No. 20-3424

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RAYMOND CROSS, et al.,
Plaintiffs-Appellants,
v.
MARK FOX, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of North Dakota – Western Division
Case No. 1-20-cv-00177

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiff Cross' (Cross) appeal in this tribal voting rights matter presents only one major issue for decision by this Court: whether Judge Traynor (Traynor) reasonably and appropriately exercised his *National Farmers Union ("NFU*) conferred prudential and discretionary authority over the facts and issues of this case. Cross contends that he did not.

Two sub-issues are also presented to this Court for review. First, Cross contends Traynor erred in holding he had not reasonably exhausted his available tribal judicial remedies, despite his prosecution of his tribal claims to two final, on the merits, tribal court decisions: the first by the tribal trial court in 2019 and the second by the tribal supreme court in 2020. Defendants admit and concede Cross' nearly two-year long prosecution of his tribal claims has resulted in: a) the 2019 final decision in this matter by the tribal trial court; and b) the 2020 functionally final decision in this matter by the tribal supreme court. See, Defendants' Response Brief at 9. (Defendants state that trial court's "August 5, 2019 decision was on the merits of [Cross'] complaint..[and]…the lower [tribal] court determined that the 'return to the reservation [to vote]' did not violate ICRA."); see also, Defendants' Response Brief at 11-12 (Defendants state that: "On July 28, 2020, the Fort Berthold Supreme Court affirmed the [trial court's] dismissal on the merits…and affirmed that

[Defendants] did not violate ICRA through [their] enforcement of the [1986] return to the reservation amendment.")

Second, Cross contends Traynor's tribal remand order violates *NFU's* two practical exemptions that are intended, among other things, to relieve tribal litigants, like Cross, from having to comply with unreasonable and inappropriate tribal remand orders. See, *National Farmers Union Ins. Cos. v. Crow Tribe (NFU),* 471 U.S. 845, fn 21 (1985). ("We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith (citation omitted), or where the action is patently violative of express jurisdictional provisions or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction").

Cross further contends Traynor's tribal remand order violates *NFU's* futility exemption by requiring him to vainly and fruitlessly seek to re-litigate in tribal court—albeit in the guise of a tribal administrative law issue—the already definitively decided tribal law issue of whether Defendants' 1986 "return to the Reservation in order to vote" directive is legally binding upon, and enforceable against, Cross. (It is.) Cross further contends that Traynor's remand order also violates *NFU's* implicit inadequate judicial forum exemption by consigning Cross' federal ICRA based claims to further adjudication (or attempted re-adjudication) in tribal court.

Given the MHA tribal court has already rendered its two definitive and legally binding decisions—those decisions having comprehensively addressed, decided, and exhausted, thereby having exhausted all of Cross' tribal claims, including his ICRA based claims—there remains no discernible or practicable rationale for the issuance of Traynor's tribal remand order. Traynor offers only, in support for his remand order, his unwarranted and unsupported contention "that the MHA Tribal Court is currently addressing the [tribal member] grievances brought before it." Appellant's Appendix at 102. Nor does his further observation—made in light of the MHA supreme court's bare statement the 2018 Tribal Election Board's (TEB) ministerially determined denial of Cross' request for an absentee ballot may be worthy of further factual development—amount to a substantial or substantive rationale that supports Traynor's tribal remand action. Appellant's Appendix at 101-02.

Cross concludes this tribal remand order's only practically operative effect is to deprive Cross of his presumptive and rightful access to a federal court for the determination of his federally created and conferred rights. He further concludes that Traynor has demonstrably failed—as is evidenced by his unwarranted tribal remand of Cross' claims to further vain and futile tribal court adjudication—to reasonably exercise his *NFU* conferred prudential and discretionary jurisdiction over Cross' claims. Traynor has: 1) erroneously refused to recognize that Cross has fully

and reasonably exhausted his available tribal remedies by prosecuting his tribal claims to two, on the merits, definitive and functionally final decisions by, first, the tribal trial court in 2019 and, second, the tribal supreme court in 2020; and 2) violated *NFU's* practical exemptions to that decision's exhaustion of remedies requirement by his issuance of a tribal remand order directing Cross to undertake the wholly futile and vain legal effort—in a clearly inadequate tribal judicial forum—to re-litigate his tribal claims that have already been fully addressed and finally decided by that Tribe's highest court.

