EXHIBIT P-5

Leech Lake Tribal Court of Appeals

AP-22-01

LaRose v MCT et al

Orders, Briefs and Exhibits

LEECH LAKE BAND OF OJIBWE
TRIBAL COURT OF APPEALS

Arthur David LaRose, LLBO Secretary-Treasurer,

Petitioner,

Case No.: CIV-22-58

v.

Cathy Chavers, Minnesota Chippewa Tribe President and Gary Frazer, Executive Director Minnesota Chippewa Tribe and as Election Court Clerk (in their official capacities) and The Minnesota Chippewa Tribe Tribal Election Court of Appeals (in their official capacities as 2022 certification panel),

OPINION

Respondents.

Justices K. Goodwill, P. Kebec and G. Soule.

This case involves an appeal by Arthur LaRose, Leech Lake Band of Ojibwe Secretary-Treasurer ("LaRose"), of an order of the Tribal Court dismissing his action, which seeks a declaratory judgment that he is eligible to be a candidate for Secretary-Treasurer in Leech Lake's 2022 Tribal election and an injunction requiring the Leech Lake Reservation to "restart" the election to include LaRose as a candidate.

The Tribal Court granted Respondents' motion to dismiss on May 5, 2022, on the ground that the Court lacked subject matter jurisdiction over Petitioner's claims. The Court denied reconsideration of the order on May 18, 2022. Petitioner filed a notice of appeal on May 23, 2022, and he requested an expedited appeal process, because the election is scheduled to be held on June 14, 2022. The Court conducted a status conference with counsel on May 26, 2022. Respondents filed their brief on June 3, 2022. Petitioner filed a reply brief on June 6, 2022. Frank Bibeau represents Petitioner; Philip Brodeen, Brodeen & Paulson, P.L.L.P., represents the Respondents.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner LaRose Background

Petitioner LaRose filed a notice of candidacy for the Secretary-Treasurer position of the Leech Lake Reservation Business Committee for the upcoming 2022 election. In an affidavit filed in the Tribal Court, LaRose stated that he had been "certified as a candidate ten (10) times for MCT[1] elections at Leech Lake

[1] MCT is an abbreviation for the Minnesota Chippewa Tribe, which is the federally-recognized tribal government with constitutional authority to regulate elections for each of its constituent member bands, including the Leech Lake Band.

Reservation, seven (7) times after the 2006 felon amendment to the MCT Constitution." He had been elected Leech Lake Chairman and Secretary-Treasurer.

In 1992, LaRose pleaded guilty to a charge of Third Degree Assault, which was a felony. LaRose received a stay of imposition and completed the terms of the stay. His conviction is now deemed a misdemeanor under Minnesota law.

The issue of LaRose's eligibility to run as a candidate for Leech Lake office was first raised in 2006 in *Gotchie v. Goggleye*, Leech Lake Band of Ojibwe Tribal Court, CV-06-07. Plaintiffs in that case challenged the eligibility of Tribal Chairman Googleye on the ground he had been convicted of 5th Degree Assault (a felony) in 1991 and 1993. The Court wrote that "Although LaRose is not a party to this action, the Court notes that the decision in this matter would apply to LaRose in the same manner as Goggleye, as LaRose's conviction was also deemed to be for a misdemeanor pursuant to Minn. Stat. 609.13." The Tribal Court (K. Wahwassuck) held that Goggleye's conviction was deemed to be a misdemeanor and therefore he "is not precluded from running for or holding office under Article IV of the Revised Constitution of the Minnesota Chippewa Tribe."[2]

A challenge to LaRose's eligibility was filed in connection with the 2018 election. The challenge is discussed below.

The Revised Constitution and Election Ordinance

Article IV of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe governs Tribal Elections for committeemen and officers. This provision prescribes the right to vote in elections on the reservations, qualifications for candidates (enrolled member, reside on the reservation, age 21 on or before the election), terms of office, and a bar on persons convicted of felonies (and certain other crimes) on running for Tribal office. Article IV, Sec. 4 – the felony disqualification provision – was "amended per Amendment IV, approved by the Secretary of the Interior on January 5, 2006."

The Minnesota Chippewa Tribe Election Ordinance is a 29-page document, last revised on December 14, 2021. The ordinance governs all aspects of elections for officers and committeepersons of the six member Tribes, including primary, general and special elections; candidates' eligibility and notice of candidacy; districts and polling places; election notices; voter eligibility; reservation election boards and election contest judges; the conduct of elections; and recounts, contests and appeals.

The MCT Election Ordinance establishes the MCT Tribal Election Court of Appeals, "comprised of a person named by each of the six Bands ("Judge"), chose as determined by the Band." "The Judge representing the Band from which the appeal is taken must be recused from sitting on that matter. In all cases, there shall be five (5) voting members of the Court." (The Tribal Election Court of Appeals may hear appeals from the decisions of Reservation Election Contest Judges.)

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[2] In 2014, the MCT Tribal Election Court of Appeals held that a candidate convicted of a felony, which was later deemed a misdemeanor, was not eligible to be a Tribal candidate. *See In re the matter of the appeal of Guy Green III, non-certification for office of District III Representative, Leech Lake Band of Ojibwe* (Feb. 14, 2014) (upholding Leech Lake decision that candidate was not eligible to be candidate after he was convicted in 2010 of felony, was discharged from probation, and therefore his offense was deemed a misdemeanor).

The Election Ordinance establishes the process for determining eligible candidates for a Trial election:

- An eligible candidate must file a notice of candidacy ((1.3)(C)(1))
- Each Band governing body must certify eligible candidates in accordance with the MCT Constitution and Election Ordinance ("Certification decisions must adhere to the requirements of the Constitution and this Ordinance. The Band governing body shall make its certification decision based on all information available at the time for determination including information provided by the person who filed the Notice of Candidacy.") (1.3(C)(4))
- Each Band shall designate an entity responsible for conducting a criminal history check and the scope of the check shall be sufficient to reasonably verify the eligibility of each candidate (1.3(D)(5))
- Each Band governing body must notify the MCT Tribal Executive Committee of eligible and ineligible candidates (1.3)(C)(4))
- Any person who has filed a notice of candidacy has standing to challenge the certification or non-certification of a person who has filed a notice of candidacy for the same position; the challenge must be filed with the MCT Executive Director (1.3(C)(6))
- The Ordinance establishes a tight timetable for deciding any challenge to certification (1.3(C)(6))
    - The challenge must be filed within two days of MCT receipt of notice of certification
    - MCT must notify the Band of the challenge and advise that a complete record of documents related to the challenge must be submitted to the Executive Director within two days of receipt of the challenge
    - MCT must notify the person whose certification is being challenged of the challenge
    - The person being challenged may file an answer to the challenge within two days of receipt of the challenge
    - The Executive Director must provide copies of the challenge, record and answer to the Tribal Election Court of Appeal
    - The Tribal Election Court of Appeals must convene and decide this issue of certification within 48 hours of receiving the written record
- "The decision of the Tribal Election Court of Appeals shall be final." (1.3(C)(6))

The 2022 Candidate Eligibility Process

At a Special Meeting on February 9, 2022, the Leech Lake Tribal Council voted to certify Arthur LaRose and Leonard Fineday as candidates for Secretary-Treasurer. That same day, Leech Lake provided its list of certified candidates to the Minnesota Chippewa Tribe.

On February 9, candidate Fineday delivered to MCT a challenge to the certification of LaRose. Fineday alleged that LaRose had been convicted of a felony in 1992 and his candidacy was barred by the MCT Revised Constitution and Bylaws Art. IV §4 ("No member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, if he or she has ever been convicted of a felony of any kind . . .") and MCT Election Ordinance §1.3(D)(2)(b) ("[n]o member of the Tribe shall be eligible as a candidate or be able to hold office if he or she has ever been convicted of a felony of any kind . . .").[3]

LaRose filed an answer to the challenge on February 11, 2022. LaRose argued that his conviction was deemed a misdemeanor under Minnesota law, therefore his candidacy was not disqualified by the MCT Constitution; that the MCT Tribal Election Court of Appeals had previously denied a challenge to LaRose's candidacy on the same ground in 2018 and that *res judicata* required the same result in the

[3] The proper reference in the Election Ordinance is to Section 1.3(D)(1).

current case; that the Constitutional provision was an ex post facto law that should not be applied to LaRose; and that denying LaRose's candidacy would deprive him of due process and equal protection.

Pursuant to the Election Ordinance, the MCT convened its Election Court of Appeals to decide the challenge. On February 14, 2022, the MCT Executive Director sent the challenge and LaRose's answer to the Court for consideration.

The MCT Tribal Election Court of Appeals order

The Tribal Election Court of Appeals issued its Decision & Order on February 16, 2022. The Court found that LaRose had been convicted of a felony (Third Degree Assault) in 1992 and therefore was ineligible to run for Tribal office under the MCT Constitution and Election Ordinance.

In response to LaRose's argument that Minnesota law now deemed his conviction to be a misdemeanor, the Court cited two Minnesota Supreme Court opinions that held: "Under Minnesota law, if a person is convicted of a felony and receives a stay of imposition, that person has been "convicted" of a felony even if that person completed the terms of the stay of imposition and their criminal record later reflects that the felony conviction has been "deemed" a misdemeanor under Minn. Stat. § 609.13." The Court held that "Mr. LaRose was "convicted" of a felony in 1992. His criminal record now reflects that his felony conviction is deemed a misdemeanor under Minn. Stat. §§ 609.13, 609.135 but that does not change the fact that Mr. LaRose was at one time convicted of a felony."[4]

After the Court issued its order, LaRose and allies requested a special meeting of the MCT Tribal Executive Committee. At the meeting on March 10, 2022, LaRose argued that the TEC should overturn the Court's order. Some of the members expressed the view that the decision of the MCT Tribal Elections Court of Appeals is final (as stated in the Election Ordinance). A majority of TEC members voted to adjourn the meeting without taking action on LaRose's request.

The Leech Lake Tribal Court Action

- The petition

Ten weeks after the MCT Tribal Election Court of Appeals issued its opinion, on April 28, 2022, LaRose commenced an action against the MCT President and Executive Director and the MCT Tribal Election Court of Appeals, "in their official capacities," in the Leech Lake Band of Ojibwe Tribal Court. Plaintiff sought a declaratory judgment that LaRose was not a convicted felon under Minnesota law "and was improperly disqualified as a certified candidate for 2022 Secretary-Treasurer by Defendants." Plaintiff also requested an injunction against Defendants to "restart the Leech Lake Reservation election contest with long-seated Secretary-Treasurer LaRose as a candidate for re-election."

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[4] The Court relied on two prior orders of the MCT Tribal Election Court of Appeals: *In re the matter of the appeal of Guy Green III, non-certification for office of District III Representative, Leech Lake Band of Ojibwe* (Feb. 14, 2014) (upholding Leech Lake decision that candidate was not eligible to be candidate after he was convicted in 2010 of felony, was discharged from probation, and therefore his offense was deemed a misdemeanor); *In re the matter of the appeal of Peter Nayquonabe, non-certification as candidate for Secretary-Treasurer of the Mille Lacs Band of Ojibwe* (Feb. 21, 2014) (upholding Mille Lacs' decision not to certify candidate after he was convicted in 1999 of theft from Grand Casino and later pardoned) ("[T]his is an MCT Election governed by the provisions of the MCT Constitution which is the supreme law of the Tribe.").

In the Leech Lake action, LaRose alleged several factual and legal theories intended to restore his candidacy: LaRose's 1992 was deemed to be a misdemeanor under Minnesota law and should not disqualify his candidacy; the MCT Tribal Election Court of Appeals Decision & Order was procedurally defective; the felony disqualification provision is an ex post facto law unenforceable against LaRose, which the MCT Tribal Elections Court of Appeals failed to address; the MCT Tribal Executive Committee refused to consider reinstating LaRose's candidacy after the MCT Tribal Elections Court of Appeals issued its order; the felony disqualification provision was unlawfully adopted even though fewer than 30% of eligible voters participated in the election to approve the constitutional amendment; the Tribal Election Court of Appeals order and its enforcement deprived LaRose of protected constitutional due process and equal protection rights.

With respect to jurisdiction,[5] LaRose alleged that the Leech Lake Tribal Court "has original jurisdiction over the parties and claims set forth in this Complaint under the MCT Constitution, the Indian Civil Rights Act of 1968, and as a result of Petitioner LaRose having exhausted administrative remedies under the Minnesota Chippewa Tribe's Election Ordinance . . . and with the MCT Tribal Executive Committee." He also alleged that the Court had jurisdiction under Leech Lake Tribal Code, Part II JURISDICTION, Section 1 Leech Lake Band Tribal Court Jurisdiction.[6]

- Order of dismissal

In response to the Complaint, Defendants filed a motion to dismiss on the grounds that the Court lacked jurisdiction to hear the matter and the claims were barred by sovereign immunity and absolute immunity. On May 5, 2022, the Tribal Court granted Defendants' motion to dismiss because "this court lacks the subject matter jurisdiction to intervene into this dispute."[7] The Court relied on its prior ruling in "White v. LaRose, CV-18-66, where it held it has no jurisdiction to intervene" in a matter that challenged LaRose's right to take office after the 2018 Tribal election at Leech Lake.

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[5] Leech Lake Band of Ojibwe Tribal Chairman Faron Jackson, Sr., sent a letter to the Tribal Court on May 3, 2022 "to reaffirm the Leech Lake Reservation Business Committee has already granted the court the authority though the adoption of our judicial codes . . . to hear the case before the court . . . ." The letter cited Leech Lake Judicial Code, Part II Jurisdiction, Section 1(C) Actions.

[6] The Code grants jurisdiction over "disputes arising within or concerning all territory within the Leech Lake Indian Reservation boundaries" ("Territory"); "All persons who reside or are found within the territorial jurisdiction of the Band and are: Band members or eligible for membership in the Band; members of the Minnesota Chippewa Tribe; members of other Federally recognized Indian tribes; or Indians who are recognized as such by an Indian community or by the Federal government for any purpose." ("Subject Matter"); "All matters and actions within the power and authority of the Leech Lake Band including controversies arising out of the Constitution of the Minnesota Chippewa Tribe, by-laws, statutes, ordinances, resolutions, and codes enacted by the Reservation Tribal Council; and such other matters arising under the enactments of the Reservation Tribal Council or the customs and traditions of the Ojibwe people of the Leech Lake Reservation." ("Actions").

[7] The Court concluded that it lacked jurisdiction "absent a clear violation of due process of law by the MCT Court of Election Appeals." The Court found that the Election Ordinance's expedited process for determining a challenge to eligibility, which includes an opportunity for the candidate subject to the challenge to submit an answer to the challenge, "constitutes due process." In this case, LaRose submitted a six-page answer to the challenge, along with 51 attachments, which was provided to the Court. The fact that the Court – in the 48-hours it had to issue a written opinion – did not cite all of respondent's arguments does not mean that the Court ignored such arguments or that LaRose was deprived of due process.

