of inspector general.-- (A) In general.-- The person alleging a reprisal under this section shall have access to the investigation file of [299] the appropriate inspector general in accordance with section 552a of title 5, United States Code (commonly referred to as the "Privacy Act"). The investigation of the inspector general shall be deemed closed for purposes of disclosure under such section when an employee files an appeal to an agency head or a court of competent jurisdiction.

(B) Civil action.-- In the event the person alleging the reprisal brings suit under subsection (c)(3), the person alleging the reprisal and the non-Federal employer shall have access to the investigative file of the inspector general in accordance with the Privacy Act.

(C) Exception.-- The inspector general may exclude from disclosure-- (i) information protected from disclosure by a provision of law; and

(ii) any additional information the inspector general determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the inspector general determines that disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(5) Privacy of information.-- An inspector general investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(c) Remedy and Enforcement Authority.-- (1) Burden of proof.-- (A) Disclosure as contributing factor in reprisal.-- (i) In general.-- A person alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure described in subsection (a) was a contributing factor in the reprisal.

(ii) Use of circumstantial evidence.-- A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial

evidence, including-- (I) evidence that the official undertaking the reprisal knew of the disclosure; or

(II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(B) Opportunity for rebuttal.-- The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under subparagraph (A) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(2) Agency action.-- Not later than 30 days after receiving an inspector general report under subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief in whole or in part or shall take 1 or more of the following actions:

(A) Order the employer to take affirmative action to abate the reprisal.

(B) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency or a court of competent jurisdiction.

(3) Civil action.-- If the head of an agency issues an order denying relief in whole or in part under paragraph (1), has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under subsection (b)(2)(B)(i), within 30 days after the expiration of the extension of time, or decides under subsection (b)(3) not to investigate or to discontinue an investigation, and there is no showing that such delay or decision is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the

complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(4) Judicial enforcement of order.-- Whenever a person fails to comply with an order issued under paragraph (2), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(5) Judicial review.-- Any person adversely affected or aggrieved by an order issued under paragraph (2) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5, United States Code.

(d) Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes.--

(1) Waiver of rights and remedies.-- Except as provided under paragraph (3), the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement.

(2) Predispute arbitration agreements.-- Except as provided under paragraph (3), no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising under this section.

(3) Exception for collective bargaining agreements.-- Notwithstanding paragraphs (1) and (2), an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under the collective bargaining agreement.

(e) Requirement to Post Notice of Rights and Remedies.-- Any employer receiving covered funds shall post notice of the rights and remedies provided under this section.

(f) Rules of Construction.-- (1) No implied authority to retaliate for non-protected disclosures.-- Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(2) Relationship to state laws.-- Nothing in this section may be construed to preempt, preclude, or limit the protections provided for public or private employees under State whistleblower laws.

(g) Definitions.-- In this section: (1) Abuse of authority.-- The term "abuse of authority" means an arbitrary and capricious exercise of authority by a contracting official or employee that adversely affects the rights of any person, or that results in personal gain or advantage to the official or employee or to preferred other persons.

(2) Covered funds.-- The term "covered funds" means any contract, grant, or other payment received by any non-Federal employer if-- (A) the Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(B) at least some of the funds are appropriated or otherwise made available by this Act.

(3) Employee.-- The term "employee"-- (A) except as provided under subparagraph (B), means an individual performing services on behalf of an employer; and

(B) does not include any Federal employee or member of the uniformed services (as that term is defined in section 101(a)(5) of title 10, United States Code).

(4) Non-federal employer.-- The term "non-Federal employer"-- (A) means any employer-- (i) with respect to covered funds-- (I) the contractor, subcontractor, grantee, or recipient, as the case may be, if the contractor, subcontractor, grantee, or recipient is an employer; and

(II) any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds; or

(ii) with respect to covered funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor of the State or local government; and

(B) does not mean any department, agency, or other entity of the Federal Government.

(5) State or local government.-- The term "State or local government" means-- (A) the government of each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, or any other territory or possession of the United States; or

(B) the government of any political subdivision of a government listed in subparagraph (A).

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UNITED STATES CONSTITUTION, AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CERTIFICATE OF SERVICE

I, Jay A. Dubow, hereby certify that a true and correct copy of the foregoing were served upon the following parties via the Court's ECF System:

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