Cross also directs this Court's attention to the D.C. Circuit Court of Appeals' recent decision in a 2021 Fort Berthold Reservation tribal voting rights matter. See, *Hudson v. Haaland,* 843 Fed. Appx. 336 (2021). That matter involved, as does Cross' voting rights lawsuit, a tribal plaintiff's challenge to a tribal constitutional amendment that allegedly impaired his tribal representational and voting rights.

The *Hudson* decision is relevant to Cross' tribal voting rights lawsuit because it discusses and analyzes—albeit in the context of an Article III jurisdictional issue—these legal questions: first, it analyzed whether the tribal plaintiff demonstrated his tribal representational and/or voting rights had been "relatively impaired" or otherwise diminished by Defendants' 2013 enactment of the challenged amendment; See, *Hudson* at 3. (It relied, in its analysis of this issue, upon the Supreme Court's 1962 decision in *Baker v. Carr*, 369 U.S. 186 (1962), holding a plaintiff's

representational and/or voting rights would be constitutionally injured by those governmental actions "where[in] the weight of one's vote is impaired relative to other voters of [that] same polity."); second, it analyzed whether the tribal plaintiff had "shown that the [challenged] tribal] election process itself [had given rise] to [the tribal plaintiff's] cognizable injury[;]" See, *Hudson* at 4; and third, it analyzed whether the tribal plaintiff demonstrated Defendants' 2013 governmental action had "deprived [him] of the tribal offices [he] sought" or had otherwise "[significantly diminished] or diluted [his tribal] voting rights [and/or his tribal] per capita shares.]" See, *Hudson* at 4 (That court cited its affirmation of a lower court's decision in *Rosales v. United States*, 477 F. Supp. 2d 119, 125-26 (D.D.C. 2007, *aff'd*, 275 Fed. Appx 1 (D.C. Cir. 2008)).

Cross submits that the *Hudson* decision may be relevant, as well, to the issue of whether Traynor erred in remanding Cross' demonstrably substantial federal claims to a functionally inadequate tribal court for the further adjudication of those claims. Given Cross' acknowledged fundamental right to vote in TAT elections, coupled with his complementary *Hudson* recognized right to be equally and fairly represented in on-going TAT governance, Traynor's tribal remand order makes no legal or rational sense given that tribal courts, unlike a state courts, are not constitutionally empowered, or practically equipped, to hear and decide those types of claims. This is especially true given the MHA tribal court forum court has already

definitively ruled—in two comprehensive and exhaustive decisions issued by both its trial court and its supreme court—that Cross' asserted ICRA-based voting and representational rights do not constitute fundamental rights under governing tribal law. The MHA Supreme Court has likewise definitively ruled that Defendants' 1986 directive requiring Cross to "return to the Reservation in order to vote" does not violate ICRA's equal protection and due process provisions. See, Defendants' Response Brief at 9, 11-12.

For these above cited reasons, Cross respectfully requests this Court to reverse Judge Traynor's ruling herein and to remand this matter for further proceedings in federal district court consistent with the other judicial relief requested by Cross and with such other relief as this Court may deem appropriate and proper.