- The 2018 Challenge

In 2018, Mick Finn challenged LaRose's eligibility to run for Secretary-Treasurer based on his 1992 conviction. The MCT Tribal Election Court of Appeals denied the challenge because "[a]side from the three (3) page personal letter . . . by Donald Finn . . . there is insufficient evidence provided in the various documents and Record from Band Governing Body to support overturning the candidate certification by the band governing body for the Leech Lake Reservation."

After LaRose won the election, Finn filed an election challenge based on the felony disqualification provision. The Leech Lake Election Contest Judge, C. Routel, found that LaRose's 1992 conviction "is considered a felony conviction under the MCT Election Ordinance, and he is ineligible to hold office in the Band." The Court, however, held that it "is without the power to invalidate the election. . . . [T]he Election Ordinance is clear that the decision of the MCT Tribal Election Court of Appeals is final. This Court has no power to review that decision." The Court denied the election contest. Decision & Order, June 29, 2018.

Thereafter, Steven White, Leech Lake District II Representative, filed a petition in Tribal Court, seeking a restraining order to prevent LaRose from taking office, based on the felony disqualification provision. In Order Denying TRO (July 3, 2018) and Order Dismissing Petition (July 12, 2018), the Tribal Court (B.J. Jones) essentially agreed with the Election Contest Judge that the tribal courts did not have the authority to upset the MCT Tribal Election Court of Appeals' determination of candidate eligibility. The Tribal Court noted it "is greatly concerned that this Court not be used to circumvent the process laid out by the MCT and the Band for entertaining certification and election contest issues," Order Denying TRO, and the Court dismissed "this application for a restraining order on the round that this Court lacks the jurisdiction to interject itself into an election that is governed by other processes set up by the MCT and approved of by the Band," Order Dismissing Petition.[8]

- Motion for reconsideration

After the Order of Dismissal, LaRose filed a motion for reconsideration. Petitioner urged the Tribal Court to reconsider its order because the MCT Tribal Election Court of Appeals order "does not mention the Indian Civil Rights Act, nor consider *ex post facto* application or retroactivity of the 2005 Amendment." On May 18, 2022, the Court denied the motion for reconsideration, concluding that the MCT Court order "is not violative of the Indian Civil Rights Act due process clause because it is not an ex post facto law."

ISSUES PRESENTED ON APPEAL

1. Whether the Leech Lake Band of Ojibwe Tribal Court has subject matter jurisdiction to overturn a decision of the MCT Election Court of Appeals on the question of candidate eligibility.

2. Whether the 2006 Amendment to the MCT Constitution, which disqualifies candidates for Council Member or Officer of any MCT Reservation Business Council who have ever been convicted of a felony, violates the Petitioner's rights to due process of law.

[8] As the Tribal Court notes, '[t]he roles appear reversed in this action." In the 2018 Election Contest and Tribal Court proceedings, Leech Lake and LaRose argued that the MCT Tribal Election Court of Appeals order, finding that LaRose was not disqualified as a candidate, was final and not subject to further review by the Tribal Court.

STANDARD OF REVIEW

This matter is an appeal of a trial court decision and Rule 49 of the Leech Lake Band of Ojibwe Judicial Code governs the standard of review. This Court's review is generally confined to matters of law; however, the rule provides for review of the factual record solely for a determination of whether it is based on substantial evidence in the record.

DISCUSSION

The Minnesota Chippewa Tribe Tribal Election Court of Appeals Has Exclusive Authority to Decide Challenges to Eligibility

This Court's jurisdiction in tribal election matters is limited by the operation of the MCT Constitution. The Leech Lake Band of Ojibwe is one of the Bands of the MCT, with the MCT Constitution serving as its principal organic governing document. The MCT Constitution provides for two distinct types of governing bodies: the Tribal Executive Committee (TEC), made up of two representatives from each of the six bands (Chairman and Secretary-Treasurer), and a Reservation Business Committee (RBC) for each of the Bands, made up of the Chairman and Secretary-Treasurer and one to three Committeemen.

The MCT Constitution addresses legislative authority on elections of officers and council men. Section 1 of Article IV (Elections) delegates the responsibility of adopting a uniform election ordinance to the TEC, with that ordinance describing "the precincts, polling places, election boards, time for opening and closing the polls, canvassing the vote and all pertinent details." MCT Constitution, Article IV, Section 1. The only election responsibility delegated to RBCs is to be "the sole judge of the qualification of its voters." *Id.* Section 1(c). Article VI (Authorities of the Reservation Business Committees) lists the powers of the RBCs and includes no mention of elections. *Id.* Article VI. Section (f) of Article VI ("the powers hereby granted to the bands by the charters issued by the Tribal Executive Committee are hereby superceded by this Article and said charters will no longer be recognized for any purpose.") serves to effectively limit the authorities of the RBC to those listed in Article VI and other powers set forth in the MCT Constitution. *Id.*

The TEC adopted an Election Ordinance, which was most recently amended in 2021. The MCT Election Ordinance sets forth procedures for the challenge of a certification or non-certification of a candidate in Section 1.3(C)(6). These challenges may only be filed by an individual who has filed a notice of candidacy for the same position and are considered and decided quickly after being received. *Id.* Challenges to candidacy or non-candidacy are decided by the Tribal Election Court of Appeals, which is "comprised of a person named by each of the six Bands ("Judge"), chosen as determined by the Band (and excluding a representative of the Band from which the appeal is taken). *Id.*, Sec. 3.4(A)(1). Decisions of the Tribal Election Court on certification or non-certification of a candidate are final decisions.

Consistent with the limitations articulated in the MCT Constitution, the Leech Lake Band Tribal Court Code has no provisions on tribal elections. While the subject matter jurisdiction of the Leech Lake Tribal Courts extends to "all matters and actions within the power and authority of the Leech Lake Band including controversies arising out of the Constitution of the Minnesota Chippewa Tribe" (Leech Lake Tribal Code, Title 1, Part II, Section 1(c)(1)), the MCT constitution effectively limits the power and authority of the RBC, the Leech Lake Band's government, on matter involving elections. The jurisdiction of the Leech Lake Band Courts on election disputes is limited to those duties specified in the MCT Election Ordinance, specifically: deciding appeals of decisions of Reservation Election Contest Judges.

MCT Election Ordinance, Chapter III, Section 3.3. Accordingly, this Court lacks the power and authority to overturn a decision on non-certification of a candidate issued by the Tribal Election Court of Appeals. That body is the tribunal empowered to receive evidence and argument, apply the law and issue decisions in accordance with applicable tribal and federal laws, including the Indian Civil Rights Act.

We agree with the Tribal Court in this case, the Election Contest Judge in *Finn v. Leech Lake*, and the Tribal Court in *White v. LaRose*, that the final authority on Tribal election candidate eligibility is the Minnesota Chippewa Tribe Tribal Election Court of Appeals.

The MCT Tribal Election Court of Appeals Order Did Not Deprive LaRose of Due Process Rights

LaRose contends that the MCT Tribal Election Court of Appeals Order deprived him of due process rights guaranteed by the Indian Civil Rights Act and the MCT Constitution. His principal argument is that his due process rights were violated when the MCT Court applied a constitutional provision adopted in 2006 to disqualify his current candidacy based on a 1992 conviction. He claims that the law cannot be applied retroactively consistent with due process[9] and the felony disqualification provision, applied in this manner, constitutes an *ex post facto* law.

We first conclude that the due process issue is entirely within the purview of the MCT Tribal Election Court of Appeals. LaRose raised this issue in his answer to the challenge to his candidacy. The fact that the Court did not discuss this issue in its Order – issued within 48 hours of submission – does not mean that the Court did not consider the issue.

Although we defer to the MCT Court decision, we comment on the due process issue raised by Petitioner.

The Tribal Court rejected Petitioner's due process challenge:

> This Court finds that the MCT Election Court of Appeals' application of the 2006 constitutional amendment to uphold the challenge to the Petitioner's eligibility to run is not violative of the Indian Civil Rights Act due process clause because it is not an ex post facto law. The prohibition of ex post facto laws refers to retroactive punishment of a person and not the imposition of additional civil collateral consequences for actions taken prior to the law being passed that imposes the additional civil consequences. See Smith v. Doe, 538 US 84 (2003)(application of sex offender registry laws to persons convicted prior to passage of law not violative of due process as it is not an ex post facto law designed to punish). See also Lehman v. Pa. State Police, 576 Pa. 365 (2002)(application of firearms disqualification law to prior convictions not violative of due process).

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[9] LaRose argues in his Reply Brief that the Constitution's language does not expressly state that felony convictions that occurred before adoption of the amendment would disqualify a Tribal candidate. The MCT Court, however, implicitly decided that the condition, "if he or she has ever been convicted or a felony," encompassed all felonies, regardless of when the convictions occurred. We also note that the MCT Court has previously disqualified a candidate based on a conviction that occurred before 2006. *See In re the matter of the appeal of Peter Nayquonabe, non-certification as candidate for Secretary-Treasurer of the Mille Lacs Band of Ojibwe* (Feb. 21, 2014) (upholding Mille Lacs' decision not to certify candidate after he was convicted in 1999 of theft from Grand Casino and later pardoned).

> The purpose of the 2006 amendment is not to punish persons, but instead to regulate whom may run for elective office for the MCT. . . . [T]he 2006 amendment to the MCT Constitution is not an attempt to impose additional punishment upon him for the crime he committed, but instead to regulate his right to run for office.

Article I, Sections 9 and 10 of the U.S. Constitution prohibit the Congress or state legislatures from passing a "bill of attainder" or "ex post facto law." "The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt." *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960). This provision is not applicable in this case. "Every law that makes criminal an act that was innocent when done, or that inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution." *Burgess v. Salmon*, 97 U.S. 381, 384 (1878).

The cases cited by the Tribal Court are instructive on what constitutes an unlawful *ex post facto* law.[10] In *Smith v. Doe*, 538 U.S. 84 (2003), persons convicted of sex crimes before passage of Alaska's Sex Offender Registration Act challenged the Act's retroactive registration and notification requirements, alleging violations of the *Ex Post Facto* and Due Process Clauses. The Court found that the intent of the Act was to create a "civil, nonpunitive regime," *id.* at 96. and that its effects were not punitive. "The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.* at 103. The Court upheld the Act in the face of constitutional challenge.

In *Lehman v. Pa. State Police*, 839 A.2d 265 (Pa. 2003), appellant was convicted of larceny (a felony) for stealing a case of beer. Many years later, he was denied the purchase of a .22 rifle because his larceny conviction disqualified his purchase under Pennsylvania law. Appellant challenged application of the gun control law on the ground it was an unlawful *ex post facto* law. The Court found that the law was "civil and non-punitive," *id.* at 375, and its intent "was not to punish past conduct, but to protect society from the risk of firearms in the hands of those who have demonstrated by their past criminal behavior that they have difficulty conforming to the law." *Id.* The Court noted that "'A statute is not made retroactive merely because it draws upon antecedent facts for its operation.' Cox v. Hart, 260 U.S. 427 . . . (1922). The [law] is simply not retrospective in the sense forbidden by the *Ex Post Facto* Clause: it does not punish conduct that occurred before its adoption." *Id.* at 378. The Court denied appellant's challenge.

The *Lehman* Court noted that "Disqualifying felons from purchasing or possessing firearms is no more punitive than disenfranchisement or occupational disbarment, sanctions which the United States Supreme Court has deemed non-punitive." 839 A.2d at 375-76 (citing *DeVeau v. Braisted*, 363 U.S. 144 (1960) ("forbidding felons from working as union officials is not punishment")). *DeVeau* held that a New York statute that barred a person earlier convicted of a felony from certain work as a union official did

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[10] Petitioner correctly contends that the courts apply a presumption against retroactive legislation "under which courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012). But the cases cited by Petitioner largely focus on whether Congress intended a statutory provision to apply retroactively, rather than on alleged due process deprivations. *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994) (newly enacted damages claims and jury trial right not available to claimant in civil rights action pending on appeal at time of enactment); *Martin v. Hadix*, 527 U.S. 343 (1999) (statute that placed limits on amounts prevailing party could recover in attorneys fees would not be applied retroactively to work performed before statute's effective date); *Vartelas v. Holder*, 566 U.S. 257 (2012) (lawful permanent resident convicted of felony not subject to newly enacted restrictions on return to United States after brief foreign travel).

not violate the *Ex Post Facto* Clause or due process. The Court noted that "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. . . . State provisions disqualifying convicted felons from certain employments important to the public interest also have a long history." 363 U.S. at 159. The Court held:

> The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. See *Hawker* v. *New York*, 170 U.S. 189. No doubt is justified regarding the legislative purpose of § 8. The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony.

Id. at 160.

In this case, the Tribal Court is correct: the felony disqualification provisions in the MCT Constitution and Election Ordinance is non-punitive. The voters and MCT Tribal Executive Committee could have intended the provisions to provide some assurance to Tribal voters and citizens that its elected officials will govern lawfully. It is a legitimate "civil regulatory scheme." That Mr. LaRose – who appears to have been law-abiding and dedicated to his Tribe for 30 years – is disqualified from this election does not mean the provisions are punitive or unlawful. We agree that the provisions do not violate his due process rights.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the Tribal Court's Order of Dismissal, dated May 5, 2022, is affirmed.

Dated: June 8, 2022.

BY THE COURT:

Kris Goodwill

Kris Goodwill, Justice

Philomena Kebec

Philomena Kebec, Justice

George Soule

George Soule, Justice

LEECH LAKE BAND OF OJIBWE
IN TRIBAL COURT OF APPEALS

Arthur LaRose, LLBO Secretary-Treasurer

Petitioner-Appellant,

v.

PETITIONER-APPELLANT'S REPLY

Cathy Chavers in her capacity as Minnesota Chippewa Tribe President; Gary Frazer in his capacity as Minnesota Chippewa Tribe Executive Director

Case No. AP-22-01

Minnesota Chippewa Tribe Tribal Executive Committee; Minnesota Chippewa Tribal Court of Appeals,

Respondents-Appellees.

INTRODUCTION

Appellant LaRose is currently the *now seated*, duly elected, Secretary-Treasurer for the Leech Lake Reservation Business Committee (LLRBC), following the 2018 MCT Elections. LaRose has held elected offices of Chairman and Secretary-Treasurer for the LLBO over the past 18 years. Appellant has been certified as a candidate for Leech Lake Reservation elections 10 times, 3 times before the 2006 MCT Constitutional amendment, and won LLRBC elected office six (6) times.

In 2005, the Bureau of Indian Affairs (BIA) conducted a Secretarial Election at the request of the Minnesota Chippewa Tribe (MCT) to amend the Revised Constitution of the Minnesota Chippewa Tribe, MN (MCT Const.) The language of the 2005 amendment focused on "if [a candidate] has ever been convicted of a felony of any kind . . . ." sometimes referred to as the felon amendment.

