



# NHBP TRIBAL COURT

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

2221 1 1/2 MILE RD. • FULTON, MI 49052

P: 269.704.8404 • F: 269.729.4826 - ORI NO. MIDIO077J

## NHBP ELECTION BOARD DECISION – ELECTION CHALLENGE 2021-A

## TRIBAL COURT CASE No. 21-151-AMA/ELE TRIBAL COURT CASE No. 21-152-AMA/ELE

### TRIBAL COURT CASE No. 21-151-AMA/ELE PLAINTIFFS/PETITIONERS

**DORIE RIOS &  
NANCY SMIT**

#### ATTORNEY FOR PLAINTIFFS/PETITIONERS:

**JEFF J. DAVIS (P82609)**  
171 Monroe Avenue, Suite 1000  
Grand Rapids, Michigan 48104  
616-742-3930  
[jdavis@btlaw.com](mailto:jdavis@btlaw.com)

### TRIBAL COURT CASE No. 21-152-AMA/ELE PLAINTIFFS/PETITIONERS

**NOTTAWASEPPI HURON BAND OF THE  
POTAWATOMI TRIBAL COUNCIL,  
JAMIE STUCK IN OFFICIAL CAPACITY AS CHAIR &  
JAMIE STUCK AS INDIVIDUAL TRIBAL CITIZEN**

#### ATTORNEY FOR PLAINTIFF/PETITIONER:

**JAMES TYSSE  
ALLISON BINNEY  
JENNY PATTEN MAGALLANES**  
Akin Gump Strauss Hauer & Feld, LLP  
2001 K Street, N.W.  
Washington, D.C. 20006  
202-887-4000  
[abinney@akingump.com](mailto:abinney@akingump.com)  
[jpatten@akingump.com](mailto:jpatten@akingump.com)  
[jtyssse@akingump.com](mailto:jtyssse@akingump.com)

### TRIBAL COURT CASE No. 21-151-AMA/ELE & TRIBAL COURT CASE No. 21-151-AMA/ELE

#### DEFENDANT/RESPONDENT

**NOTTAWASEPPI HURON BAND OF THE POTAWATOMI  
ELECTION BOARD**

#### ATTORNEYS FOR DEFENDANT/RESPONDENT:

**MATTHEW LESKY (P69418)**  
Law Offices of Matthew W. Lesky  
P.O. Box 460  
Petoskey, Michigan 49770  
231-838-4566  
[leskylaw@gmail.com](mailto:leskylaw@gmail.com)

#### CO-COUNSEL:

**KRISTEN BURGE (9020)**  
Arrow Creek Law PLLP  
4500 Huntington Hills Road  
Billings, Montana 59101-9096  
[kristen.burge@arrowcreeklaw.com](mailto:kristen.burge@arrowcreeklaw.com)

#### 2021 CANDIDATES FOR TRIBAL COUNCIL ELECTION

**ROANN BEEBE-MOHR  
ROBYN BURLINGHAM  
DR. JEFF CHIVIS – RESPONDENT (FILED BRIEF)**  
**ATTORNEYS FOR CANDIDATE/RESPONDENT CHIVIS:**  
**TANYA GIBBS DUPEY (P78619)**  
**LAUREN MULHERN (P83774)**  
Rosette, LLP  
44 Grandville Ave SW, Suite 300  
Grand Rapids, MI 49503-4064  
616-655-1601  
[tgibbs@rosettela.com](mailto:tgibbs@rosettela.com)  
[lmulhern@rosettela.com](mailto:lmulhern@rosettela.com)

**DORIE RIOS – PETITIONER IN 21-151-AMA/ELE  
NANCY SMIT – PETITIONER IN 21-151-AMA/ELE  
JEFF TENBRINK - CHALLENGER**

**FILED**  
JUL 06 2021  
NHBP TRIBAL COURT

## OPINION AFTER ORAL ARGUMENTS

## SUMMARY

This *Opinion After Oral Arguments* involves this Tribal Court's decisions in two appeals of the Nottawaseppi Huron Band of the Potawatomi *Election Board Decision – Election Challenge 2021-A: Rios and Smit v. NHBP Election Board*, Tribal Court Case Number 21-151-AMA/ELE; and *NHBP Tribal Council, Chairman Stuck, and Stuck v. NHBP Election Board*, Tribal Court Case Number 21-152-AMA/ELE.

The Court does not consolidate the cases but issues this joint *Opinion After Oral Arguments* in the interests of judicial economy, in part because the Election Board raised the issue of counsel for Petitioners NHBP Tribal Council, Chairman Stuck and Stuck having previously served as counsel for the NHBP Election Board with there not being sufficient time to further brief and analyze the issues within the statutory time period for issuing a decision.

In response to an Election Challenge filed by Tribal Council Candidate Jeff TenBrink, the Nottawaseppi Huron Band of the Potawatomi (“NHBP”) Election Board (“NHBP Election Board” or “Election Board”) set aside the 2021 Election Results for two of the three (2 of 3) open seats on Tribal Council after finding that statements made by Chair Jamie Stuck and Tribal Citizen comments read aloud, at the April 22, 2021 Tribal Council Business Meeting and April 24, 2021 Annual Meeting of NHBP Tribal Citizens constituted campaigning in violation of the NHBP Election Code. The Election Board also found that the campaigning that occurred did not affect the Candidate receiving the highest number of votes, incumbent Candidate Dr. Jeff Chivis, due to the significantly higher number of votes received as compared to the Candidate receiving the next highest number of votes and the number of votes impacted by the improper campaigning being significantly lower than the number of votes by which he won relative to the total number of votes cast.