ISSUES FOR REVIEW

Despite having to wade through the welter[1] of Defendants' mischaracterizations of Cross' factual assertions and legal claims, there nonetheless

[1] Defendants contend that Cross has inflicted upon them and this Court a "rambling," "weak" and "myopic recitations of the [governing]facts and procedural history." See, Defendants' Response Brief at 3-4. Defendants' proffered example of Cross' weak recitation of the facts is their wonderment regarding why "Cross does [not] make any arguments…bearing on federal [or] state elections." See, Defendants' Response Brief at 4. The short answer is Cross is challenging the legality of tribal—and not state or federal—voting rights practices, standards and procedures. Moreover, Defendants choose to mischaracterize—rather than to directly dispute **any** (emphasis added) of Cross' factual assertions or statements. This is so despite their promises to vigorously challenge and dispute Cross' factual claims.

emerges a surprising degree of inter-party consensus regarding the relevant facts governing the legal issues before this Court. First, the parties agree Cross has prosecuted his tribal claims in tribal court to two practically definitive, on the merits, decisions by the tribal trial court in 2019 (decision rendered on August 5, 2019) and the tribal supreme court in 2020 (decision rendered on July 28, 2020); See, Defendants' Response Brief at 9, 11-12. Second, the parties agree the TEB's 2018 action in denying Cross' request for an absentee ballot was wholly dictated and pre-determined by the legally binding absentee ballot provisions of Defendants' 2014 administratively issued Tribal Elections Ordinance. They also further agree that the TEB—as a ministerial and subordinate body—was not legally or administratively free to do otherwise. See, Defendants' Response Brief at 5-6.

ARGUMENT

Traynor accepted *NFU's* proffered discretionary and prudential jurisdictional authority over Plaintiff Cross' claims.[2] See, Appellants' Appendix at 96-97.

Defendants also blandly and falsely assert, without any factual warrant or legal justification, that "Cross has consistently ambushed courts—both tribal and federal—shortly before an election date with litigation." See, Defendants' Response Brief at 7. Cross stands by his straightforward and well-documented—if perhaps overlong—Statement Of Case and its Procedural History.

[2] If Traynor's non-mainstream and idiosyncratic legal views were taken wholly seriously, then—as Professor Martin H. Redish contends in his seminal 1984 law review article on the federal judicial abstention doctrine—his views may be construed as amounting to a "total judicial abstentionist" viewpoint. Redish criticizes this judicial viewpoint as constituting a legally unauthorized usurpation of

((Traynor discusses at some length the "exhaustion of tribal remedies for ICRA due process and equal protection claims" and, as well, he discusses the fact that "[e]xhaustion is required as a matter of comity and as a jurisdictional prerequisite." (citations omitted)). He also thereby accepted its legal and equitably imposed constraints on his exercise of his judicially conferred abstention and remand powers thereunder. Moreover, Traynor, by accepting *NFU* jurisdiction over Cross' tribal voting rights case, also inferentially disavowed his prior pronouncements that: 1) his court wholly lacked subject matter jurisdiction over Cross' federal claims; 2) his court would never intervene in an internal tribal voting rights matter, and 3) tribes—and not federal courts—must always decide the nature and scope of tribal voting rights. See, Appellants' Appendix at 106; see also, Appellants' Appendix at 102

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legislative authority that, when taken to their extremes, threaten to judicially impair if not nullify important federally guaranteed individual rights and liberties. Traynor's views—applied as they are in the context of tribal plaintiffs' civil rights based lawsuits against their tribal governments—would threaten to nullify the application of the Federal Question Statute in Indian Country, ICRA's equal protection and due process provisions, the *Ex Parte Young* decision, and the *NFU* decision itself. See, Martin H. Redish, *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 Yale L. J. 71, 105-114 (1984). Arguably Traynor's embrace of *NFU's* conferred judicial authority—including its prudentially and equitably constrained and regulated judicial abstention and remand powers—represents his subordination of his personal views and beliefs—regarding how today's tribal members should be judicially required to relate to their tribal governments' decisions affecting their equal voting and representational rights—to that decision's dictates. See, Id.

("[this] court will not interject itself into a purely intra-tribal matter); and Appellants' Appendix at 106 ([T]rib[al]…[governments and not federal courts]…must make the decision…whether to [exclusively] restrict the [voting right] franchise to reservation residents…[thereby] denying [other] tribal citizens the right to vote."