There was a timely challenge to the 2005 Secretarial Election about (1) not meeting the 30% required eligible voters participation in the MCT Constitution, Art XII and (2) the ex post facto "if . . . ever" constitutional violations of the MCT Const. and Indian Civil Rights Act of 1968 (ICRA)(See Complaint **Exhibit A**, MCT's Legal Counsel Brodeen Memorandum to MCT-TEC on Applicability of *Hudson v Zinke* dated 7-13-2020, including 2005 amendment challenge history). Ultimately, the Secretary of the Interior approved the MCT Constitutional amendment in 2006, which became part of the MCT Constitution on Jan. 5, 2006.

Shortly after in 2006, the Honorable Judge Wahwassuck of the Leech Lake Tribal Court determined in *Gotchie v Goggleye* (CV-06-07), that both Appellant LaRose herein and then seated Chairman George Goggleye were not convicted felons under Minnesota's criminal law. (See *Aff. of LaRose* **Exhibit 3**, Findings of Fact, Conclusions of Law & Declaratory Judgment by the Honorable Judge Wahwassuck dated 12-8-2006). On Feb. 23, 2006 the Leech Lake Reservation Business Committee (LLRBC) adopted Resolution 2006-76 *Convictions that are deemed misdemeanors for certification of tribal office candidates*. (See *Aff. of LaRose* **Exhibit 1**). The Tribal Court *found* that the Res. 2006-76 was not inconsistent with Minnesota Law or MCT Election Ord. No. 10, and *concluded* that the LLRBC did not exceed its authority by passing Res. #2006-76. (See Wahwassuck decision dated 12-8-2006, attached as *Aff. of LaRose* **Exhibit 3**). Whether Appellant LaRose was convicted of a misdemeanor has been long decided election certification law for Leech Lake Reservation and its voters.

The Minnesota Chippewa Election Ordinance was amended by the MCT Tribal Executive Committee (TEC) before the 2020 January election cycle and again just before the January 2022 election cycle, which revisions permit candidates to challenge another candidate's certification with supporting documentation, *after* the Leech Lake Reservation Business Committee (LLRBC) had certified candidates. (See **Exhibit B**, MCT Election Ordinance). There was not a due process requirement under the MCT Election Ordinance (revised 12/14/2021) that any candidate's challenge to another candidate's certification, with supporting documentation, be filed first with the Leech Lake Reservation Business Committee (RBC). (Id.)

In their *In Re LaRose Decision & Order* dated 2-16-22, the Court stated that based on the records received, submitted by the Challenger, the Minnesota Chippewa Tribe's Tribal Election Court of Appeals determined LaRose was "convicted of a felony and therefore ineligible to be a candidate for LLRBC Secretary/Treasurer in accordance with the eligibility requirements set forth in the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe and the Minnesota Chippewa Election Ordinance, as amended on December 14, 2021. . . ." (Id. See *Decision & Order* dated 2-16-22 attached as *Aff. of LaRose* **Exhibit 4**).

The Minnesota Chippewa Tribe's Tribal Election Court of Appeals decision did not consider or mention Appellant LaRose's constitutional and ICRA expressly raised defenses against *ex post facto* application of the 2006 amendment for a 1992 conviction. (See *Aff. of LaRose* at p. 3, item 17). Nor did the MCT Election Court of Appeals comment on the

LLRBC Resolution 2006-76 entitled *Convictions that deemed to be misdemeanors for certification of tribal office candidates*, which declared that the Leech Lake Tribal Court's determination that convictions deemed to be a misdemeanor under Minnesota criminal law was now codified as Leech Lake Band law. (See *Aff. of LaRose* **Exhibit 1**, Res. 2006-76 with Minutes). The Minutes from Feb. 21, 2006 and Feb. 23, 2006 reveal a 4-0 unanimous vote to codify Leech Lake policy with Res. 2006-76, with Donald Finn, then LLRBC District 3 Representative, present and voted as part of the 4-0 vote to adopt 2006-76.

The *ex post facto* "if . . . ever" MCT Const. amendment language was obtained by a Secretarial Election with BIA waivers, which resulted in about 17% MCT eligible voter participation, thereby circumventing the MCT Constitutional requirement of 30% eligible voter participation in Article XII, as legally analyzed and described in *Hudson v Zinke*[1] (2020) decision (overturned by *Haaland* in 2021 for Hudson's *lack of standing*).

Here, Appellant has been certified as a candidate for Leech Lake Reservation elections 10 times, 3 times before the 2006 MCT Constitutional amendment, and won LLRBC elected office six (6) times. Respondent's collective, substantial and fundamental unconstitutional deprivations and injuries caused by retroactive application of a clearly ex

[1] See *Hudson v Haaland* (U.S. Court of Appeals filed April 6, 2021), on Appeal from the United States District Court for the District of Columbia, *Hudson v Zinke* (2020)(No. 1:15-cv-01988). *Haaland* reversed, remanded and ordered dismissal for *Hudson v Zinke* due to Hudson's lack of standing as an eligible voter, because Hudson needed to be a duly elected office holder on the Reservation Business Committee, like Appellant LaRose herein to have standing to appeal due to injury to property interests and due process deprivations impacting his rights to hold office.

post facto amendment in 2006, to a 1992 conviction, in 2022, after 18 years of election certifications and holding office, makes Appellant's claims timely and *now* ripe.

I. Ripeness

Before 2022, Appellant was without an injury-in-fact to claim or seek redress of the retroactive application of the 2006 amendment. Appellant and the LLRBC relied in good faith on the 2006 decision by Judge Wahwassuck in Goggleye and the subsequent resolution 2006-76 (Exhibit) to codify LLRBC Resolution 2006-76 entitled *Convictions that deemed to be misdemeanors for certification of tribal office candidates*, which declared that the Leech Lake Tribal Court's determination that convictions deemed to be a misdemeanor under Minnesota criminal law was now codified as Leech Lake Band law. (See *Aff. of LaRose* **Exhibit 1**, Res. 2006-76 with Minutes).

Appellant has *now* sustained personal and economic injuries, constitutional deprivations, unjust taking of property and liberty rights to hold office by the acts and omissions of Respondents, and therefore the necessary standing to challenge the retroactive application of the 2006 amendment *now* because his claim has just become ripe with the MCT's 2022 Tribal Election Court of Appeals *In Re LaRose Decision & Order* dated 2-16-22 denying Appellant's certification.

II. Applying the 2006 Amendment to Petitioner's Prior Conviction Constitutes an Unlawful Retroactive Application of Law

Respondents argue that "[t]he term 'ever' is unambiguous. Appellant's claims to the contrary are laughable." (See Brief of Respondents at p. 15). Respondents, however, do not point to any TEC resolution or legislative history showing that the 2006 Amendment

was clearly and unambiguously intended to be applied retroactively to convictions taking place prior to its enactment and when the candidate has been consistently certified as a candidate took effect. Rather, Respondents assert only that the word "ever" shows intent by the MCT to apply the 2006 Amendment retroactively. This use of the word "ever" in the 2006 Amendment, however, fails to rebut the well-settled presumption against retroactivity. In fact, the TEC was specifically requested to decide this issue through certification by the Leech Lake Tribal Court in 2006 when the Honorable Judge Wahwassuck of the Leech Lake Tribal Court certified the following questions to the TEC for an opinion pursuant to a Tribal Constitution Interpretation No. 1-80:

1. Is Revised MCT Constitution Article IV intended to apply to Tribal Council member elected to office prior to the date of enactment on January 5, 2006?

2. Does application of Revised MCT Constitution Article IV to sitting Tribal Council members (elected prior to the date of enactment) constitute a retrospective application of the law?

Gotchie v. Goggleye, No. CV-06-07, *Request for Opinion From Tribal Executive Committee* at 2 (Leech Lake Tribal Ct. Dec. 8, 2006). The TEC subsequently failed to provide any interpretation on the two questions regarding the retroactive application of the 2006 Amendment as certified by Judge Wahwassuck. In other words, Respondents say that the language in 2006 Amendment clearly and unambiguously expresses intent to be applied retroactively, but the TEC has said absolutely nothing about the retroactive application of the 2006 Amendment when specifically requested to decide this issue through certification by the Leech Lake Tribal Court in 2006. This cannot be right. If the 2006 Amendment is so clear and unambiguous that it was intended to apply to Tribal

Council members elected to office prior to the Amendment's enactment, there would have been no need to seek guidance from the TEC on this precise question.

Under the presumption against retroactivity, "courts read laws as prospective in application unless [the legislature] has unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012). "Requiring clear intent assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf v. USI Film Products*, 511 U.S. 244, 272–73 (1994).

The use of the word "ever" does not operate as an "express command" or "unambiguous directive" required to make the 2006 Amendment retroactive. *See Martin v. Hadix*, 527 U.S. 343, 354 (1999) (quoting *Landgraf*, 511 U.S. at 263, 280); *Reynolds v. McArthur*, 27 U.S. 417, 434 (1829) ("[L]aws by which human action is to be regulated … are never to be construed retrospectively unless the language of the act shall render such construction indispensable."). "The standard for finding such unambiguous direction is a demanding one[,] … [requiring] 'statutory language that was so clear that it could sustain only one interpretation.'" *I.N.S. v. St. Cyr*, 533 U.S. 289, 316–17 (2001) (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

The Supreme Court's decision in *Martin v. Hadix* is instructive for the Court in this case. In *Martin*, the Supreme Court considered whether the Prison Litigation Reform Act of 1995 ("PLRA"), which imposed limits on the fees that could be awarded to attorneys who litigate prisoner suits applied to post-judgment monitoring of defendants' compliance

with remedial decrees that had been performed before the PRLA became effective. 527 U.S. at 347. The text of the PLRA provides that [i]n *any* action brought by a prisoner who is confined [to a correctional facility] … attorney's fees … shall not be awarded, except" as authorized by the statute. 42 U.S.C. § 1997e(d)(1) (emphasis added).

The Supreme Court in *Martin* rejected the argument that the statutory phrase "[i]n any action brought by a prisoner who is confined" clearly expresses congressional intent to apply the statute retroactively. 527 U.S. at 355. The Court pointed out that "Congress has not expressly mandated the temporal reach" of the PLRA. *Id.* Additionally, the Court explained that "although the word 'any' is broad, it stretches the imagination to suggest that Congress intended, through the use of this one word, to make the fee limitations applicable to all fee awards." *Id.* at 354. As the Court detailed: "Had Congress intended [PLRA] to apply to all fee orders entered after the effective date, even when those awards compensate for work performed before the effective date, it could have used language more obviously targeted to addressing the temporal teach of that section. It could have stated, for example, that 'No award entered after the effective date of this Act shall be based on an hourly rate greater than the ceiling rate." *Id.*

In discussing statutory language that might show clear congressional intent to apply the PLRA retroactively the Court explained: "The conclusion that [PLRA] does not clearly express congressional intent that it apply retroactively is strengthened by comparing [PLRA] to the language that we suggested in *Landgraf* might qualify as a clear statement that a statute was to apply retroactively: '[T]he new provisions shall apply to all

proceedings pending on or commenced after the date of enactment.' This provision, unlike the language of the PLRA, unambiguously addresses the temporal reach of the statute. With no such analogous language making explicit reference to the statute's temporal reach, it cannot be said that Congress has 'expressly prescribed' [PLRA]'s temporal reach." *Id.* 354–55. As such, the Court "conclude[d] that the PLRA contains no express command about its temporal reach" and because "the PLRA, if applied to postjudgment monitoring services performed before the effective date of the Act, would have a retroactive effect inconsistent with our assumption that statutes are prospective, in the absence of an express command by Congress to apply the Act retroactively, we decline to do so." *Id.* at 362 (citing *Landgraf*, 511 U.S. at 280).

Here, the 2006 Amendment presents a clear case for application of the presumption against retroactivity. First, the 2006 Amendment is entirely silent with respect to the issue of retroactivity and the Amendment's temporal reach. There is no language in the 2006 Amendment whatsoever that operates as an "unambiguous directive" or "express command" to apply the Amendment retroactively to convictions taking place prior to its effective date. The 2006 Amendment does not speak to persons who have previously been certified as a candidate for Tribal office under the prior version of the MCT Constitution and have been convicted *before* the Amendment's enactment. An express directive of the 2006 Amendment's retroactive application must have clear and unambiguous language mandating retroactive application. *See Varetlas*, 566 U.S. at 267 (stating that IIRIRA's amendment of "aggravated felony" definition applies expressly to "conviction[s] …

entered before, on, or after" the statute's enactment date); IIRIRA § 321(c) ("The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred …."); IIRIRA § 322(c) ("The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act"); *Landgraf*, 511 U.S. at 255–56 & n.8 (stating that the language "all proceedings pending on or commenced after the date of "enactment" amount to "an explicit retroactivity command"). The 2006 Amendment says absolutely nothing about convictions entered before its enactment.

Moreover, while the phrase "ever been convicted of a felony of any kind" may read broadly, it is a far stretch to suggest that the MCT people intended, through the use of the word "ever," to make the 2006 Amendment applicable to all convictions, including those entered prior to its enactment. *See Martin*, 527 U.S. at 343 (explaining that "although the word 'any' is broad, it stretches the imagination to suggest that Congress intended, through the use of this one word, to make the fee limitations applicable to all fee awards" in the phrase "[i]n any action brought by a prisoner who is confined"). At most, the "ever been convicted" language in the 2006 Amendment raises an ambiguity as to whether it applies to a person committed a felony prior to its enactment and has previously been certified as a candidate for Tribal office. The language in the 2006 Amendment thus "falls short … of the 'unambiguous directive' or 'express command' that the [2006 Amendment] is to be applied retroactively." *Martin,* 527 U.S. at 354. Had the MCT voters intended the 2006 Amendment to apply to criminal convictions entered prior to its effective date, they "could

have used language more obviously targeted to addressing the temporal reach of that section." *Id.* Such language could have explicitly stated that the 2006 Amendment is to apply to convictions entered on, before, or after its effective date. But they chose to not do so.

Additionally, Respondents' reliance on *In re Guy Green III, Non-Certification for Office of District III Representative, Leech Lake Band of Ojibwe* (MCT Tribal Election Ct. of Appeals Feb. 21, 2014) and *In re Peter Nayquonabe* (MCT Tribal Election Court of Appeals Feb. 15, 2018) is misplace. Respondents fail to discuss the obvious differences between *In re Guy Green III* and *In re Peter Nayquonabe* that make these cases clearly distinguishable from this case on the retroactive application issue.

In *In re Guy Green*, the Election Court of Appeals considered whether Guy Green III—a MCT tribal member who was convicted of a second-degree assault with a dangerous weapon under Minnesota law in 2010 *after* the 2006 Amendment's enactment—was eligible to run for Tribal office. *In re Guy Green III*, Decision & Order at 1. The Court found that "Mr. Green's conviction constitutes a felony conviction under the MCT Constitution and Election Ordinance," and therefore "confirm[ed] the decision of the Leech Lake Band to deny him certification as a candidate for the office of District III Representative." *Id.* at 2. Unlike Petitioner's prior conviction, Mr. Green's conviction occurred *after* the 2006 Amendment's enactment. This critical fact makes it so that there is no retroactive application of the 2006 Amendment issue with Mr. Green's conviction disqualifying him from running for Tribal office.