In both cases, the Petitioners ask this Court to set aside the Election Board Decision, primarily under the allegation that the Decision was arbitrary, capricious and an abuse of discretion.

Petitioners Rios and Smit also allege denial of due process.

Petitioners NHBP Tribal Council, Chairman Stuck, and Stuck additionally challenged jurisdiction of the NHBP Election Code with the April 22, 2021 and April 24, 2021 Meetings held remotely, as well as requested that, if the Election Board Decision is upheld, that this Court set aside the Election Board's finding that Dr. Jeff Chivis was duly elected and require that all three seats be on the ballot or, put another way, require Dr. Chivis to run again.

This Court dismisses Petitioners NHBP Tribal Council and Jamie Stuck in his official capacity as the Chair of NHBP, finding that neither have standing to file a petition to appeal *Election Board Decision – Election Challenge 2021-A*. The Court also finds the Tribal Council vote to file suit to be invalid on its face due to the conflict of interest of two incumbent Candidates voting on whether to file a Petition.

The Court finds jurisdiction for remote proceedings and overturns *Election Board Decision – Election Challenge 2021-A* as the Election Board did not set aside the 2021 Election results pursuant to the Election challenge filed by Candidate TenBrink, but rather, finding that the comments criticizing the Election Board and Election process to the extent that the integrity of the outcome of the election was put into question without proper notice to the Candidates and other denials of due process.

## STATEMENT OF JURISDICTION

This Statement of Jurisdiction applies to both *Rios and Smit v. NHBP Election Board*, Tribal Court Case Number 21-151-AMA/ELE, and *NHBP Tribal Council, Chairman Stuck, and Stuck v. NHBP Election Board*, Tribal Court Case Number 21-152-AMA/ELE.

The NHBP Constitution defines the jurisdiction of the NHBP Tribal Court in Article XI § 3: Section 3. Jurisdiction.

- a) The judicial power of the Nottawaseppi Huron Band of the Potawatomi shall be in the Tribal Court system. The judicial power shall extend to all civil and criminal cases arising under this Constitution, all legislative enactments of the Band, including codes, statutes, ordinances, regulations, all resolutions, agreements, and contracts to which the Band or any of its entities is a party, and the judicial decisions of the Tribal Court system.
- b) The judicial power of the Tribal Court system may be exercised to the fullest extent consistent with self-determination and the sovereign powers of the Band, and, as exercised, shall govern all persons and entities subject to the jurisdiction of the Band under Article II of this Constitution.
- c) Appellate Jurisdiction. The Tribal Supreme Court shall have jurisdiction to review a final judgment, order or decree of the Tribal Court as provided in appellate rules adopted by the Tribal Judiciary or as prescribed by applicable Tribal law.
- d) Finality of Appellate Review. Rulings of the Tribal Supreme Court are final and binding and cannot be appealed to the Tribal Council, General Membership or any other jurisdiction.

The present case involves analysis of the *NHBP Election Board Decision – Election Challenge 2021-A* with Article XV § 3.1-41, Expedited Review by NHBP Court, of the NHBP Election Code providing that “[a]ny aggrieved candidate or eligible voter may seek expedited judicial review of any final decision of the Election Board by filing a petition for review in NHBP Court”.

This Court, therefore, has jurisdiction over this matter pursuant to Article XI § 3 (a) of the NHBP Constitution with this provision stating that “[t]he judicial power of the Nottawaseppi Huron Band of the Potawatomi shall be in the Tribal Court system” and that it “...shall extend to all civil and criminal cases arising under this Constitution, all legislative enactments of the Band, including codes...” with the NHBP Election Code a legislative enactment that specifically provides for Tribal Court review of NHBP Election Board decisions in Article XV § 3.1-41.

## STATEMENT OF FACTS OF THE CASE – PETITIONERS RIOS AND SMIT AND PETITIONERS NHBP TRIBAL COUNCIL, CHAIRMAN STUCK, AND STUCK

On April 7, 2021, this Court issued the *Opinion After Oral Argument in Stuck and Swimmer v NHBP Election Board*, Tribal Court Case No. 21-074-AMA/ELE, holding that “This Tribal Court shall not set aside the March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2. The Court finds that the Election Code includes jurisdiction over NHBP Tribal Government Employees. This jurisdiction involves the ability to review the conduct of NHBP Tribal Government Employees as it relates to the Election Code, including assessing penalties as

provided in the Election Code, if an Employee violates the Election Code. The jurisdiction of the Election Board to apply the Election Code to NHBP Tribal Government Employees does not include authority to discipline an Employee as it relates to their employment. Although the Court recognizes that the Election Code does not authorize the Election Board to interfere with the attorney-client relationship, it does not find that attorneys serving in the NHBP Legal Department are exempt from the Election Code. The Court finds that the Election Board properly found that Petitioner Chairman Stuck and Petitioner CLO Swimmer had qualified immunity from being assessed penalties under the Election Code for conduct at the January 21, 2021 NHBP Tribal Council Business Meeting. The Court also found that “nothing in the Election Code or the application of qualified immunity within the Guiding Principles of the NHBP Constitution prohibit ‘adverse’ findings regarding conduct protected under qualified immunity, identifying concerns of conduct protected under qualified immunity, or making recommendations to address or prevent conduct protected under qualified immunity in the future, pursuant to the responsibilities of the Election Board under the Election Code to facilitate elections that are ‘[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings’ that are also ‘[c]onducted in accord with NHBP constitutional requirements’, including the Guiding Principles of the NHBP Constitution.” (*Opinion After Oral Argument* at 1-13).