1. Cross Has Reasonably Exhausted His National Farmers Union's (NFU) Tribal Exhaustion of Judicial Remedies Requirement by Prosecuting His Tribal Claims to Two Definitive, on-the-Merits, Decisions in the Tribal Trial Court (August, 2019) and the Tribal Supreme Court (July, 2020).

Cross' prosecution of his tribal claims to two definitive and functionally final, on the merits, tribal court decisions—the first by the MHA trial court in 2019 and the second by the MHA supreme court in 2020—demonstrates his fulfilment of *NFU's* tribal exhaustion of available remedies requirement. Cross' actions thereby demonstrate his agreement with the overarching comity-based principle "a federal court should not exercise [judicial] jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." See, *Petrogulf Corp v. Arco Oil & Cas Co.*, 92 F. Supp. 2d 1111, 1113 (2000) (quoting *Tillet v. Lujan*, 931 F. 2d 636, 640 (10th Cir. 1991)).

His tribal exhaustion actions demonstrate his support for those three comity-based concerns that are singled out by *NFU's* exhaustion of available tribal remedies requirement. They include: 1) furthering the contemporary congressional Indian policy supporting the development of tribal self-governance; 2) promoting the

orderly administration of justice within Indian Country by allowing a full record to be first developed within the affected tribal court system; 3) obtaining the benefit of tribal judicial expertise regarding the relevant tribal issues in a particular case if federal judicial review of the affected tribal government's action become necessary. See, *Petrogulf Corp.*, 92 F. Supp. 2d at 1113 (citing *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997)).

His tribal exhaustion efforts also fulfil what the Tenth Circuit Court of Appeals describes as the "strict view" of the tribal exhaustion of remedies rule. That strict view requires tribal litigants to prosecute, as did Cross, their tribal claims through all the available levels of tribal appellate review. See, e.g., *DHS Drilling Company v. Estate of Jeremy Jorgensen*, No. 09-CV-200-J (D. Wyo. 2010) (That court held that for comity-based and exhaustion of available tribal remedies reasons that the tribal litigant must also exhaust available tribal appellate review remedies). Cross further submits that the record demonstrates that he has also fulfilled this Court's tribal exhaustion of available remedies requirement. See, *Kodiak Oil v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019) ("Exhaustion is not required…' where it would serve no other purpose other than delay'…and '[r]equiring the development of a factual records where the jurisdictional challenge does not turn on issue of fact would not serve…any other purpose than delay." (citations omitted)).

Judge Traynor ruled that Cross must, nonetheless, return to tribal court to exhaust the practically futile and legally inconsequential issue of whether the 2018 Tribal Election Board's (TEB) denial of his request for an administratively issued absentee ballot violated his ICRA conferred rights. See, Appellants' Appendix at 101-02. Traynor seizes on this purportedly significant remand issue—arising from, as Defendants themselves assert, the wholly ministerially directed and determined 2018 TEB's act of denying Cross' request for an absentee ballot—as the basis for his issuing his tribal remand order. See, Appellants' Appendix at 101-02.

But the sad, simple and uncomplicated truth is Traynor's purported significant legal basis for his tribal remand order simply doesn't exist. It doesn't exist as a viable legal issue because the MHA Supreme Court's 2020 decision upheld—as against Cross' ICRA based equal protection and due process based challenges—Defendants' 1986 directive requiring him, as a non-Reservation resident, to physically return to the Reservation in order to vote in any TAT election. See, Appellants' Appendix at 50 and Appellees' Addendum at 15. It also doesn't exist as a viable factual issue because the TEB functions as a wholly ministerial and non-discretionary administrative body that is doubly bound by: 1) the absentee ballot provisions of Defendants' 2014 Tribal Elections Code; and 2) the 1986 tribal constitutional amendment that specifically requires Cross, as a non-Reservation resident, to return to the Reservation in order to vote. Even assuming that the TEB

members especially liked Cross and willingly issued him a sort of "honorary Reservation resident" ballot, that ballot would be null and void because the underlying board action, itself, would be *ultra vires* the TEB's overriding and superior organic law that established it. See, Defendants' Response Brief at 6-7.