In re Peter Nayquonabe is also distinguishable from this case. In that case, the Election Court of Appeals determined that Peter Nayquonabe—who sought to run for Tribal office for the first time in 2010—was ineligible to be certified as a candidate for Mille Lacs Band Secretary-Treasurer based on a prior felony theft conviction. *In re Peter Nayquonabe*, Decision & Order at 5. Unlike Petitioner who was certified to be a candidate for Tribal office several times *before* the 2006 Amendment's enactment, Nayquonabe was *never* certified as a candidate for Tribal office. This means that Nayquonabe did not obtain "vested rights acquired under existing laws," *Vartelas*, 566 U.S. at 266, in the way that Petitioner did by being certified as a candidate before the 2006 Amendment's enactment. Moreover, there is no indication that Mr. Nayquonabe even raised the issue of whether the 2006 Amendment could be applied retroactively, so it only makes sense that the Election Court of Appeals did not address retroactivity in its Decision & Order. This is consistent with the standard practice of declining to review constitutional questions and issues not raised by the parties. *See Andrews v. Louisville & N.R. Co.*, 406 U.S. 320, 325 (1972) ("We do not reach for constitutional questions not raised by the parties."); *United States v. Walrath*, 324 F.3d 966, 970 n.2 (8th Cir. 2003) ("We decline to address the argument, which was not raised before the district court or in [the] appeal brief or at oral argument.").

III. The 2006 Amendment Was Intended to Apply to a Narrow Classification of Felony Convictions Involving Theft, Misappropriation, and Embezzlement

Appellant argues that term "any" is ambiguous and that "if . . . ever convicted of a felony of 'any' kind" is an over-broad and vague, retroactive application of the 2006 Amendment that on its face violates the Indian Civil Rights Act of 1968 25 U.S.C. § 1301

et seq., the United States Const. and the Revised Const. of the MCT, Art XIII Rights of Members whereby "no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States . . . ." The second half of the amendment explains the temporal reach intended was to protect against "crimes involving theft, misappropriation, or embezzlement of money, funds, assets, or property of an Indian tribe or a tribal organization" directly expressed that:

> No member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, if he or she has ever been convicted of a felony of any kind; or of a lesser crime involving theft, misappropriation, or embezzlement of money, funds, assets, or property of an Indian tribe or a tribal organization.

See MCT Const., Art IV, Sec. 4.

The "if . . . ever convicted of a felon of any kind" was to avoid difficult to explain language in Secretarial Election referendum ballot initiative for people to understand all the possible crimes prosecuted by the federal government against a tribal government like *U.S. v Wadena, Rawley and Clark*, (Nos. 96-4141, 96-4145 and 96-4146) (1998) whereby:

> In June 1996, Rickie Lee Clark, Jerry Joseph Rawley, Jr., and Darrell "Chip" Wadena were convicted in federal district court of conspiracy, in violation of 18 U.S.C. § 371, theft or bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 666, engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. §§ 1957 and 2, and willful misapplication of tribal funds, in violation of 18 U.S.C. § 1163. In addition, Clark and Rawley were convicted of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, and conspiracy to oppress free exercise of election rights, in violation of 18 U.S.C. § 241.1

And *U.S. v Pemberton, Brown and Finn* (Nos. 96-3417, 96-3498, 96-3527 (1997) whereby

> Alfred "Tig" Pemberton, Daniel Brown, and Harold "Skip" Finn appeal their convictions on various charges related to the insurance arrangements of the Leech Lake Band of Chippewa Indians (the Band) in the late 1980s and early 1990s.

Id.

Three (3) years after the 2006 Amendment was approved by the Secretary of Interior, the Tribal Executive Committee decided the Amendment language lacked the obvious and plain meanings and adopted TEC Interpretation 13-09 declaring that:

> Now therefore be at resolved that article 4, section 4 of the revised constitution and bylaws of the Minnesota Chippewa Tribe is here by interpreted as follows: a conviction of a lesser crime involving theft, misappropriation, or embezzlement of money, funds, assets or property of an Indian tribe or tribal organization show include a conviction for an attempt to commit such a crime if the attempt is punishable as an offense under applicable law.

See TEC Interpretation 13-09 "constitutional interpretation was duly presented and acted upon by a vote of 7 For, 2 against (Herb Weyaus, Arthur LaRose), two silent (Marge Anderson, Michael Bongo), on December 8, 2009."[2] (Id. "the TEC believes that the provisions of the constitution should be interpreted to give affect to the common sense expectations of the membership.)

Common sense expectations are that the TEC would have and should have known to include the lesser crime of attempt involving theft, misappropriation, or embezzlement of money, funds, assets or property of an Indian tribe or tribal organization. This is the temporal reach and commonsense expectation of why the MCT Constitution was amended

[2] See TEC Interpretations at http://fdlrez.com/government/tecinterpretations.htm

in the first place. Commonsense expectations are that the TEC was not really thinking of a felony of any kind but rather crimes involving theft, misappropriation, or embezzlement of money, funds, assets or property of an Indian tribe or tribal organization. The 2006 Amendment language problem is that it is easier to say felony of any kind, instead of assault, DUI, failure to pay child support,[3] which common sense expectations are not crimes related to protecting tribal resources.[4]

The TEC could have adopted TEC Interpretation 16-22 and said the TEC believes the commonsense expectations are "any felony convictions before 2006 not related to crimes involving theft, misappropriation, or embezzlement of money, funds, assets or property of an Indian tribe or tribal organization, are not the common sense kind of crimes related to protecting funds and other tribal resources intended to bar MCT candidate certification, especially of an elected and re-elected official before the 2006 Amendment.

CONCLUSION

Respondents have engaged in acts and omissions amending the MCT Constitution with BIA waivers, with less than the required 30% eligible voter participation to adopt an unconstitutional amendment, which is now being unlawfully applied retroactively to

[3] See Minn. Stat. 609.375, A person who fails to pay court-ordered child support or maintenance may be charged with a crime, which may include misdemeanor, gross misdemeanor, or felony charges, according to Minnesota Statutes, section 609.375.

[4] See *U.S. v Wadena* (for list of crimes hard to put in a referendum paragraph like: conspiracy, in violation of 18 U.S.C. § 371, theft or bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 666, engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. §§ 1957 and 2, and willful misapplication of tribal funds, in violation of 18 U.S.C. § 1163. In addition, Clark and Rawley were convicted of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, and conspiracy to oppress free exercise of election rights, in violation of 18 U.S.C. § 241.1)

Appellant as part of an amended Election Ordinance so as to injure and unjustly take the property rights of holding elected office including re-election, previously secured over the past 18 years. Consequently, Respondents' acts violate important and significant civil rights protections and must be viewed as ultra vires and the case remanded to Tribal Court for further proceedings.

Dated: June 6, 2022

Respectfully submitted,

/s/ Frank Bibeau

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TRIBAL CONSTITUTION

INTERPRETATION NO. 13-09

WHEREAS, Interpretation No. 1-80 provides that the Tribal Executive Committee (TEC) may at its own motion issue written opinions as to the meaning and interpretation of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe;

WHEREAS, Article IV, Section 4 of the revised Constitution and Bylaws provides that "[n]o member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, if he or she has ever been convicted of a felony of any kind; or of a lesser crime involving theft, misappropriation, or embezzlement of money, funds, assets, or property of an Indian tribe or a tribal organization"; and

WHEREAS, a question has arisen whether a conviction for an attempt to commit theft, misappropriation, or embezzlement of tribal money, funds, assets, or property is a disqualifying offense under Article IV, Section 4, and

WHEREAS, the TEC believes that the provisions of the Constitution should be interpreted to give effect to the common sense expectations of the membership; and

NOW THEREFORE BE IT RESOLVED that Article IV, Section 4 of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe is hereby interpreted as follows:

> A conviction of a lesser crime involving theft, misappropriation, or embezzlement of money, funds, assets or property of an Indian tribe or tribal organization shall include a conviction for an attempt to commit such a crime if the attempt is punishable as an offense under applicable law.

We do hereby certify that the foregoing Constitutional Interpretation was duly presented and acted upon by a vote of 7 For, 2 Against (Herbert Weyaus, Arthur LaRose), 2 Silent (Marge Anderson, Michael Bongo), at a Special Meeting of the Minnesota Chippewa Tribal Executive Committee, a quorum present, held on December 8, 2009 at Prior Lake, Minnesota.

Norman W. Deschampe, President
THE MINNESOTA CHIPPEWA TRIBE

Franklin B. Heisler, Secretary
THE MINNESOTA CHIPPEWA TRIBE

AP-21-01
CV-22-58

THE COURT OF APPEALS OF
THE LEECH LAKE BAND OF OJIBWE

Arthur LaRose, LLBO Secretary-Treasurer,

Petitioner/Appellant

vs.

Cathy Chavers, Minnesota Chippewa Tribe President and Gary Frazer, Executive Director Minnesota Chippewa Tribe and as Election Court Clerk (in their official capacities) and The Minnesota Chippewa Tribe Tribal Election Court of Appeals (in their official capacities as 2022 certification panel),

Respondents.

On Appeal from the Tribal Court of the Leech Lake Band of Ojibwe

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BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Whether the Tribal Court of the Leech Lake Band of Ojibwe properly conclude it lacked jurisdiction to hear challenges to candidate certification decisions issued by the MCT Election Court of Appeals.

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STATEMENT OF THE CASE

On February 16, 2022, the Minnesota Chippewa Tribe Tribal Election Court of Appeals ("MCT Election Court of Appeals") issued a Decision and Order which held that Arthur LaRose ("Appellant") was ineligible to be certified as a candidate in the upcoming Minnesota Chippewa Tribe ("MCT") elections. Decision and Order, February 16, 2022. Since that time, Appellant and his allies have continually attempted to undermine the decision of the MCT Election Court of Appeals through political means and litigation.

On February 17, 2022, Appellant submitted a letter to Respondent Cathy Chavers, President of the Tribal Executive Committee ("TEC"), requesting an Emergency Special Meeting of the TEC. Compl., Ex. 10. Appellant specifically requested reconsideration of the MCT Election Court of Appeals certification decision. *Id*. President Chavers responded immediately and denied the request. Compl., Ex. 11. "Section 1.3(C)(6) of the Election Ordinance as amended clearly states that the Court's decision is final and therefore, not subject to appeal or reconsideration…Because the Court's decision is final[,] I am denying your request for an "Emergency" Special Meeting of the MCT TEC." *Id.*, paragraphs 3, 4.

Appellant then forced a Special Meeting of the TEC to take place pursuant to Article II of the MCT Bylaws. Article II requires a Special Meeting to be called if a written request is submitted to the President by one-third (1/3) of the TEC, which currently equals four (4) TEC members. Complaint, Exhibit 12. A Special Meeting of the TEC occurred on March 10, 2022, in Walker, Minnesota. Brodeen Aff., Ex. 1.[1] Appellant spent over two (2) hours presenting his case to fellow TEC members and implored the TEC to overturn the decision of the MCT Election Court of

[1] During the May 27, 2022 scheduling conference, the Leech Lake Court of Appeals instructed Respondents to file supplemental documentation related to deliberations by the TEC regarding Appellant's request to overturn the certification decision.

Appeals. TEC member and Grand Portage Secretary-Treasurer April McCormick ultimately moved to adjourn the meeting without taking formal action on Appellant's request.[2] Secretary-Treasurer McCormick stated that the TEC has a duty to uphold duly enacted tribal laws and the Election Ordinance states that the decision of the MCT Election Court of Appeals is final. For this reason, she did not see the need to continue entertaining discussion on the topic. The TEC voted to adjourn the meeting by a vote of seven (7) to four (4). The four (4) that voted against adjourning the meeting were the same TEC members that formally requested the meeting in the first place.

Even though the TEC refused to act on the matter, Appellant and his supporters continued to exercise political influence with the goal of overturning the decision of the MCT Election Court of Appeals. On March 31, 2022, Leech Lake Chairman Faron Jackson submitted a letter to Respondent and MCT Executive Director Gary Frazer arguing that the MCT Election Court of Appeals did not have jurisdiction to render a decision related to the certification of candidates at Leech Lake. Compl., Ex. 14. Respondent Frazer and the undersigned attorney responded on April 1, 2022, and informed Chairman Jackson that his reading of the Election Ordinance was incorrect. Compl., Ex. 15. The reply correspondence explained that the MCT Election Court of Appeals has exclusive jurisdiction over candidate certification matters.

Having failed to gain traction through political maneuvering, Appellant turned to the Tribal Court of the Leech Lake Band of Ojibwe ("Tribal Court") for relief and filed the underlying Complaint on April 29, 2022. Compl. The suit named President Chavers, Executive Director Frazer, and the MCT Election Court of Appeals as Respondents. The Complaint stated that Appellant was suing Respondents in their official capacities relative to the 2022 election

[2] This is not the first time that the TEC has refused to act at the behest of Appellant related to election related matters. *See generally*, Frazer Affidavit. In 2019, Appellant and his allies attempted to resolve issues related to his criminal history by proposing amendments to the Election Ordinance. The TEC chose not to incorporate the proposed amendments and instead left the criminal background provisions in the Election Ordinance unchanged.

certification process. The Complaint alleged that the actions of Respondents, specifically the non-certification of Appellant, violated Appellant's constitutional rights. Appellant sought an order declaring that his civil rights had been violated and injunctive relief requiring Respondents to cease going forward with the 2022 MCT Election without Appellant on the ballot.

The Tribal Court issued an order dismissing Appellant's Complaint on May 5, 2022. *LaRose v. MCT*, CV-22-58, (LLBO T.C. 2022). "This Court has reviewed the MCT Election Ordinance, as well as the MCT Constitution and laws of the Band, and concludes that absent a clear violation of due process of law by the MCT Court of Election Appeals[,] this Court lacks the subject matter jurisdiction to intervene into this dispute and thus grants the motion to dismiss for want of jurisdiction." Order of Dismissal, at 3.

Appellant filed a Motion for Reconsideration with the Tribal Court on May 10, 2022. The motion was based in large part on the Tribal Court's dicta in the Order of Dismissal related to its potential jurisdiction in election related matters that involve due process violations. The Tribal Court denied the Motion for Reconsideration on May 18, 2022 and found that the decision of the MCT Election Court of Appeals was not violative of due process protections.

Appellant filed a Notice of Appeal and Appellate Brief on May 23, 2022. Once again, Appellant's Brief fails entirely to address the significant jurisdictional defects of the underlying cause of action. Instead, Appellant skips right to the merits of his arguments and focuses seventeen (17) pages of analysis on ex post facto laws and retroactivity.

Tribal elections are nearing their conclusion. Primaries have been conducted and the General Election will occur in a matter of weeks on June 15, 2022. The ballots have been printed and delivered to the Reservation Election Boards. Appellant's only potential relief at this point

would involve the postponement of elections for the Leech Lake Band of Ojibwe. Such a postponement would be unprecedented.