On April 7, 2021, this Court issued the *Opinion After Oral Argument* in Rios and Smit v NHBP Election Board, Tribal Court Case No. 21-075-AMA/ELE, holding that “Petitioner Rios and Petitioner Smit met the burden for this Court to set aside the February 5, 2021 NHBP Election Board Decision and March 12, 2021 NHBP Election Board Decision – Election Dispute 2021-1 based on the Petitioners not being afforded the due process protections in the Election Code. Article VIII § 3.1-26 (A), (B), (C), (D), (E), (F), and (G) articulate the due process rights of the Candidate when read together, including the right to a hearing, for a person to be found by the Election Board as having violated the Election Code. The right to due process is also articulated through the incorporation of the traditional values of this Native Nation through the purpose of the Election Code in Article I § 3.1-2 and the Guiding Principles in Article II § 2 (b) of the NHBP Constitution, the supreme law of this federally recognized American Indian Tribe. In addition, the Petitioners did not violate Article VIII § 3.1-9 (M) of the Election Code as they paid the licensing fee to have the legal right to use the photographs taken in previous years without paying a fee to the NHBP Tribal Council as it was not requested and the Petitioners were photographed as part of their duties as Members of Tribal Council with the NHBP Tribal Government contracting for and receiving a service that was independent of the election currently being held.” (*Opinion After Oral Argument* at 15).

#### **STATEMENT OF FACTS OF THE CASE – PETITIONERS RIOS AND SMIT**

On June 9, 2021, Petitioners Rios and Smit filed Petitioners’ Request for Expedited Review of NHBP Election Board Decision along with a Proof of Service.

On June 11, 2021, the Court filed the Notice of Election Petition Hearing initially setting the hearing for June 17, 2021 at 1 p.m.

On June 16, 2021, the Court filed the Notice of Joint Election Petition Hearings setting both election cases to be heard on June 21, 2021 at 1 p.m.

An Administrative Order Establishing Process for Public Viewing During the Covid-19 Pandemic of Hearings on Appeals to the NHBP Tribal Court of NHBP Election Board Decision - Election Challenge No. 2021-A was issued by the Chief Judge on June 17, 2021.

On June 18, 2021, Dr. Chivis filed Candidate Chivis's Reply to Petitions for Expedited Review.

On June 18, 2021, the NHBP Election Board Response & Brief was filed.

On June 18, 2021, Crystall Peek filed a Motion to Join as a Petitioner along with Rios & Smit.

On June 21, 2021 at 1:00 p.m., the joint hearings were held by Zoom.

#### **STATEMENT OF FACTS OF THE CASE – PETITIONERS TRIBAL COUNCIL, CHAIRMAN STUCK AND STUCK**

On June 10, 2021, Petitioners filed Petition for Expedited Review of NHBP Tribal Election Board Election Decision.

The Court had originally planned to set the hearing for June 17, 2021 at 3:00 p.m. but was advised a Motion may be coming to consolidate the hearings.

On June 15, 2021, Petitioners filed Tribal Council and Jamie Stuck's Motion for Joint Hearing on Expedited Review of NHBP Election Board Decision.

On June 16, 2021, the Court filed the Notice of Joint Election Petition Hearings setting both election cases to be heard on June 21, 2021 at 1 p.m.

An Administrative Order Establishing Process for Public Viewing During the Covid-19 Pandemic of Hearings on Appeals to the NHBP Tribal Court of NHBP Election Board Decision - Election Challenge No. 2021-A was issued by the Chief Judge on June 17, 2021.

On June 18, 2021, Notice of Appearance was filed by Akin Gump for James Tysse, Allison Binney & Jenny Patten Magallanes.

On June 18, 2021, Dr. Chivis filed Candidate Chivis's Reply to Petitions for Expedited Review.

On June 18, 2021, the NHBP Election Board Response & Brief was filed.

On June 18, 2021, Motions to Join as a Petitioner were filed by the following individuals: Daniel Jacobs; Brian Rios; Shirley English; Tyrone Rios; Rodney Mandoka; Dana Lewis; Mariasha Keith; Harold Morseau II; Jordyn Morseau; Daejion Morseau; Mark Simmons; Kenneth Lee Inman Jr.; Gwynneth Nugent; Robert Williams; William C. Osborn; Destiny Steffens; John Day Jr.; Paula Stuck; Richard Lee Bush, Jr.; Charles Pfeifer; Mon-ee Zapata; O'Felia Zapata; Onyleen Zapata; Owyn Zapata; Kiara Dougherty; Julius Harris; Kevin Harris Sr.; Tiesha Williams; Kevin Harris II; Camie Castaneda; Jeff Kendall; Ben Wilkins; Curtis Dougherty; Timmeka Krupp; Taisa Dougherty; Lisa Dougherty; Brandon Krupp; Tracey Dedrick; Nickole Keith; Paula Keith; En'Dia Day; Marquis Day; Christopher Wilson; Shelly Morris; Crystall Peek; Andrea Rainer;

Roberta Brauillet; Niko Brown; Joseph Fernandez; Tyreece Mandoka; Ashleigh Martell; and Xavier Mullins<sup>1</sup>

On June 21, 2021 at 1:00 p.m., the joint hearings were held by Zoom.