Cross further brings to this Court's attention Traynor's statements about tribal absentee balloting and tribal absentee voting. His statements may be relevant in determining whether his remand order is intended to fulfill *NFU's* salutory and significant comity-based goals. See Appellants' Appendix at 102-03. While he does conclude that "[v]oting is a fundamental right" he adds further, in footnote 8 to his ruling, that "voting absentee is not." (citations omitted). See Appellants' Appendix at 106.

Cross—given, as well, Traynor's evident "buy-in" to *NFU's* judicially declared framework of comity and abstention based concurrent federal jurisdiction that now governs federal-tribal judicial relations—requests that this Court reverse or vacate, as may be deemed appropriate, Traynor's tribal remand order.

2. Cross is Excused From Complying With Judge Traynor's Tribal Remand Order By *NFU's* Two Exceptions to its Tribal Exhaustion of Remedies Requirement Because: (a) Further Litigation of Cross' of its ICRA-Based Claims in Tribal Court Would Be Futile; and/or (b) Tribal Court is an Inadequate Judicial Forum Given Cross' Lack of an Adequate Opportunity to Challenge That Court's Disposition of His ICRA-Based Challenges in Those Two Above-Referenced Tribal Court Decisions.

a. Traynor's Tribal Remand Order Remand Order Requires Cross to Undertake a Legally Futile and Practically Vain Endeavor to Re-Litigate His ICRA Based Claims in a Tribal Judicial Forum That Has Already Definitively Decided and Disposed of Those Claims.

Traynor's remand order relates solely to the issue of whether the TEB's 2018 denial of Cross' request for an absentee ballot violated ICRA's equal protection and due process provisions. See, Appellants' Appendix at 101-02. Traynor's tribal remand order tracks the tribal supreme court's remand to the tribal trial court on the limited tribal administrative law issue of "determine[ing] whether the equal protection guarantees of the ICRA have been violated by the absentee voting provisions of the [administratively authorized and enacted] Tribal Election Ordinance[.]") We already know—based upon the administratively defined character of the TEB as a wholly ministerial body, Defendants' admissions on this issue and the TEB's letter to Cross denying his ballot request—the answer to Traynor's remand question: the TEB lacked the independent authority to do other than deny Cross' request for an absentee ballot.

Defendants admit the "Tribal Election Board denied [Cross'] absentee ballot application in October 2018 because [the Defendants' 1986] tribal constitutional [amendment] require[s]… [all] tribal members living off the reservation…[to]…return to the Reservation to vote." See, Defendants' Response Brief at 5-6. Furthermore—based upon the Defendants' lengthy and thorough

description of Defendants' governmental structure—the TEB is a legally subordinate and wholly ministerial tribal body whose denial of Cross' request was dictated and pre-determined by Defendants' 1986 directive requiring Cross to "return to the Reservation to vote." See, Defendants' Response Brief at 5-7.

Cross further contends Traynor's trial remand order violates *NFU's* express and implied exceptions to its tribal exhaustion of remedies requirement, as well as the fundamental legal principle that law does not require litigants to do wholly futile things or actions. See, *Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

b. Traynor's Tribal Remand Order Requires Cross to Re-Litigate His ICRA-Based Claims in an Inadequate Judicial Forum That: (1) Has Already Decided These Claims in its 2019 and 2020 Decisions in This Matter Thereby Precluding Cross From Re-Litigating Those Same or Similar Claims Under That Court's "Law Of The Case" Principles; and (2) That Tribal Forum Has Already Fully Exercised, and Thereby Exhausted, its Jurisdictional Authority in This Matter.