SUMMARY OF THE ARGUMENT

The Tribal Court properly determined that it lacked subject matter jurisdiction to hear challenges to candidate certification decisions issued by the MCT Election Court of Appeals. The MCT Constitution requires elections to be conducted pursuant to a uniform election ordinance. MCT Constitution, Article IV, § 1. The Election Ordinance, specifically § 1.3(C)(6), governs candidate certification challenges and provides exclusive jurisdiction over such challenges to the MCT Election Court of Appeals. The exclusive jurisdiction of the MCT Election Court of Appeals and the corresponding lack of a role for the LLBO Tribal Court in candidate certification decisions was recognized in *Finn v. Leech Lake Election Board*, Decision and Order, (LLBO Election Contest Court 2018); and *White v. Larose*, CV-18-66 (LLBO T.C. 2018).

Appellant's litigation strategy on appeal seems to be to skip right to the merits of his argument. Appellant has not and cannot establish the subject matter jurisdiction of the Tribal Court. In fact, the term "subject matter jurisdiction" appears only three (3) times in his Appellate Brief and only when repeating the Order of Dismissal of the Tribal Court. The failure of Appellant to address the underlying basis for dismissal by the Tribal Court is fatal to this appeal. Appellant's Complaint suffers from other jurisdictional defects all of which are dispositive and fatal to his cause of action. Respondent's sovereign immunity and absolute immunity bar suit against them while acting in their official capacities. Similarly, Appellant failed to state a claim upon which relief can be granted and failed to join the MCT as a necessary and indispensable party.

Even if the Leech Lake Court of Appeals could reach the merits of this case, which it cannot, Appellant's ex post facto and retroactive arguments are unsupported by statutory authority or caselaw. The Tribal Court's analysis of due process rights was superfluous but reached the appropriate conclusion; Appellant's due process rights were not violated.

The only area in the Tribal Court's decisions in this matter that erred and require modification involve the conclusion that the Tribal Court could have jurisdiction to hear a challenge from the MCT Election Court of Appeals if a deprivation of due process was involved. This conclusion is unsupported by the MCT Constitution, Election Ordinance, and previous precedent of the Leech Lake Tribal Court.

The decision of the Tribal Court dismissing the Complaint on the grounds of subject matter jurisdiction should be affirmed. Dismissal should also be ordered on other jurisdictional grounds mentioned. The Court of Appeals for the Leech Lake Band of Ojibwe ("Court of Appeals") should decline to extend the Tribal Court's jurisdiction to the degree included in the Order for Dismissal. It should instead reverse that portion of the Order of Dismissal to conform with the Tribal Court's holding in *White.*

ARGUMENT

I. THE LEECH LAKE TRIBAL COURT PROPERLY DETERMINED THAT IT LACKED JURISDICTION TO HEAR APPELLANT'S CASE

This appeal begins and ends with the lack of Tribal Court jurisdiction in candidate certification matters for MCT elections. This lack of jurisdiction is clearly codified in MCT law and has previously been recognized by the Leech Lake Tribal Court. The Tribal Court in this case properly held that it lacked subject matter jurisdiction to hear Appellant's case, but its analysis should have ended there.

A. The MCT Constitution and Election Ordinance Make Clear that Tribal Courts Lack Jurisdiction in Candidate Certification Challenges

The Revised Constitution and Bylaws of the Minnesota Chippewa Tribe (the "Constitution") provides that "[a]ll elections held on the six (6) Reservations shall be held in accordance with a uniform election ordinance to be adopted by the Tribal Executive Committee."

MCT Constitution, Article IV, § 1. The TEC enacted a uniform Election Ordinance that governs all tribal elections. The Election Ordinance is the primary source of authority for election related matters.

Section 1.3(C)(6) of the Election Ordinance governs candidate certification challenges and requires such challenges to be decided by the MCT Election Court of Appeals. Jurisdiction over candidate certification challenges pursuant to § 1.3(C)(6) lies exclusively with the MCT Election Court of Appeals. Bands do not have to opt-in and do not have the ability to opt-out of MCT Election Court of Appeals jurisdiction for certification challenges.

The Election Ordinance also provides that "[t]he decision of the MCT Election Court of Appeals shall be final." Election Ordinance, § 1.3(C)(6). The individual courts of the Bands do not have jurisdiction to hear candidate certification challenges, nor can they overturn issues that have been decided by the MCT Election Court of Appeals. Tribal Courts do not have jurisdiction to overturn the decisions of the MCT Election Court of Appeals or grant the relief requested by Appellant. In fact, Tribal Courts do not have any prescribed role in candidate certification matters conducted pursuant to the Election Ordinance.

The public policy rationale for conferring exclusive jurisdiction over certification challenges with the MCT Election Court of Appeals is sound. There is no step in the election process subject to political gamesmanship as much as the certification of candidates. The Reservation Business Committees have a significant role in candidate certification that includes reviewing background checks, ensuring that filing requirements have been met, and certifying candidates in the first instance. A sitting incumbent or their political allies could use candidate certification to unfairly impact tribal elections in an effort to remain in office. By conferring exclusive jurisdiction to the MCT Election Court of Appeals, the TEC provided an appropriate

check on the Reservation Business Committee's otherwise unbridled authority over candidate certifications.

B. Tribal Courts Lack Subject Matter Jurisdiction in Candidate Certification Challenges

The MCT is a federally recognized Indian tribe comprised of six constituent Bands: Bois Forte; Fond du Lac; Grand Portage; White Earth; Mille Lacs; and White Earth. The duly elected governing body of the MCT is the TEC. Each of the six Bands are federally recognized and exercise inherent sovereign powers of self-determination over the trust and reservation lands within or near their reservation boundaries.

The unique structure of the MCT and the legislative and administrative actions of the Federal Government has resulted in a complicated governance structure for the MCT. This governance structure is premised on separations of authority between the MCT and the constituent Bands. This complicated governance structure is controlled by and outlined in the MCT Constitution. The MCT Constitution is controlling on all matters of tribal law. Similarly, the duly enacted Ordinances and Resolutions of the TEC are controlling for matters that are specifically delegated to the TEC pursuant to the MCT Constitution.

This appeal is a direct challenge to the MCT Constitution and Election Ordinance and the dutiful implementation of the Election Ordinance's procedures by tribal officials. Appellant seeks to modify the duly enacted Constitution and laws of the MCT through judicial fiat. The MCT Constitution provides the sole remedy for tribal members who seek to modify the duly enacted laws of the TEC. Article XIV, § 1 of the MCT Constitution provides that a referendum must be called on any enacted or proposed resolution or ordinance of the TEC upon receipt of a petition signed by twenty percent (20%) of the resident voters of the MCT or an affirmative vote of eight (8) members of the TEC. Importantly, a referendum has not been triggered by an affirmative vote

of eight (8) members of the TEC. Appellant does not allege that he has submitted a duly executed petition for a referendum or even that he has obtained a significant number of signatures on such a petition. Instead, he attempts to circumvent the referendum process by filing the Complaint and Appeal currently pending before this Court.

The MCT Constitution does not grant subject matter jurisdiction to any judicial body, including the tribal courts of the individuals Bands, to challenge the decisions of the MCT Election Court of Appeals. Nor is subject matter jurisdiction provided to the tribal courts of the individual Bands to challenge the dutiful implementation of MCT laws by tribal officials. In fact, the Constitution is completely devoid of any mention of judicial bodies. Instead, the TEC has specifically stated that it has the sole authority to interpret the Constitution. *See* Tribal Interpretations 1-80 and 10-96. Although the creation of a judicial body through the Constitution would be beneficial and is currently being considered in the constitutional reform process, the result of that process is still unknown and not subject to this proceeding. For now, neither the Tribal Court nor any judicial body outside of the TEC has subject matter jurisdiction to hear a challenge to a duly enacted law of the MCT or the dutiful implementation of those laws by tribal officials. Instead, jurisdiction over this matter lies exclusively with the MCT Election Court of Appeals.

The MCT Constitution defines authorities that are to be exercised by TEC members and appointed officials and by the individual Bands. The authorities exercised by TEC members and appointed officials are separate and distinct from the authorities exercised by the individual Bands through their governing bodies. Under the current structure created by the MCT Constitution, a Band cannot exercise its authority to negate the duly enacted laws of the TEC. Nor can a Band create a manner of redress against the TEC that is not provided for in the MCT Constitution.

Similarly, a tribal court of an individual Band cannot exercise jurisdiction to hear a case that challenges the actions of the TEC unless the Constitution confers such jurisdiction.

Pursuant to the MCT Constitution and out of respect for the unique governance structure of the MCT, the Court of Appeals should affirm the Order for Dismissal's holding on subject matter jurisdiction. The Tribal Courts of the individual Bands are inappropriate and inadequate forums to review the duly enacted laws of the TEC which are applicable on all six reservations. The Tribal Courts are also inadequate forums to challenge the actions of MCT officials dutifully implementing those laws.

C. Tribal Sovereign Immunity and Absolute Immunity Bar Suit Against Respondents

Appellant's case suffers from other jurisdictional defects which require dismissal of the underlying Complaint. Sovereign immunity and absolute immunity provide independent bars to Appellant's suit.

Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (*quoting Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). Tribes are subject to the plenary authority of Congress, but they have also been recognized as "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (*quoting United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

One of the foundational aspects of sovereignty that tribes possess, subject to Congressional action, is the "common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. The Supreme Court has specifically held that tribal sovereign

immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986).

"[T]ribal sovereign immunity is a threshold jurisdictional question." *Amerind Risk Mgmt. Corp. v. Malaterre,* 633 F.3d 680, 684 (8th Cir. 2011); *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.,* 786 F.3d 662, 670 (8th Cir. 2015). "[I]f the Tribe possesses sovereign immunity, then the district court had no jurisdiction." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995). "[I]t is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434 (2007).

The MCT, as a federally recognized Indian tribe, possesses sovereign immunity from suit. *See* 84 FR 1200, 1202. "[T]ribal officers are clothed with the Tribe's sovereign immunity." *Baker Elec. Co-op v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994). Naming a tribal official as a defendant does not operate as an end around sovereign immunity:

> A suit against the Tribe and its officials in their official capacities is a suit against the tribe and is barred by tribal sovereign immunity unless that immunity has been abrogated or waived. Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority. A plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than a sovereign entity.

Miller v. Wright, 705 F.3d 919, 927-28 (9th Cir. 2013).

In this instance, Respondents share the MCT's sovereign immunity when acting in their official capacities. The only way around tribal sovereign immunity is if such immunity has been abrogated by Congress or the Tribe itself has waived such immunity.

Federal law does not provide a general waiver of tribal sovereign immunity. Instead, Congress has created federal remedies against Indian tribes in very limited circumstances through the Indian Civil Rights Act. 25 U.S.C. § 1301 *et seq*. The only cause of action made available to

litigants to challenge the actions of an Indian tribe that is exercising powers of self-government is a federal writ of habeas corpus. Appellant is not and cannot seek a federal writ of habeas corpus in the tribal court setting.

Sovereign immunity has not been waived by the MCT for election related matters. The MCT has not waived its sovereign immunity for suits brought by tribal members seeking to undo TEC actions. The MCT has waived its sovereign immunity in only in extremely limited instances. MCT Ordinance No. 6 provides a limited waiver of sovereign immunity related to liability insurance coverages, contract bonds, performance bonds, and payment bonds for MCT subdivisions and business corporations. MCT Ordinance No. 14 provides a limited waiver of sovereign immunity related to the Minnesota Chippewa Tribal Housing Corporation. None of these Ordinances apply to the case at bar. Nor can Appellant point to a valid waiver of sovereign immunity that would allow his Complaint and Appeal to go forward.

Even if sovereign immunity had been abrogated or waived, other immunity doctrines would apply to bar the Complaint. Absolute immunity applies to high-level executive officers of an Indian tribe. *Diver v. Peterson*, 524 N.W.2d 288, 291 (Minn. Ct. App. 1995). Absolute immunity is "designed to aid in the effective functioning of government." *Carradine v. Minnesota*, 511 N.W.2d 733, 735 (Minn. 1994). While the effect is to protect an official from civil liability, the Minnesota Supreme Court has explained that "unless the officer in question is absolutely immune from suit, the officer will timorously, instead of fearlessly, perform the function in question and, as a result, government – that is, the public – will be the ultimate loser." *Diver*, 524 N.W.2d at 291.

TEC Members, the MCT Executive Director, and the MCT Court of Appeals constitute the highest executive officers under MCT law. Other courts have determined that high-level executive

officials are entitled to absolute immunity. *See e.g.*, *Johnson v. Dirkswager*, 315 N.W.2d 215 (Minn. 1982); *Bd. of Regents of the Univ. of Minn. v. Reid*, 522 N.W.2d 344 (Minn. 1994). In this instance, Respondents are entitled to absolute immunity in a similar fashion to other high-level executive officials.

D. Appellant Failed to State a Claim Upon Which Relief Can be Granted and Failed to Join the MCT as a Necessary and Indispensable Party

Appellant attempts to relitigate matters that were properly presented to the MCT Election Court of Appeals. Those arguments were dismissed, and that tribunal ruled against Appellant. Appellant now asks this Court to overturn the decision of the MCT Election Court of Appeals. Granting relief in favor of Appellant would require the unprecedented postponement of the upcoming tribal elections at Leech Lake. Nowhere in tribal law is such an extraordinary remedy contemplated. In fact, such relief runs against the explicit language of the Election Ordinance and the MCT Constitution's requirement to conduct elections pursuant to a uniform ordinance. The lack of Tribal Court jurisdiction and the explicit language of the Election Ordinance related to the finality of MCT Election Court of Appeals decisions require affirmance of the Order for Dismissal.

The MCT is a necessary and indispensable party in any litigation challenging the validity of duly enacted laws or the implementation of such laws by MCT officials. Appellant did not join the MCT nor can he due to tribal sovereign immunity.

Respondents constitute one elected leader, one appointed administrative official, and the MCT Election Court of Appeals itself. Any order issued in the underlying case would only apply to the officials named in the Complaint. Put differently, the only relief that can be granted in the underlying case is against the Respondents. The joinder of the MCT or the entire TEC would be necessary in order for Appellant to obtain complete relief and a "permanent prohibitory injunction be issued against Respondents from continuing the 2022 LLRBC Secretarial-Election without

Petitioner LaRose on the ballot." Complaint, pg. 25. For this reason, the MCT or the TEC as a whole is a necessary and indispensable party to this action. The failure to join the MCT is fatal.

Each TEC member is uniquely positioned to advocate at the TEC for the unique needs of their reservation. Filing suit against a few members of the TEC and appointed tribal officials, without joining the other TEC members or the MCT as a whole, does not allow for each Band to advocate for the needs of its reservation. Each member of the TEC or the MCT as a whole must be present to protect the collective interests of the MCT and the individual interests of the reservations. This also illustrates why the Tribal Courts of the Bands are inappropriate forums for challenging TEC decisions.