**ANALYSIS – INFORMATION IDENTICAL TO BOTH APPEALS OF *ELECTION BOARD DECISION – ELECTION CHALLENGE 2021-A***

This section is identical for both cases, Rios and Smit v. NHBP Election Board, Tribal Court Case Number 21-151-AMA/ELE, and NHBP Tribal Council, Chairman Stuck, and Stuck v. NHBP Election Board, Tribal Court Case Number 21-152-AMA/ELE.

The votes for the 2021 NHBP Tribal Council Election were counted on April 24, 2021. Pursuant to incumbent Candidate Dr. Jeff Chivis, the results were as follows:

Roann Beebe-Mohr: Received 215 total votes (200 by mail and 15 in person)

Robyn Burlingham: Received 166 total votes (139 by mail and 27 in person).

Jeff Chivis: Received 315 total votes (285 by mail and 30 in person)

Dorie Rios: Received 228 total votes (188 by mail and 39 in person)

Nancy Smit: Received 220 total votes (188 by mail and 31 in person)

Jeff TenBrink: Received 218 total votes (207 by mail and 10 in person)

(Candidate Chivis’s Reply to Petitions for Expedited Review at 4).

Candidate Jeff TenBrink filed an Election Challenge on multiple grounds. The Election Board addressed several of the issues raised by Candidate TenBrink, scheduling an Election Board Hearing on the following:

While several issues were raised in the election challenge, the Election Board has limited the scope of the hearing to alleged violations of Election Code Sections 3.1-9.O., 3.1-9.K., and 3.1-22.B. based on election-related comments and statements made at the April 22, 2021 monthly Tribal Council business meeting and the April 24, 2021 annual membership meeting. (Election Challenge Notice of Hearing at 1).

In the *Election Board Decision – Election Challenge 2021-A*, the Election Board noted:

All of the candidates were provided notice of the hearing on the election challenge and had the opportunity to participate in the hearing, including the ability to present testimony and evidence, or to attend the hearing only as an observer. Jeff TenBrink, as the challenger, participated in the hearing, along with candidates, Dorie Rios and Nancy Smit. Candidate Robyn Burlingham attended the hearing as an observer. (*Election Board Decision – Election Challenge 2021-A* at 1-2).

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<sup>1</sup> Another Tribal Member Rose Tepastte has paid the Motion filing fee but as of 5:00 p.m. on Friday, June 18, 2021 we had not yet received the actual Motion.

The Election Board Hearing was held on May 17, 2021. On May 31, 2021, the Election Board issued a written decision, *Election Board Decision – Election Challenge 2021-A* (“Election Board Decision”) setting aside the Election except as it relates to incumbent Candidate Dr. Jeff Chivis who was found to be duly elected. The foundation for setting aside the Election results for two seats on Tribal Council involved conduct that occurred at the April 22, 2021 NHBP Tribal Council Business Meeting (“April 22, 2021 Tribal Council Meeting” or “Tribal Council Meeting”) and April 24, 2021 Annual Meeting of NHBP Tribal Citizens (“April 24, 2021 Annual Meeting” or “Annual Meeting”)<sup>2</sup>. The comments at issue are all included below as provided in the *Election Board Decision – Election Challenge 2021-A* with the page number of that document cited:

At the April Tribal Council business meeting on April 22, 2021, Chairman Jamie Stuck made a motion to approve December 10, 2020 Special Tribal Council Closed Session meeting minutes. Chairman Stuck proceeded to make comments on the motion that included the following:

“Back in November, one of our tribal elders who is an election board member actually blew the whistle on the election board on some items, and it was during this -- this was back in November, and it was during this closed session that we actually addressed a resolution, resolution number 12-10-20-12, authorizing execution of an attorney contract with Wilson Elser to take a look at conduct with election board members . . .”

“I want that to be stated for the record so our tribal membership knows that there was an investigation initiated back in 2020 pertaining to the conduct of election board members . . .” (Above Three Paragraphs at 2).

After Tribal Council passed the motion to approve the December 10, 2020 Special Tribal Council Closed Session meeting minutes, Chairman Stuck made a motion to approve Special Tribal Council Closed Session meeting minutes from April 20, 2021. Chairman Stuck then made comments on the motion, which included the following:

“So, as stated in the last motion, we had initiated an investigation. Since the initiation of that investigation, we had three more whistleblowers come forward, another one being a member of the election board. I just want to say that we’re not getting the full story as far as conduct of the election board through reports that Jared provides.”