"[Cross] argue[s] [the lower] court should excuse [him from] his exhaustion [obligation because]… the [tribal court] is not an adequate judicial forum to hear [his] claims." See, Appellants' Appendix at 96. Traynor also acknowledged Cross' "express[ed] concern" the tribal court has refused—in its 2019 and 2020 decisions in this matter—to "classify [his tribal] voting rights as fundamental" and he fears that "the tribal court will [therefore] just apply whatever standard it pleases." See, Appellants' Appendix at 101. He responded to Cross' concern by stating: "the

[tribal] court did not make a finding that [Cross'] right was **not** (emphasis in original) fundamental" and **if** (emphasis added) the tribal court someday chose to act like a state or federal court **then** (emphasis added) it would "treat the right as fundamental…[and it]…would follow the strict scrutiny standard [in gauging Defendants' 1956 and 1986 actions that denied and diminished Cross' tribal voting and representational rights.]" See, Appellants' Appendix at 101.

Cross contends—after unpacking Traynor's double negatives and conditional statements…that the legal and jurisdictional standards used by the tribal court in making its 2019 and 2020 decisions in determining the tribal legal status of Cross' voting rights are, indeed, highly relevant to the issue of whether the tribal court constitutes an adequate judicial forum. The *NFU* decision expressly excepts from its tribal exhaustion requirement those situations wherein a tribal litigant is confronted with "the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction[al] [standards that it employed in making its 2019 and 2020 decisions in this matter.]" See, *NFU*, 471 U.S. 845 fn. 21.

The "law of the case" application of those tribal jurisdictional standards established by the tribal court's 2019 and 2020 decisions ensure that Cross' ICRA based claims will not fare any better upon their second time around in tribal court. That's because the tribal court's 2019 and 2020 decisions—upholding Defendants' 1986 "return to the Reservation to vote" requirement as against Cross' ICRA based

challenges—have already pre-judged and pre-determined the outcome of Traynor's remanded issue. in tribal court. That's true because the 2018 TEB's—an admittedly legally subordinate and temporarily convened administrative body whose actions are ministerially directed and determined by the absentee ballot standards of issuance that are set forth in Defendants' 2014 Tribal Elections Ordinance—denial of Cross' request for an absentee ballot was inferentially, if not directly, resolved by the tribal court's two decisions in this matter. Cross and Defendants both agree on this legal point. See, Defendant's Response Brief at 5-6 ("The Tribal Election Board denied [Cross'] absentee ballot application in October 2018 because of the [1986] tribal constitutional requirement that tribal members [such as Cross who] liv[e] off the Fort Berthold Indian Reservation must return to the Reservation to vote.").

Traynor, despite recognizing Cross' fundamental right to vote, nonetheless implicitly, if not expressly, holds the tribal interest in its further adjudication of an already pre-judged and pre-determined tribal administrative law issue outweighs Cross' interest in having his federally created and conferred rights adjudicated and declared in a federal judicial forum. Traynor's tribal remand order returning Cross' case to a definitively inadequate tribal forum likewise ignores his "virtually unflagging obligation [as a federal judge] to exercise the jurisdiction given [him]" by appropriately "balanc[ing] the interest of the individual [litigant] in retaining prompt access to a federal judicial forum against countervailing institutional

interests favoring exhaustion." See, *Stacking The Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. of Penn. L. Rev. 817, 821 (2008) (Given the federal courts "virtually unflagging obligation to exercise the jurisdiction given them," they "should balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interest favoring exhaustion." (citations omitted).

Cross contends—in light of the record facts demonstrating that whatever significant tribal judicial jurisdictional interest may have once existed in exercising its jurisdiction over Cross' claims, that interest has been fully and completely addressed by his prosecution of his tribal claims to the 2019 and 2020 final, on the merits, tribal trial court and tribal supreme court decisions in this matter—that the equitable and practicable balance has already been struck in favor of Cross' right of access to a federal adjudicatory forum for the declaration his federally created and conferred rights.

c. Traynor's Tribal Remand Order Does Not Serve or Further Any Legally Cognizable or Justifiable Tribal Sovereign Interest or Prerogative and, Therefore, is Not an Appropriate Exercise of Traynor's *NFU* Abstention Based Discretionary Authority.