II. THE 2006 CONSTITUTIONAL AMENDMENT IS NOT AN EX POST FACTO LAW NOR IS ITS APPLICATION VIOLATIVE OF BARS AGAINST RETROACTIVE APPLICATION

Appellant creates constitutional violations out of whole cloth by arguing that constitutionally prescribed eligibility requirements for office applied to prior convictions amount to ex post facto laws and their current usage violates undefined bars against retroactive application. No jurisdiction has ever reached such a conclusion.

A. The 2006 Constitutional Amendment Is Not An Ex Post Facto Law

The Tribal Court properly held that the 2006 Constitutional Amendment is not an ex post facto law. This is because the eligibility to run for office is a civil matter. Ex post facto laws are generally applied in a criminal context. The Supreme Court has provided the appropriate analysis for ex post facto laws.

> We must "ascertain whether the legislature meant the statute to establish civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Ibid.* (*quoting U.S. v.*

> *Ward*, 448 U.S. 242, 248-249 (1980). Because we "ordinarily defer to the legislature's stated intent," *Hendricks, supra*, at 361, " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," (internal citations omitted).

Smith v. Doe, 538 U.S. 84, at 92 (2003).

The MCT Constitution and the candidate eligibility requirements apply specifically in the civil context and governs eligibility to run for office in elections occurring after the 2006 Constitutional Amendment. The 2006 Constitutional Amendment did not create or add additional penal penalties to Plaintiff's underlying conviction. Instead, it created an eligibility requirement that must be satisfies in future elections. It creates additional civil collateral consequences for prior actions. Such civil consequences do not make the 2006 Constitutional Amendment an impermissible ex post facto law. *Id.*; *see also Lehman v. Pa. State Police*, 576 Pa. 356 (Pa. 2002).

B. The MCT Constitution Clearly Specifies the Temporal Reach of the 2006 Constitutional Amendment

Even if this Court had jurisdiction, this dispute does not merely concern a statute enacted by the legislature but squarely and expressly involves an amendment to the Constitution voted on by the people sixteen (16) years ago. As Appellant admits, the applicable standard is imposed by the MCT Constitution and the "Election Court of Appeals determined that [LaRose] could not be certified for the 2022 election based on the candidate criteria set forth in a 2006 amendment to the MCT Constitution." Appellate Brief, pg. 1. Thus, the terms of the MCT Constitution control.

Appellant's retroactive argument fails because the voters have defined the temporal reach of the 2006 Constitutional Amendment. The term "ever" is unambiguous. Appellant's claims to the contrary are laughable. Under Appellant's theory, he only needs to meet the Constitutional criteria contained in "the MCT Constitution in effect when he was convicted" in 1992 of third-degree assault. Appellant Brief, pg. 4. Appellant believes that the 2006 Constitutional amendment

cannot apply to a felony conviction prior to 2006 and instead the Constitution must be interpreted to be frozen in time to accommodate his 1992 felony conviction. But the 2006 amendment explicitly defines the temporal reach of the felony eligibility standard and asks, "if he or she has *ever* been convicted of a felony of any kind." MCT Constitution, Art. IV, §4 (emphasis added).

Evidence that tribal members know exactly how to impose and restrict the temporal reach of the Constitution need look no further than Article II, § 1 of the MCT Constitution, which contains several date restrictions on the temporal reach of the provisions related to membership. To accept Appellant's argument would require the Court to delete and add terms to the 2006 amendment to the MCT Constitution. Specifically, the term "ever" would need to be deleted and a temporal marker such as "after 2006" would need to be added. The people have spoken. If a tribal member "has ever been convicted of a felony" then that member is not "eligible to hold office." MCT Constitution, Art. IV, § 4.

C. The 2006 Constitutional Amendment Has Not Been Applied Retroactively to Appellant

There are no property rights or vested interests at issue in this matter. Appellant is pursuing the privilege to qualify as a candidate. The 2006 Constitutional Amendment was adopted by the people and has been applied prospectively to all candidates, including Appellant, for the last sixteen (16) years of elections. "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994).

Appellant is not the victim of a new statute being applied retroactively. In fact, Appellant has been treated like every other tribal member seeking to become a candidate. And the law at issue – the 2006 Constitutional Amendment – has been squarely applied for the past sixteen years. Missing from Appellant's brief is the principal that "that legislation readjusting rights and burdens

is not unlawful solely because it upsets otherwise settled expectations." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) *see Landgraf*, 511 U.S. at 269 n.24 ("Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct.").

Appellant has been the beneficiary of an unenforced windfall which resulted from incomplete records being provided to the RBC during candidate certification. Appellant confuses retrospective application of an alleged new legislative standard with a lack of past enforcement. No prior judicial body properly possessed the criminal records pertaining to his 1992 felony conviction. "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 46 (2006); *Landgraf*, 511 U.S. at 270 n. 4. Appellant, like all other tribal members, has been fairly subject to Article IV, § 4 of the MCT Constitution.

In 1991, Appellant was charged with nine (9) felony counts. In 1992, Appellant was convicted of third-degree assault, which is a felony. The Constitution asks, "if he or she has ever been convicted of a felony of any kind" and Appellant must answer yes because he was convicted of a felony in 1992. Only several years later in 1995, after Appellant satisfied the terms of a stay of imposition of a *sentence* pursuant to Minn. Stat. § 609.13, was Appellant's conviction viewed as a misdemeanor. But in answering the Constitutional question if Appellant has "ever been convicted of a felony of any kind" the answer must be yes. This proposition is supported by an abundance of legal authority. *See In Re Guy Green III, Non-Certification for Office of District III Representative, Leech Lake Band of Ojibwe* (Minnesota Chippewa Tribe Tribal Election Court of Appeals, Feb. 21, 2014) (felony conviction later deemed a misdemeanor resulted in ineligibility); *In Re Peter Nayquonabe* (Minnesota Chippewa Tribe Tribal Election Court of Appeals, Feb. 15, 2018) (applied 1999 crime involving theft resulted in ineligibility); *In Re Peace Officer License of*

Woollett, 540 N.W.2d 829 (Minn. 1995) (denial of peace officer license due to felony conviction later deemed a misdemeanor); *State v. S.A.M.*, 891 N.W.2d 602 (Minn. 2017) (denial of expungement due to felony conviction later deemed a misdemeanor). Appellant offers little in return to rebut this overwhelming legal authority.

III. THE TRIBAL COURT'S PRONOUNCEMENT REGARDING ITS POTENTIAL JURISDICTION SHOULD BE REVERSED

In the Order of Dismissal, the Tribal Court stated that it was following prior precedent from *White v. Larose*, CV-18-66 (2018) by concluding that it did not have jurisdiction to interfere in election certification matters. The present case and *White* were decided by the same Tribal Court Judge, and both relate to Appellant's eligibility to hold office. The only practical difference between the cases is which side of the decision Appellant is on.

In the present case, the Tribal Court expanded its jurisdiction and departed from *White* by issuing a sweeping pronouncement that "absent a clear violation of due process of law by the MCT Election Court of Appeals[,] this Court lacks subject matter jurisdiction to intervene into this dispute…" Order of Dismissal, at 3. This expansion of Tribal Court jurisdiction is unsupported by statutory authority, runs counter to the exclusive jurisdiction of the MCT Election Court of Appeals, and would allow a Tribal Court to proceed in the absence of subject matter jurisdiction.

"The requirement that jurisdiction be established as a threshold matter is inflexible and without exception for jurisdiction is power to declare the law, and without jurisdiction the court cannot proceed at all in any cause." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 577 (1999). "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-102 (1998). "[T]here is no unyielding jurisdictional hierarchy" *Ruhrgas AG*, 526 U.S. at 578, *see Sinochem Intern. Co. Ltd. v. Malaysia Intern.*

Shipping Corp., 549 U.S. 422, 431 (2007) ("While *Steel Co.* confirmed that jurisdictional questions ordinarily must precede merits determinations in dispositional order, *Ruhrgas* held that there is no mandatory sequencing of jurisdictional issues.").

As previously stated, the Election Ordinance provides exclusive jurisdiction over candidate certification challenges to the MCT Election Court of Appeals. There are no exceptions to such exclusive jurisdiction recognized under MCT law. The Election Ordinance also provides that the decisions of the MCT Election Court of Appeals relating to candidate certification challenges are final and unappealable. There is simply no recognized mechanism that provides subject matter jurisdiction to the Tribal Court in candidate certification challenges, even if a due process violation is properly pleaded.

The Tribal Court concluded that it could have jurisdiction in certain instances by utilizing flawed analysis of tribal sovereign immunity doctrines. The Tribal Court cited *Bay Mills* and *Ex Parte Young* as providing a mechanism around tribal sovereign immunity to entertain claims against Respondents. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2013); *Ex Parte Young*, 209 U.S. 123 (1908). To be clear, Appellant never raised *Bay Mills* or *Ex Parte Young*. Instead, Appellant fashioned his Complaint in a manner that precludes application of the legal principles in those cases. Appellant's Complaint and subsequent filings make it clear that he sued Respondents in their official capacities. Conversely, the analysis provided *sui sponte* by the Tribal Court relating to *Bay Mills* and *Ex Parte Young* applies to suits filed against officials only in their individual capacities. The importance of the distinction between official capacity suits and individual capacity suits cannot be overstated. If pleaded correctly, one can provide a way around tribal sovereign immunity. However, this case does not involve a properly pleaded individual capacity suit nor should Appellant's Complaint be construed by a reviewing court as such.

Finally, the Tribal Court in *White* criticized a previous judge's superfluous analysis of issues not properly before the Court and declared such analysis non-binding dicta.

> This Court does not find Judge Routel's finding regarding the Respondent's legal right to occupy the seat he was elected to of any legal import. This Court can certainly understand the consternation created in the Community and amongst the other elected officials when confronted with a decision such as that rendered by Judge Routel. She appears to be ruling that LaRose is not eligible to be seated as the Secretary-Treasurer, but there is no mechanism in place to stop him from being seated. In general a Court should not engage in analysis that is not necessary to the resolution of a case before that Judge because such analysis is deemed dicta and not entitled to any legal weight in a Court of law. *See Hoffman v. Colville Confederated Tribes*, 1997 Colville App. Lexis 7 (Colville Ct. of App. 1997).

White, Order Denying TRO/Directing Responses. The Tribal Court in the Order of Dismissal engaged in the same type of inquiry that he derided in 2018 by engaging in superfluous analysis of legal issues not properly before the court. This time, the Tribal Court spent a significant amount of its time second guessing the MCT Election Court of Appeals' holding pertaining to Minnesota statutory law. The Tribal Court acknowledged this folly, "[c]ontinuing to rehash this issue makes it seem like political theater instead of informed judicial decision-making." Order of Dismissal, at 7. Unfortunately, the Tribal Court's musings on its potential jurisdiction have real consequences. The second guessing of the MCT Election Court of Appeals erodes faith in the electoral process, runs counter to the exclusive jurisdiction included in the Election Ordinance, calls into question the finality of decisions of the MCT Election Court of Appeals, and creates a potentially brand-new avenue of redress in Tribal Court related to candidate certification challenges. In fact, Appellant's Motion for Reconsideration responded singularly to the Tribal Court's new pronouncement pertaining to its potential jurisdiction if a due process violation is involved. The MCT Constitution and Election Ordinance do not provide a role for Tribal Courts in candidate certification challenges. What is not accomplished in binding statutory law should not be accomplished through judicial fiat.

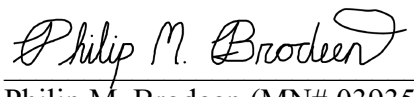
The Court of Appeals should reject the jurisdictional expansion in the Order of Dismissal and return to the clear and definite jurisdictional statement included in *White*. In *White*, the Tribal Court held that it lacked jurisdiction to "inject itself into an election that is governed by other processes set up by the MCT and approved by the Band." *White*, Order Dismissing Petition, at 2. "This Court finds that by exercising jurisdiction over the dispute it would in essence be permitting a separate process for election contests other than that countenanced by the Band. This would violate the clear process agreed to by the Band to permit the MCT to hear and resolve election appeals." *Id*. at 2. No exception to the Tribal Court's lack of jurisdiction were delineated in *White* nor are any appropriate.

CONCLUSION

Appellant's Complaint and Appeal represent a last-ditch effort by an incumbent to remain in office. However, the die has been cast and the issue was conclusively decided by the only judicial body with proper jurisdiction, the MCT Election Court of Appeals. In disregard to this finality, Appellant continues to argue that his due process rights have been violated. Appellant ignores the fact that he was afforded notice and an opportunity to be heard by five (5) judges on the MCT Election Court of Appeals, the other eleven (11) members of the TEC, and the Leech Lake Tribal Court. None of the Judge nor the TEC agreed with Appellant to grant his unprecedent request for relief. The Court of Appeals should affirm the dismissal of Appellant's Complaint based upon a lack of subject matter jurisdiction. The Court of Appeals should find that the Complaint should also have been dismissed on the grounds of tribal sovereign immunity, absolute immunity, failure to state a claim upon which relief can be granted, and failure to join the MCT as a necessary and indispensable party. Finally, the Court of Appeals should reverse the Tribal

Court's sweeping pronouncement regarding its potential jurisdiction in election certification matters.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Philip M. Brodeen, certify that on June 3, 2022, I filed the following documents with the Clerk of Court via email: Brief of Respondents; and Affidavit of Philip Brodeen and Exhibits. I certify that I caused a copy of the foregoing documents to be served on the parties of record in this matter as indicated below. I declare under penalty of perjury that everything I have stated in this document is true and correct.

VIA EMAIL TO:

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Dated: June 3, 2022

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LEECH LAKE BAND OF OJIBWE
IN TRIBAL COURT OF APPEALS

Arthur LaRose, LLBO Secretary-Treasurer

Petitioner-Appellant,

v.

PETITIONER-APPELLANT'S BRIEF

Cathy Chavers, Minnesota Chippewa Tribe President and Gary Frazer, Executive Director Minnesota Chippewa Tribe and as Election Court Clerk (in their official capacities) and The Minnesota Chippewa Tribe Tribal Election Court of Appeals (in their official capacities as 2022 certification panel).

Respondents-Appellees.

INTRODUCTION

Petitioner Arthur "Archie" LaRose hereby respectfully appeals the Tribal Trial Court's Order of Dismissal dated May 5, 2022 in the above referenced case. This case concerns the denial of certification for Petitioner to run as a candidate for Secretary-Treasurer for the Leech Lake Band of Ojibwe ("Leech Lake" or "Band") Reservation Business Committee ("LLRBC") in the upcoming 2022 election. Petitioner is currently the seated and duly elected Secretary-Treasurer for the LLRBC. Despite serving on the LLRBC for the past 18 years and consistently certified as a candidate for Tribal office, the Minnesota Chippewa Tribe ("MCT") Election Court of Appeals declined to certify Petitioner as a candidate for the 2022 election cycle.