“The resolution that we addressed in closed session is resolution number 04-20-21-01, authorizing the release of the closed session investigation and the exhibits of election board investigation. There was one vote yes, which I voted yes on, one no, and three abstentions. So this investigation will not be released to the tribal membership. Certain questions that have come up could have been answered by the releasing of this information to our tribal

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<sup>2</sup> This Court purposefully uses the term “Tribal Citizen” and not “Tribal Member” to reflect the status of federally-recognized American Indian Tribes as sovereign Native Nations. The Court recognizes that some NHBP documents, including the NHBP Constitution, along with federal laws and federal caselaw use “Tribal Member” and notes that the terms are synonymous to this Court, but that it uses “Tribal Citizen” to express the unique governmental status of Native Nations, the government-to-government relationship between Native Nations and the United States, and that enrollment in a federally-recognized Tribe is a political status between the Tribal Government and the individual.

membership and truths. And the courage that it took to these four tribal members, one being an elder, is in vain right now because this investigation and the report is being buried by this action of the one no. And tribal membership will not see this report, will not be informed of what's going on and what's really going on or able to develop their own opinion on it."

"So I just wanted to let it be known for the record, you know, we always encourage people to tell the truth and be truthful and seek the truth, but how can you do that when the truth's not provided? So I want that to be stated for the record." (Above Four Paragraphs at 2-3).

At the annual membership meeting on April 24, 2021, at the beginning of the Tribal Member Comments section, Chairman Stuck made the following statement:

"So Tribal Council has received comments dealing with personnel matters, dealing with election matters, dealing with legal matters, and council did agree that we're not going to silence our tribal members, and we're going to read the comments out."

"We want to thank tribal members for providing us with your comments and concerns but, again, just wanted to put that blanket statement out there, since we already know that there's some issues with the election. . ." (Above Three Paragraphs at 3).

The election-related comments submitted by Tribal Members and publicly read during the annual membership meeting, included the following:

This comment is from Paula Stuck. She is located in Battle Creek, Michigan:

"After watching April's 2021 council meeting, I have one very important question shared by many tribal members. The question is for sergeant-of-arms. What is the reason you voted no for sharing the closed session investigation concerning the election board? The elder and a board member courageously came forward to council reporting a wrongdoing. Hats off to both of them. Transparency has always been a topic membership wants. It's one councilman that is preventing it. Again, what is the sergeant-of-arms done -- what is it the sergeant-of-arms doesn't want us to know? We need to be careful who we put in charge. The tribe needs to know what the election board is doing. They're responsible for making sure every candidate is speaking the truth. Maybe the election board needs to review the Seven Grandfather Teachings." (Above Three Paragraphs at 3).

The fourth comment is from Dana Lewis, who's located in Battle Creek. The comment is:

"Yesterday's Tribal Council meeting showed something going on with the election board that was voted by only two members. Why is it that it



couldn't be shared? I would like to know, as a member, if there is something going on that I should know about or that us, as members, should know." (Above Two Paragraphs at 3).

This comment is from Paula Keith, and the issue is:

"Why did these people even consider being on election committee when they don't know what the tribal laws are and never knew where this reservation was or been here? We need a committee with knowledge about this reservation and Indian laws. We are a sovereign nation. No one should be swayed by anyone. Use your own judgment. Do what benefits the whole tribal nation. Grandfather Teachings are not being followed: truth, wisdom, love, bravery, respect, honest, humility." (Above Two Paragraphs at 4).

This is actually an emailed letter from Nickole Keith, and she's located in Fulton, Michigan:

"March 10th, 2021. Tribal members of NHBP, this is a letter to be sent to our Tribal Council and would like it to be read at the annual membership meeting, April 24th, 2020 [sic]. We were notified of its outcome on April 22, 2020 [sic] by Chairman Stuck. We are not pleased with the outcome and would like to share this information with our tribal members.

We, concerned and devoted members of the tribe, are reaching out to the Tribal Council in regards to recent developments to the candidacies for three individuals running for Tribal Council seats, including two incumbent members. We have witnessed both in public and private settings instances in which election board members have attempted to tamper with our electoral process by removing certain candidates from the ballot for nonsubstantive reasons and without the full consent of the entire election board. This has led to the current back and forth of candidates on the ballot appealing short-sided decisions by the election board motivated by overt political interests of individual members of the election board.

Our unique election board was created to be an unbiased and impartial overseer of our electoral system. We are at risk of comprising the integrity of our elections by continuing to entertain baseless and nonsubstantive complaints against candidates running for Tribal Council. This letter is intended to serve as more evidence into the public record of political tampering by members of the election board.

The following evidence is based on conversations we had with one courageous member of the election board. The evening of March 2nd, 2021, Nathaniel (Nat) Spurr divulged information about current election board members and internal issues within the board. He informed tribal members, Mariesha Keith and Nickole Keith, that the current NHBP election board members were partaking in unethical, biased behavior he could no longer ignore. He informed us that this behavior has been ongoing and ultimately began during the previous NHBP Tribal Council

election and has continued to this election. He explained he had run out of avenues to disclose this information, including to current election chair Jared TenBrink. Nathaniel disclosed that if he -- if we knew this information, we would do something about it.

Nat shared that on more than one occasion current board members verbally voiced their opinions of who they were in support of during official election counting of ballots, a textbook demonstration of not being impartial or unbiased. This occurred during the last election cycle. Nat, himself, told the board that their conversations were inappropriate. No action was taken to stop the conversations by Chair Jared TenBrink. Nat went on to share that current and former board members, Rebecca Kladder and Jessica Chivis-Blain, initiated dialogue through text messages that suggested campaigning for certain individuals, a more explicit and nefarious form of partiality and bias that election board members are supposed to refrain from.

Specifically, Kladder and Chivis-Blain conspired to publicly campaign for Dr. Jeff Chivis, a candidate for an incumbent on Tribal Council.