Traynor's remand order violates *NFU's* comity and equity based principle—as well as the *Randall*-based judicial inquiry principle—requiring that judicial abstention and deference should only be granted in furtherance of significant tribal

traditional welfare-enhancing and tribal justice-enhancing tribal values and sovereign prerogatives and not, as the case is here, in furtherance of a contemporary minority's goal—as is evidenced by Defendants' 1956 and 1986 actions—of disrupting, undermining and ultimately undoing the TAT people's generations long endeavor to weld together three distinct and disparate tribal peoples (Mandan, Hidatsa and Arikara Tribes) into one tribal people. See, *Randall v. Yakima Indian National Tribal Court*, 841 F.2d 897 (9th Cir. 1988).

Cross has previously detailed the results of a *Randall* inquiry into the nature and scope of the sovereign interests and prerogatives that Defendants are seeking to further and promote in this matter. Their contemporary 1956 and 1986 governmental interests are not premised upon the protection of any long-standing, sacrosanct, widely shared and valued tribal justice principles or ceremonial practices. Instead, Defendants' governmental interests are expressly premised on well acknowledged, if oft times criticized, Anglo-Saxon inspired legal and political practices that are focused on shrinking and restricting their own qualified tribal voters' access to the ballot box. Unfortunately, the tribal court's 2019 and 2020 decisions have explicitly and expressly upheld Defendants' tribal constitutional authority to continue the enforcement of these standards, practices as against Cross' ICRA based challenges.

JUDICIAL RELIEF REQUESTED

Plaintiff Cross respectfully requests this Court to reverse Judge Traynor's ruling in this matter for the above stated reasons. He further respectfully requests this Court to remand this matter to the lower court for further proceedings consistent with these following guidelines or instructions governing the purpose and objectives of those further lower court proceedings:

1. Cross requests this Court to exercise the power conferred upon it by 28 U.S.C. §2106:

"The Supreme Court or court of appellate jurisdiction may affirm, modify or set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

a. Cross requests this Court to remand this matter to the lower court for its application of these following *Hudson*-developed legal standards—articulated by the D.C. Court of Appeals in an analogous context involving a TAT voter's federal equal claims that Defendants' 2013 governmental actions impaired, diluted or otherwise diminished his tribal voting or representational rights—to the facts and issues that are presented by Cross'

claims: Whether Cross has demonstrated under the 1962 *Baker v. Carr* standard that his tribal voting and/or representational rights have been "relatively impaired" by Defendants' 1956 and 1986 governmental actions "where[in] the weight of [Cross'] vote is impaired relative to other voters of [that] same polity;"

b. Whether Cross has "shown that the [challenged tribal] election process…[established by Defendants' 1956 and 1986 actions]…[caused Cross'] cognizable injury;" and

c. Whether Cross has shown that Defendants' 1956 and 1986 governmental actions "deprived [him] of the [tribal] offices [he] sought" or had otherwise "[significantly diminished] or diluted [his] voting rights or [his tribal] per capita shares [of tribal assets]."

Cross also respectfully requests such other appropriate judicial relief as this Court deems worthy of granting.

Dated this 1st day of July, 2021.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,627 words.

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The electronic version of this Brief filed with the Court complies with this Court's Local Rule 25A because it has been submitted in Portable Document Format (PDF), which was generated by printing to PDF from the original word processing file so that the electronic version may be searched and copied.

Dated this 1st day of July, 2021.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that, with respect to the foregoing:

1. All required privacy redactions have been made per 8th Cir. R. 25A(i).

2. If required to file additional hard copies, the ECF submission is an exact copy of those documents.

3. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program – ESET Endpoint Security and, according to the program, are free of viruses.

Dated this 1st day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on July 1, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by this Court's CM/ECF system.

I also hereby certify that upon notification that Appellant's Reply Brief has been filed, I will file with the Clerk of Court ten (10) paper copies of Appellant's Reply Brief by sending them to the Court via Federal Express.

I also hereby certify that upon notification that Appellant's Reply Brief has been filed, I will send one (1) paper copy of Appellant's Reply Brief to counsel of record for Defendants by sending it via U.S. Mail to the address listed on the Court's CM/ECF System.

Dated this 1st day of July, 2021.

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