The Election Court of Appeals determined that Petitioner could not be certified for the 2022 election based on the candidate eligibility criteria set forth in a 2006 amendment to the MCT Constitution and Revised MC Election Ordinance, which provides that "[n]o member of the Tribe

shall be eligible to hold office … if he or she has ever been convicted of a felony." MCT Const. art. IV, § 4 (hereinafter referred to as the "2006 Amendment"). The Election Court of Appeals' decision was based on Petitioner's 1992 criminal conviction involving third degree assault—a conviction that took place long before the 2006 Amendment's enactment, and is labeled as a misdemeanor on the court records produced in the certification challenge. This Court has previously recognized that Petitioner's 1992 conviction is deemed to be a misdemeanor under Minnesota law. *Gotchie v. Goggleye, Findings of Fact, Conclusions of Law & Declaratory Judgment*, No. CV-06-07, at 2 n.2 (Leech Lake Tribal Ct. Dec. 8, 2006). As explained by the Court below, deeming Petitioner's prior conviction a felony is "a dubious proposition since Minnesota law deems the crime he committed a misdemeanor back to the imposition of his sentence." *LaRose v. Chavers, et al.*, Order Denying Reconsideration at 2 (Leech Lake Tribal Ct. May 18, 2022).

Petitioner brought this suit seeking declaratory and injunctive relief against Respondents, including a declaration that he may be certified as a candidate for LLRBC Secretary-Treasurer in the 2022 election. On May 5, 2022, the Tribal Trial Court below dismissed for lack of subject matter jurisdiction Petitioner's Complaint alleging that Respondents violated his rights by upholding a certification challenge filed by another candidate. *LaRose v. Chavers, et al.*, Order of Dismissal at 7 (Leech Lake Tribal Ct. May 5, 2022). In its Order, the Court concluded that "absent a clear violation of due process of law by the MCT Court of Election Appeals this Court lacks the subject matter jurisdiction to intervene into this dispute and thus grants the motion to dismiss for want of jurisdiction." *Id.* at 3. The Court determined that the Leech Lake Tribal Court would have authority to intervene in a case involving the denial of a candidate's certification, such as when "the MCT [has] made a decision to disqualify a candidate without considering the candidate's

written response [as] such a process may violate the Indian Civil Rights Act due process clause and sovereign immunity would not bar a suit against the MCT officials responsible for such [actions]." *Id.* at 4.

Following dismissal, Petitioner filed a Motion for Reconsideration asserting that his written response to the certification challenge raised the issue of whether the 2006 Amendment could be retroactively applied to his prior 1992 conviction. On May 18, 2022, the Court denied Petitioner's Motion for Reconsideration. *LaRose v. Chavers*, Order Denying Reconsideration (Leech Lake Tribal Ct. May 18, 2022). In its Order, the Court determined that the Election Court of Appeals' application of the 2006 Amendment to Petitioner's eligibility to run for Tribal office does not violate his due process rights because the 2006 Amendment "is not an ex post facto law." *Id.* at 2. The Court reasoned that "[t]he purpose of the 2006 amendment is not to punish persons, but instead to regulate whom may run for elective office for the MCT." *Id.*

The Court's analysis in its Order denying reconsideration missed the mark. The Court incorrectly focused only on whether the 2006 Amendment is an *ex post facto* law, not whether the 2006 Amendment can be applied retroactively more broadly. Whether the 2006 Amendment may be applied retroactively does not depend in any way on the 2006 Amendment punishing Petitioner or regulating who may run for Tribal office. Under the "well-settled presumption" against retroactivity, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), laws are to be read "prospective in application unless [the legislature] has unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012). A law operates retroactively when it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.]" *Id.* at 265. "The 'principle that the legal effect

of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Id.* (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring)).

It is clear that neither Petitioner's conviction, nor the MCT Constitution in effect when he was convicted, barred him from running for Tribal office. In fact, Petitioner has been certified as a candidate several times—both before and after the 2006 Amendment's enactment. The 2006 Amendment, if applied to Petitioner in the manner upheld by the Election Court of Appeals, would attach "a new disability" to "conduct over and done well before the [Amendment's] enactment." *See Vartelas*, 566 U.S. at 267. The Election Court of Appeals' decision is directly at odds with "familiar considerations of fair notice, reasonable reliance, and [Petitioner's] settled expectations." *Landgraf*, 511 U.S. at 270. Without a doubt the retroactive application of the 2006 Amendment to Petitioner's 1992 conviction "would impair rights [Petitioner] possessed when he acted, increase [his] liability for past conduct, [and] impose new duties with respect to transactions already completed." *Id.* at 280.

The presumption against retroactivity is not limited to *ex post facto* laws in the criminal context. "[T]he presumption against retroactivity applies far beyond the confines of the criminal law." *I.N.S. v. St. Cyr*, 533 U.S. 289, 324 (2001) (citing *Landgraf*, 511 U.S. at 324) (in *Landgraf*, the Supreme Court considered whether provisions of the Civil Rights Act of 1991 creating a right to recover compensatory and punitive damages for certain Title VII violations applied to pending cases). "The specific prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." *Lynce v. Mathis*, 519 U.S. 433, 440 (1997). For

"civil legislation … prospectively remains the appropriate default rule." *Landgraf*, 511 U.S. at 272.

As explained by the Supreme Court, "[s]everal provisions of the Constitution … embrace the doctrine [against retroactivity], among them, the *Ex Post Facto* Clause, the Contract Clause, and the Fifth Amendment's Due Process Clause." *Vartelas*, 566 U.S. at 266. "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation." *Landgraf*, 511 U.S. at 267. "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.* at 266–67. Due process concerns involving the application of the 2006 Amendment is implicated in this case.

Nothing in the 2006 Amendment clearly and unambiguously demonstrates that MCT tribal members intended the no felony requirement to retroactively apply to conduct taking place prior to the effective date. As the Tribal Trial Court below explained, a "troubling aspect of this case is the apparent flip-flop on the determination of the Petitioner's eligibility to serve in public office." Order of Dismissal at 5. The Election Court of Appeals' "flip-flop" determination on Petitioner's certification without addressing the retroactivity argument (which is dispositive of this case) violates Petitioner's rights protected under the MCT Constitution and Indian Civil Rights Act. This is the exact scenario in which the Court found that it would have subject matter jurisdiction to review the merits of Petitioner's claims.

Moreover, Petitioner's prior conviction is deemed a misdemeanor. The MCT Constitution prohibits only persons with a felony conviction from running for Tribal office. Petitioner's prior 1992 conviction is labeled as deemed as a misdemeanor on the court records produced in the

certification challenge. "Minnesota law deems the crime [Petitioner] committed a misdemeanor back to the imposition of his sentence." Order Denying Reconsideration at 2. As such, Petitioner's 1992 conviction does not disqualify him from being certified as a candidate. This Court's precedent and Tribal law affirm Petitioner's eligibility to be certified as a candidate for the 2022 election.

Petitioner asks this Court to reverse the Tribal Trial Court's dismissal of this suit, and enter an order immediately directing Respondents to: (1) certify Petitioner as a candidate for Secretary-Treasurer for the LLRBC, and (2) place Petitioner on the ballot for the 2022 regular election consistent with the MCT election calendar. Due to the urgent nature of this case (MCT general election June 14, 2022), Petitioner also requests that the Court order expedited briefing and a hearing to resolve the issues discussed herein in a timely manner.

I. BACKGROUND

A. Petitioner's Past Certification for Tribal Office.

Petitioner is an enrolled member of Leech Lake Band of Ojibwe—a constituent band of the Minnesota Chippewa Tribe, a federally recognized sovereign Indian tribe. 87 Fed. Reg. 4636, 4638 (Jan. 28, 2022). Petitioner is currently the seated and duly elected Secretary-Treasurer of the LLRBC. LaRose Aff. ¶ 1. Over the past 18 years, Petitioner has held the positions of Chairman and Secretary-Treasurer of the LLRBC. *Id.* ¶ 3. During this time, Petitioner has been certified as a candidate for/to serve on the LLRBC a total of ten times and seven times following the enactment of the 2006 Amendment to the MCT Constitution. *Id.* ¶ 2. Prior to the 2022 election cycle, Petitioner has never been denied certification to be a candidate for the LLRBC. *See id.*

B. <u>The 2006 Amendment to the MCT Constitution Prohibiting Candidates with Felony Convictions.</u>

The MCT Constitution ensures that all MCT Tribal members are afforded basic privileges and protections: "All members of the Minnesota Chippewa Tribe shall be accorded by the governed body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, and no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including … the right to petition for action or the redress of grievances, and due process of law." MCT Const. art. XIII.

In 2006, the Honorable Judge Wahwassuck of the Leech Lake Tribal Court determined in *Gotchie v. Goggleye* (CV-06-07), that both Petitioner LaRose and then-seated Chairman George Goggleye were not convicted felons under Minnesota criminal law. Findings of Fact, Conclusions of Law & Declaratory Judgment by the Honorable Judge Wahwassuck (Leech Lake Tribal Ct. Dec. 8, 2006). The Tribal Court also found that the Resolution No. 2006-76 was not inconsistent with Minnesota Law or MCT Election Ord. No. 10, and concluded that the LLRBC did not exceed it authority by passing Res. #2006-76. *Id.* Judge Wahwassuck explained that Resolution No. 2006-07 "codifies the Band's policy on certification, declaring that when a Minnesota criminal background check indicates that a conviction is deemed to be for a misdemeanor, the [LLRBC] will also deem it to be for a misdemeanor." *Id.* at 9–10. Thus, the question of whether Petitioner was convicted of a misdemeanor has been a long-decided election certification law for Leech Lake Reservation and its voters.

Judge Wahwassuck also certified the following questions to the TEC for an opinion pursuant to a Tribal Constitution Interpretation No. 1-80:

1. Is Revised MCT Constitution Article IV intended to apply to Tribal Council member elected to office prior to the date of enactment on January 5, 2006?

2. Does application of Revised MCT Constitution Article IV to sitting Tribal Council members (elected prior to the date of enactment) constitute a retrospective application of the law?

Gotchie v. Goggleye, No. CV-06-07, *Request for Opinion From Tribal Executive Committee* at 2 (Leech Lake Tribal Ct. Dec. 8, 2006). The TEC, however, has failed to provide any interpretation on the two questions regarding the retroactive application of the 2006 Amendment as certified by Judge Wahwassuck.

A. <u>Petitioner's Non-Certification as a Candidate for the 2022 Election.</u>

On February 9, 2022, Leonard Fineday, a certified candidate for LLRBC Secretary-Treasurer, filed a certification challenge against Petitioner pursuant to the MCT Election Ordinance as amended in December 2021.[1] Petitioner received a copy of Mr. Fineday's certification challenge on 3:30 PM on February 9, 2022. In the certification challenge, Mr. Fineday asserted that Petitioner was ineligible to be a candidate in the 2022 election based on a third-degree assault charge under Minnesota law from 1992. Fineday Certification Challenge Letter at 1.

On February 11, 2022, at 2:15 PM, Petitioner filed his Answer to Challenge Motion to Dismiss with MCT Executive Director Frazer. On February 16, 2022, the Tribal Election Court of Appeals issued its Decision & Order denying Petitioner certification as a candidate for the Secretary-Treasurer of the LLRBC. Petitioner was provided a copy of the Decision & Order at 11:17 AM on February 16, 2022. In the Order & Decision, the Election Court of Appeals approved Mr. Fineday's certification challenge, finding that Petitioner "was convicted of a felony and

[1] On December 14, 2021, the TEC amended the MCT Election Ordinance to allow candidates other candidate's certification with supporting documentation *after* candidates have already been certified by the RBC.

therefore ineligible to be a candidate for LLRBC Secretary/Treasurer in accordance with the eligibility requirements set forth" in the MCT Constitution and MCT Election Ordinance. Decision & Order at 1.

On February 17, 2022, Petitioner wrote a letter to MCT President Cathy Chavers requesting an emergency TEC special meeting to reconsider the denial of his certification as a candidate for the 2022 election. Petitioner's request was denied.

II. ARGUMENT

A. The 2006 Amendment May Not Be Applied Retroactively to Petitioner's Prior Conviction Occurring Before the Amendment's Enactment.

Regardless of whether Petitioner's prior conviction is deemed a felony or misdemeanor, Respondents unlawfully applied the 2006 Amendment retroactively to past conduct taken place prior to the Amendment's effective date. Petitioner's relevant conduct—a criminal conviction for third-degree assault under Minnesota law—occurred in 1992—long before the 2006 Amendment's effective date.

In his written response to the certification challenge, Petitioner asserted that applying the 2006 Amendment to a 1992 conviction would constitute an unlawful retroactive application of the 2006 Amendment to his conviction that occurred long before the Amendment's enactment. Answer to Certification Challenge at 2. That is precisely the situation in which the Court determined that Respondents would not enjoy immunity from suit as Petitioner raised in his written response to the certification challenge the issue of whether the 2006 Amendment may be applied retroactively to a conviction occurring *before* the Amendment's enactment, and Respondents completely failed to address this critical issue in denying Petitioner certification as a candidate for Tribal office. *See* Order Denying Reconsideration at 4 (stating that this Court would have authority

to intervene when "the MCT [has] made a decision to disqualify a candidate without considering the candidate's written response [as] such a process may violate the Indian Civil Rights Act due process clause and sovereign immunity would not bar a suit against the MCT officials responsible for such [actions]").

Adhering to the traditional presumption against retroactivity in applying the 2006 Amendment shows why the Court should reverse the Election Court of Appeals' decision to deny Petitioner certification for the 2022 election cycle. "As a general, almost invariable rule, a legislature makes law for the future, not for the past." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at 261 (2012). "Even when they do not say so (and they rarely do), statutes will not be interpreted to apply to past events." *Id.* The presumption against retroactivity is "[t]he principle that legislation usually applies only prospectively [which] 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" *Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)).

The presumption against retroactivity may apply to amendments to tribal constitutions. *See Ballini v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 107, 117 (Confederated Tribes of the Grand Ronde Cmty. Ct. App. 2003) ("[W]e adopt the presumption against retroactive legislation as explained in *Landgraf*, understanding 'legislation' to include not only the Tribal Council's enactments but also voter-approved constitutional amendments.").[2]

[2] The presumption against retroactively is also codified in Minnesota statutes: "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21. "The language of the statute must contain clear evidence of retroactive intent, 'such as mention of the word 'retroactive.''" *Sletto v. Wesley Const., Inc.*, 733 N.W.2d 838 (Minn. Ct. App. 2007) (quoting *Duluth Firemen's Relief Ass'n v. City of Duluth*, 361 N.W.2d 381, 385 (Minn. 1985)); *see also K.E. v. Hoffman*, 452 N.W.2d 509, 512 (Minn. Ct. App. 1990) (concluding that reference in statute to "actions pending" indicated retroactive intent), *review denied* (Minn. May 7, 1990). While the Election Court of Appeals

Under the presumption against retroactivity, "courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012); *see also Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997) (explaining that a court is to "apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary"). To have retroactive effect, the statutory language must be "so clear that it could sustain only one interpretation." *I.N.S. v. St. Cyr*, 533 U.S. 289, 316–17 (2001).[3] Specifically, there must be an "express command" or "unambiguous directive" in order to apply laws retroactively. *Martin v. Hadix*, 527 U.S. 343, 354 (1999) (quoting *Landgraf*, 511 U.S. at 263, 280); *Reynolds v. McArthur*, 27 U.S. 417, 434 (1829) ("[L]aws by which human action is to be regulated … are never to be construed retrospectively unless the language of the act shall render such construction indispensable.").