He explained that the two individuals mistakenly included all board members into the text thread.

The true mistake in this case is that impartial and unbiased actors were willing to use their power to help their preferred candidate get reelected. Nat explained he has evidence, upon request, of those conversations. Nat shared that current board members also exchanged emails that included campaigning. Nat said that he also has evidence, upon request, of those emails. Nat shared that the current board member, Rebecca Kladder, is still on payroll as an active election board member, and he has suggested many times for her removal as part of her corrupt participation in the previous and current election cycles. Nat later told us that he believes the ultimate goal of the current election board members was to remove opposing candidates from the ballot by entertaining all discrepancies.

We are deeply concerned by the action of certain election board members, and inaction from the election board chair, that has fostered an environment that supports politically corrupt decision-making by a supposed-to-be impartial and unbiased body within the tribal government. We have decided to not send this letter to councilperson Chivis due to a perceived conflict of interest; nevertheless, Tribal Council as a whole cannot sit idly by with our election just weeks away.

We are calling for Jared TenBrink to lose his chairmanship of the election board and Rebecca Kladder to be removed from the election board. We are also calling for the removal of all other members on the election board affiliated with this conspiracy to unfairly remove candidates from the ballot. Anything less will only result in decreased trust in our elections and a disservice to our entire tribal community. Signed Mariesha Keith, Nickole Keith.” (Above 11 Paragraphs at 4–5).

Comment by Chairman Stuck:

“I just want to thank Nickole and Mariesha for their bravery and their courage.” (Above Two Paragraphs at 5).

The last comment is from Kaitlyn Perry in Galesburg, Michigan:

“With the majority of Tribal Council unable to vote on the disclosure of the resolution and the reports from the April 20th special closed session meeting, once the voting is completed, can that be readdressed to meet the quorum?” (Above Two Paragraphs at 5–6).

Comment by Chairman Stuck:

“Yeah. Right now, with the resolution as it stands -- and this is available to the public so this is not closed session item -- resolution number 04-20-21-01 is a public record with the vote count. You have one yes, one no, three abstentions. There was, of course, three conflicts of interest on that. And it’s up to Tribal Council to – if they want, they can bring it back for action again, but, again, you can do a special meeting. Special meetings require, one, either the Tribal Council chair can bring back the topic, or two, members of council can bring it back. So it can be brought back to the table for future action.” (Above Two Paragraphs at 6).

The Election Board stated the reasons for setting aside the results of the 2021 Election, except for finding that incumbent Candidate Dr. Jeff Chivis was duly elected, as follows:

In addition to the evidence and testimony provided by the hearing participants, the Board reviewed election documents and statistics provided by the election-services provider, Automated Election Services. In this election, there was a very slim vote margin between the candidates who placed second through fifth: Dorie Rios received 228 votes, Nancy Smit received 220 votes, Jeff TenBrink received 218 votes, and RoAnn Beebe-Mohr received 215 votes. Thus, there was only a difference of 13 votes between these four candidates, with just two or three votes separating a few candidates. The small margin between these four candidates is significant in light of the tally of 52 in-person ballots cast on election day and the timing of the election-related comments made on April 22nd and April 24th. The Board also notes that 17 of the ballots cast in-person at the April 24th Tribal Council election were by voters who had not voted in the previous Tribal Council election. Taking into account all of these factors, the Election Board finds, based on the totality of the circumstances and evidence, that the election-related comments made on April 22nd and April 24th affected the fairness and integrity of the election process and rendered the results of the election uncertain. (*Election Board Decision – Challenge 2021-A* at Page 10).

The Election Board began the analysis regarding incumbent Candidate Chivis by citing the following provision in the Election Code:

Sec. 3.1-29.E. of the Election Code states:

Should the challenge be upheld, a reelection will take place within sixty (60) days of the Election Board's decision. The slate of candidates shall be the same

as the original election, except that any candidates who were duly elected in the original election and not affected by, or subject to, the challenge shall be considered elected and need not stand for reelection. (*Election Board Decision – Election Challenge 2021-A* at Page 11).

With regard to finding incumbent Candidate Dr. Jeff Chivis duly elected, the Election Board stated:

Jeff Chivis received the highest number of votes (315 votes), which was 87 votes more than the next candidate. The Board finds that the election-related comments at issue primarily impacted in-person voting and not absentee ballots since the April 22nd comments were made the day before the deadline for receipt of absentee ballots. Since there were a total number of 52 in-person ballots, and Jeff Chivis received 87 more votes than the second-place candidate, the Board finds that Jeff Chivis was not affected by the April 22nd and April 24th comments at issue in this election challenge. Therefore, he is considered duly elected and need not stand for reelection. Accordingly, the slate of candidates shall be the same as the original election, except it shall not include Jeff Chivis, and voters may vote for two (2) candidates to fill the two remaining open seats on Tribal Council. (*Election Board Decision – Election Challenge 2021-A* at Page 11).

An appeal of *Election Board Decision – Election Challenge 2021-A* was jointly filed by Petitioners and incumbent Candidates Dorie Rios and Nancy Smit who received the second and third highest number of votes respectively in the count of votes conducted on April 24, 2021. Another appeal was filed by the NHBP Tribal Council, Jamie Stuck in his official capacity as NHBP Chair, and Jamie Stuck as an individual NHBP Tribal Citizen.

#### **ANALYSIS – JURISDICTIONAL CHALLENGE OF ELECTION CODE JURISDICTION OVER REMOTE PROCEEDINGS**

The first issue that must be addressed is raised in relation to the location of the conduct that occurred at the April 22, 2021 Tribal Council Meeting and April 24, 2021 Annual Meeting /of Tribal Citizens alleged to violate the Election Code but actually relate to the jurisdiction of NHBP and the NHBP Tribal Government:

Chairman Stuck’s comments did not violate section 3.1-9.K because the meetings did not take place on Tribal property. Under this section, “NHBP members and candidates may engage in campaign activities, which are not otherwise prohibited by these regulations, on property owned by the NHBP, if the campaign activities occur within: (1) Residential units or residential lots leased or assigned to NHBP members, such as apartment units (including common areas); (2) On lots leased or assigned to NHBP members under a NHBP- administered rental or homeownership program; and (3) On church property, provided that the church grants permission to allow campaign activities.” The tribal meetings took place through Zoom virtual forums and not on Tribal property. (Tribal Council, Chairman Stuck, and Stuck v. Election Board, Petition for Expedited Review of NHBP Election Board Election Decision at Pages 10-11)

NHBP is a sovereign Native Nation and federally-recognized American Indian Tribe. As a sovereign nation, NHBP has a Constitution that establishes: the jurisdiction of NHBP; the requirements for citizenship; the form, powers, and duties of the branches of the Tribal Government; the requirements, processes to attain, and processes for removal of leadership; and the Guiding Principles of the Nation, Government, leadership, Citizens, and actions of the Nation, among other critical aspects of this Nation.

This Court has been documenting and will continue to document the impact of what is now known as the COVID-19 Pandemic in the written documents of the NHBP Tribal Court, including opinions and orders, to ensure this world-wide public health crisis is documented for future generations. The Court has been attempting to streamline this language for consistency, thus some language may be identical across opinions, orders, and other documents.

In December 2019, individuals outside of the United States began presenting with symptoms of what has now been titled the coronavirus or COVID-19.<sup>3</sup> The first case of COVID-19 in the U.S. was confirmed on January 21, 2020.<sup>4</sup> On January 30, 2020, the World Health Organization (WHO) Director-General issued the Statement of the International Health Regulations (IHR) Emergency Committee that declared a public health emergency of international concern.<sup>5</sup>

Although detailed information was not readily available at the start of the Pandemic, it was widely known early on that COVID-19 was highly contagious. The primary avenues for reducing the risk of COVID-19 included: quarantining at home unless an essential worker or in the process of performing an essential task, such as grocery shopping; social distancing when required to be out of the home by maintaining a distance of at least six feet (6 feet) from others; avoiding gatherings; frequently washing hands and/or using hand sanitizers frequently; disinfecting of surfaces, and wearing a mask when not at home and/or with others.

On March 10, 2020, Michigan Governor Gretchen Whitmer declared a state of emergency in Executive Order No. 2020-4 with the announcement that Michigan had its first confirmed cases of COVID-19, a woman from Oakland County who had traveled internationally and a man from Wayne County who had traveled domestically<sup>6</sup>. Governor Whitmer issued the first of many Executive Orders on March 23, 2020, referred to generally as the “Stay Home, Stay Safe” Order, to protect Michigan residents as the number of COVID-19 cases – and COVID-19 deaths – increased throughout the State of Michigan. Once the time-frame for emergency powers expired, the Michigan Legislature and Governor have been responsible for collectively managing the Pandemic, along with the heads of various Michigan Departments, to implement statewide safety protocols, administer the two-dose vaccine, provide economic relief, develop strategies for access to critical services, and develop other strategies for managing the Pandemic. At the time this *Opinion After Oral Arguments* is being issued, the vaccine is available to all members of the public through mainstream avenues, such as pharmacies.

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<sup>3</sup> See: <https://www.who.int/news/item/29-06-2020-covidtimeline> & <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>

<sup>4</sup> <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>

<sup>5</sup> [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihremergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihremergency-committee-on-novel-coronavirus-(2019-ncov))

<sup>6</sup> [https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1F3yB-Sm5-6t\\_K2yvZ06uBPjurEfH1uQzxb3zwpv\\_tIA&font=Default&lang=en&initial\\_zoom=2&height=650](https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1F3yB-Sm5-6t_K2yvZ06uBPjurEfH1uQzxb3zwpv_tIA&font=Default&lang=en&initial_zoom=2&height=650)

As state jurisdiction does not apply to Tribal lands of federally-recognized American Indian Tribes, including gaming facilities, decisions regarding FireKeepers Casino and Hotel (FKC) and the NHBP Tribal Government were made independently of the State of Michigan. On March 13, 2020, NHBP Tribal Council began to operate the majority of Tribal Government Departments remotely. On March 15, 2020, FKC released a Press Statement that FKC would close at 3:00 AM on Monday, March 16, 2020 to reduce the risk of the COVID-19 and implement safety protocols throughout the facility.<sup>7</sup> FKC reopened on Monday, June 1, 2020 at 11:00 AM with safety protocols announced via a Press Release.<sup>8</sup> The Tribal Government has consistently worked to continue access to critical services to Tribal Citizens, including testing and now the two-dose vaccine. The Tribal Government has also worked in cooperation with Tribal, State, and Federal Partners throughout the Pandemic, including NHBP Chairman Jamie Stuck being appointed by Michigan Governor Gretchen Whitmer to the Michigan Coronavirus Task Force on Racial Disparities.