The Supreme Court has set forth a two-part test for evaluating whether a statute applies retroactively. First, the court must "determine whether [the legislature] has expressly prescribed the statute's proper reach." *Martin v. Hadix*, 527 U.S. at 352 (quoting *Landgraf*, 511 U.S. at 280). If there is no "directive on the temporal reach of a statute, [the court] determine[s] whether the application of the statute to the conduct at issue would result in a retroactive effect." *Id.* If so, consistent with the "'traditional presumption' against retroactivity, [the court] presume[s] that the statute does not apply to that conduct." *Id.* "[D]eciding when a statute operates 'retroactively is

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focused its analysis on whether Petitioner's prior conviction constitutes a felony under Minnesota law, it failed to point out that Minnesota law follows the well-settled presumption against retroactivity.

[3] *Murray v. Gibson*, 56 U.S. 421, 423 (1853) ("As a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only.").

not always a simple or mechanical task." *Landgraf*, 511 U.S. at 268. As the Supreme Court explained in *Landgraf*:

> A statute does not operate "retroactively" merely because it is applied in a case arising from conduct antedating the statute's enactment …. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 269–70. Several cases have applied the presumption against retroactivity framework in analyzing the retroactive application of *civil laws*, which are instructive for the Court in this case.

For example, in *Vartelas*, the Court considered whether a provision of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which precluded foreign travel by lawful permanent residents, applied retroactively to a lawful permanent resident convicted *before* the IIRIRA's enactment. 566 U.S. at 260. "Guided by the deeply rooted presumption against retroactive legislation," the Supreme Court held that "the relevant provision of IIRIRA … attached a new disability (denial of reentry) in respect to past events (Vartelas' pre-IIRIRA offense, plea, and conviction)." *Id.* at 261. As such, the Court concluded that the IIRIRA provision "does not apply to Vartelas' conviction" and "brief travel abroad on his permanent resident status is therefore determined not by IIRIRA, but by the legal regime in force at the time of his conviction." *Id.*

In analyzing whether the IIRIRA provision could be applied retroactively, the Court stated that "Congress did not expressly prescribe the temporal reach of the IIRIRA provision in question[.]" *Id.* at 267. This is in contrast to other provisions of the IIRIRA, which "expressly direct retroactive application." *Id.* (citing 8 U.S.C. § 1101(a)(43)) (IIRIRA's amendment of the "aggravated felony" definition applies expressly to "conviction[s] … entered before, on, or after"

the statute's enactment date); *see also INS v. St. Cyr*, 533 U.S. 289, 319–20 & n.43 (2001) (setting out further examples in the IIRIRA).

The Court then proceeded to "the dispositive question whether, as Varetlas maintains, application of IIRIRA's travel restraint to him 'would have retroactive effect' Congress did not authorize." *Id.* The Court determined that "Varetlas presents a firm case for application of the antiretroactivity principle" because "[n]either his sentence, nor the immigration law in effect when he was convicted and sentenced, blocked him from occasional visits to his parents in Greece" and the IIRIRA provision, "if applied to him, would thus attach 'a new disability' to conduct over and done well before the provision's enactment." *Id.*

Likewise, in *Martin v. Hadix*, the Supreme Court considered whether the Prison Litigation Reform Act of 1995 ("PLRA"), which imposed limits on the fees that could be awarded to attorneys who litigate prisoner suits applied to post-judgment monitoring of defendants' compliance with remedial decrees that had been performed before the PRLA became effective. 527 U.S. at 347. The text of the PLRA provides that [i]n *any* action brought by a prisoner who is confined [to a correctional facility] … attorney's fees … shall not be awarded, except" as authorized by the statute. 42 U.S.C. § 1997e(d)(1) (emphasis added).

The Court rejected the argument that the statutory phrase "[i]n any action brought by a prisoner who is confined" clearly expresses congressional intent to apply the statute retroactively. 527 U.S. at 355. The Court pointed out that "Congress has not expressly mandated the temporal reach" of the PLRA. *Id.* Additionally, the Court explained that "although the word 'any' is broad, it stretches the imagination to suggest that Congress intended, through the use of this one word, to make the fee limitations applicable to all fee awards." *Id.* at 354. As the Court detailed: "Had Congress intended [PLRA] to apply to all fee orders entered after the effective date, even when

those awards compensate for work performed before the effective date, it could have used language more obviously targeted to addressing the temporal teach of that section. It could have stated, for example, that 'No award entered after the effective date of this Act shall be based on an hourly rate greater than the ceiling rate." *Id.*

In discussing statutory language that might show clear congressional intent to apply the PLRA retroactively the Court explained: "The conclusion that [PLRA] does not clearly express congressional intent that it apply retroactively is strengthened by comparing [PLRA] to the language that we suggested in *Landgraf* might qualify as a clear statement that a statute was to apply retroactively: '[T]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment.' This provision, unlike the language of the PLRA, unambiguously addresses the temporal reach of the statute. With no such analogous language making explicit reference to the statute's temporal reach, it cannot be said that Congress has 'expressly prescribed' [PLRA]'s temporal reach." *Id.* 354–55. As such, the Court "conclude[d] that the PLRA contains no express command about its temporal reach" and because "the PLRA, if applied to postjudgment monitoring services performed before the effective date of the Act, would have a retroactive effect inconsistent with our assumption that statutes are prospective, in the absence of an express command by Congress to apply the Act retroactively, we decline to do so." *Id.* at 362 (citing *Landgraf*, 511 U.S. at 280).

Here, the 2006 Amendment presents a clear case for application of the presumption against retroactivity. First, the 2006 Amendment is entirely silent with respect to the issue of retroactivity and the Amendment's temporal reach. There is no language in the 2006 Amendment whatsoever that operates as an "unambiguous directive" or "express command" to apply the Amendment retroactively to convictions taking place prior to its effective date. The 2006 Amendment does not

speak to persons who have previously been certified as a candidate for Tribal office under the prior version of the MCT Constitution and have been convicted *before* the Amendment's enactment. An express directive of the 2006 Amendment's retroactive application must have clear and unambiguous language mandating retroactive application. *See Varetlas*, 566 U.S. at 267 (stating that IIRIRA's amendment of "aggravated felony" definition applies expressly to "conviction[s] … entered before, on, or after" the statute's enactment date); IIRIRA § 321(c) ("The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred …."); IIRIRA § 322(c) ("The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act"); *Landgraf*, 511 U.S. at 255–56 & n.8 (stating that the language "all proceedings pending on or commenced after the date of "enactment" amount to "an explicit retroactivity command").[4] The 2006 Amendment says absolutely nothing about convictions entered before its enactment.

Furthermore, while the phrase "ever been convicted of a felony of any kind" may read broadly, it is a far stretch to suggest that the MCT people intended, through the use of the word "ever," to make the 2006 Amendment applicable to all convictions, including those entered prior to its enactment. *See Martin*, 527 U.S. at 343 (explaining that "although the word 'any' is broad, it stretches the imagination to suggest that Congress intended, through the use of this one word, to make the fee limitations applicable to all fee awards" in the phrase "[i]n any action brought by a

[4] *See also Al Bahlul v. United States*, 767 F.3d 1, 12 (D.C. Cir. 2014) (holding that statutory language conferring jurisdiction on military commissions to try "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001" constitutes a "clear[] statement of the Congress's intent to confer jurisdiction on military commissions to try the enumerated crimes regardless whether they occurred 'before, on, or after September 11, 2011").

prisoner who is confined").[5] At most, the "ever been convicted" language in the 2006 Amendment raises an ambiguity as to whether it applies to a person committed a felony prior to its enactment and has previously been certified as a candidate for Tribal office. The language in the 2006 Amendment thus "falls short … of the 'unambiguous directive' or 'express command' that the [2006 Amendment] is to be applied retroactively." *Martin*, 527 U.S. at 354. Had the MCT voters intended the 2006 Amendment to apply to criminal convictions entered prior to its effective date, they "could have used language more obviously targeted to addressing the temporal reach of that section." *Id.* Such language could have explicitly stated that the 2006 Amendment is to apply to convictions entered on, before, or after its effective date. But they chose to not do so.

Because the 2006 Amendment contains no "language making explicit reference to [its] temporal reach," *Martin*, 527 U.S. at 355, the Court must "proceed to the second step of *Landgraf*['s] retroactivity analysis in order to determine" whether the 2006 Amendment has a retroactive effect on the rights of Petitioner in this case. *St. Cyr*, 533 U.S. at 320. It is clear that neither Petitioner's conviction, nor the MCT Constitution in effect when he was convicted, barred him from running for Tribal office. The 2006 Amendment, if applied to Petitioner in the manner submitted by the Election Court of Appeals, would thus attach "a new disability" to "conduct over and done well before the [Amendment's] enactment." *See Vartelas*, 566 U.S. at 267. The Election Court of Appeals' decision is directly at odds with "familiar considerations of fair notice, reasonable reliance, and [Petitioner's] settled expectations." *Landgraf*, 511 U.S. at 270. Without a doubt the retroactive application of the 2006 Amendment "would impair rights [Petitioner] possessed when he acted, increase [his] liability for past conduct, [and] impose new duties with

[5] *See also Scott v. Boos*, 215 F.3d 940, 944 (9th Cir. 2000) ("The fact that [a] statute applies to all people and is very clear in its mandate … does not necessarily mean that it should apply retroactively.").

respect to transactions already completed." *Id.* at 280. Because application of the 2006 Amendment to Petitioner's prior conduct would have a "retroactive effect inconsistent with [the] assumption that [laws] are prospective," *Martin*, 527 U.S. at 362, the Court should decline to apply the 2006 Amendment to Petitioner's conviction that occurred well before its enactment.

As noted above, the Tribal Trial Court failed to consider whether the 2006 Amendment could be applied retroactively to Petitioner's 1992 conviction. The Tribal Trial Court determined only whether the Election Court of Appeals' application of the 2006 Amendment to Petitioner's eligibility to run for Tribal office does not violate his due process rights because the 2006 Amendment "is not an ex post facto law." *Id.* at 2. The Court analyzed whether applying the 2006 Amendment to Petitioner's prior conviction would "impose punishment upon him for the crime he committed, [or] regulate his right to run for office." *Id.* The Court's *ex post facto* analysis missed the mark. "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by [the Supreme Court] that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). "[T]he presumption against retroactivity applies far beyond the confines of the criminal law." *I.N.S.*, 533 U.S. at 324. For "civil legislation … prospectively remains the appropriate default rule." *Landgraf*, 511 U.S. at 272. The presumption against retroactivity is the default rule for the 2006 Amendment. Because there is no evidence suggesting that the 2006 Amendment was intended to be applied retroactively, the Amendment should be read prospectively.

Finally, the consistent and repeated certification of Petitioner for the Band's Secretary-Treasurer position in the past several tribal election cycles under the 2006 Amendment heavily weighs in favor of declining to apply the 2006 Amendment retroactively. "It is for the legislature,

not the courts, to amend a statute if the plain language of the statute does not accurately reflect the legislature's intent." *In re Racing Servs., Inc.*, 779 F.3d 498 (8th Cir. 2015) (citation omitted). Indeed, if MCT tribal members sincerely believed that Petitioner has been improperly certified as a candidate for Tribal office at any time during the past several election cycles due to his prior conviction, the MCT people would most likely have sought to amend the MCT Constitution to make clear that they intended for the 2006 Amendment is to be applied retroactively. But that is not the case here, especially since the TEC was specifically requested to decide this issue through certification by the Leech Lake Tribal Court in 2006; and in 2022 through a request for a Special TEC meeting to address this very issue. Each time, the TEC failed to address this very issue of the retroactive application of the 2006 amendment. Then, when this very issue was squarely before the MCT Court of Election Court of Appeals, that tribunal failed to even mention the issue, let alone decide it. The Tribal Trial Court also failed to address the retroactivity issues. There is no evidence that the MCT people have ever sought to amend or clarify the 2006 Amendment so that it is applied retroactively. The Court should thus reverse the dismissal of Petitioner's suit on grounds that the 2006 Amendment may not be applied retroactively to convictions occurring before the Amendment's enactment, such as Petitioner's 1992 conviction.

B. <u>Petitioner's 1992 Conviction is Deemed to Be a Misdemeanor.</u>

Despite Petitioner's prior 1992 conviction labeled as deemed as a misdemeanor on the court records produced in Mr. Fineday's certification challenge, the Election Court of Appeals determined that Petitioner's conviction is a felony and precludes him from being certified as a candidate. The Election Court of Appeals' conclusion, however, conflicts with this Court's precedent and Tribal law interpreting the 2006 Amendment.

The 2006 Amendment prohibits MCT members who have been "convicted of a felony of any kind." MCT Const. art. IV. The Election Ordinance provides that "[e]ach Band governing body must certify eligible candidates for office in accordance with the Minnesota Chippewa Tribe Constitution, the Minnesota Chippewa Tribe Election Ordinance, and the dates and guidelines established for Minnesota Chippewa Tribe elections." Election Ordinance § 1.3(C)(4). Under the Band's law, convictions bearing the declaration "'[t]his offense is deemed to be a misdemeanor' on criminal background check results shall be deemed to be misdemeanors by the Leech Lake Tribal Council in determining eligibility to run for tribal council." Resolution No. 2006-76.

As Tribal Trial Court has explained, "[t]his interpretation is not inconsistent with Minnesota law … nor is it inconsistent with the MCT Election Ordinance." *Gotchie v. Goggleye, Findings of Fact, Conclusions of Law & Declaratory Judgment*, No. CV-06-07, at 2 n.2 (Leech Lake Tribal Ct. Dec. 8, 2006). The Tribal Trial Court has also concluded that Petitioner's 1992 conviction at issue in this case is "deemed to be a misdemeanor pursuant to Minn. Stat. 609.13." *Id.* at 2 n.2. Accordingly, this Court should reaffirm its precedent determining that Petitioner's prior 1992 conviction is a misdemeanor and does not preclude him from being certified as a candidate in the 2022 election.

As the Tribal Trial Court explained, deeming Petitioner's prior conviction a felony is "a dubious proposition since Minnesota law deems the crime he committed a misdemeanor back to the imposition of his sentence." Order Denying Reconsideration at 2. The Court should decline to endorse this dubious proposition, and enter an order mandating that Petitioner be certified as a candidate for the 2022 election.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court reverse the Tribal Trial Court's dismissal of this case. Due to the urgent nature of the issues involved, the Court should also order expedited briefing and schedule a hearing to timely resolve this case.

Dated: May 23, 2022

Respectfully submitted,

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