The NHBP Tribal Court has worked in consultation with the NHBP Tribal Council, NHBP Partners, Tribal Partners and non-Tribal Partners throughout the Pandemic to remain fully operational in fulfilling its duties pursuant to the NHBP Constitution, Tribal laws, and Tribal Court Rules, protecting and exercising the sovereignty of this Native Nation, protecting the rights guaranteed by the NHBP Constitution, and ensuring access to the essential services the Court provides, including the services provided through the Victim Services Department and Probation Department, while maintaining the health and safety of Court Staff and all those accessing the NHBP Tribal Court. The Chief Judge issued the first Administrative Order on management of the Court during the Pandemic on March 19, 2020, along with documents designed to assist individuals with accessing the Court. These documents have been amended throughout the Pandemic, and will continue to be amended, as scientific knowledge about COVID-19 increases. The Chief Judge, with initial and ongoing consultation with Court Staff, implemented a multitude of safety protocols to maintain onsite access to the Court that included but are not limited to: utilizing the safety features of the Tribal Court and Police Building of a Lobby with separate receiving windows and a locked door to the Court and Police wings as protection from COVID-19; rotation of one Court Staff Person daily; screening protocols for Court Staff; prioritizing of remote Court proceedings with policies to facilitate access for individuals to participate if unable to afford or without access to necessary technology and/or equipment; screening protocols for Clients of the Victim Services Department (VSD) and individuals with Hearings scheduled; purchase of personal protective equipment with priority for VSD Staff who continued to provide in-person services, such as accompaniment to emergency rooms for urgent medical care and emergency shelter; disinfecting protocols; personal purchase of industrial disinfecting equipment; and social distancing requirements for when multiple Court Staff had to be onsite, such as all Administrative Court Staff being onsite for Hearings that could not be held remotely, among others. Court Staff has also periodically received all mail and packages for the Tribal Government throughout the Pandemic.

The Court includes this detailed information about the COVID-19 Pandemic as the safety protocols for reducing the risk of COVID-19 have touched every facet of life. Whether individuals trying to see their doctor, a staff person at a victim services agency trying to find emergency shelter for a victim and children fleeing their abuser, a professional association offering training to its

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<sup>7</sup> <https://firekeeperscasino.com/2020/03/15/firekeepers-casino-hotel-guest-protection-update-3-15-2020/>

<sup>8</sup> <https://firekeeperscasino.com/2020/05/26/firekeepers-casino-hotel-announces-extensive-property-wide-health-and-safety-measures-designed-to-create-an-environment-where-guests-and-team-members-win/>

membership, a child in fifth grade trying to participate in a class assignment, a party trying to submit pleadings before a Court Hearing, a government staff person scheduling a meeting, or a restaurant owner trying to remain open, technology has been critical to meeting day-to-day needs for over a year. Whether trying to access or provide something – and whether right or wrong – reliance on technology has been crucial to daily life since the first person in Michigan was diagnosed with COVID-19 in March 2020.

It is within this context of relying on technology throughout the COVID-19 Pandemic for the operation of the NHBP Tribal Government, including the 2021 Tribal Council Election, that the argument set forth by Petitioners Tribal Council, Chairman Stuck, and Stuck of alleging that the comments made at the April 22, 2021 Tribal Council Meeting and April 24, 2021 Annual Meeting of Tribal Citizens did not violate the Election Code because “[t]he tribal meetings took place through Zoom virtual forums and not on Tribal property” must be analyzed.

The Constitution addresses the jurisdiction of NHBP in Article II § 2 (a):

Jurisdiction. The jurisdiction and sovereign powers of the Band shall, consistent with applicable federal law, extend and be exercised to the fullest extent consistent with tribal self-determination, including without limitation, to all of the Band's territory as set forth in Section 1 of this Article, to all natural resources located within the Band's territory, to any and all persons within the Band's territory and to all activities and matters within the Band's territory. The Band's jurisdiction shall also extend beyond its territory whenever the Band is acting pursuant to jurisdiction that is created or affirmed by rights reserved or created by treaty, statutes adopted by the Tribal Council in the exercise of the Band's inherent sovereignty, Federal statute, regulation or other federal authorization, or a compact or other agreement entered into with a state or local government under applicable law.

Article II § 2 (a) of the Constitution mandates that “[t]he jurisdiction and sovereign powers of the Band shall, consistent with applicable federal law, extend and be exercised to the fullest extent consistent with tribal self-determination, including without limitation... to all activities and matters within the Band's territory”. This language is clear and concise in setting forth a Constitutional mandate for the broadest interpretation possible whenever examining the jurisdiction of NHBP, in particular when that jurisdiction is related to “tribal self-determination”.

The remainder of language in Article II § 2 (a) also supports this Court’s determination that the Constitution mandates a broad interpretation of Tribal jurisdiction, dictating that NHBP’s “jurisdiction shall also extend beyond its territory”, not only recognizing “jurisdiction that is created or affirmed by rights reserved or created by treaty”, “Federal statute, regulation or other federal authorization” and “a compact or other agreement entered into with a state or local government under applicable law”, but “statutes adopted by the Tribal Council in the exercise of the Band's inherent sovereignty”. The language that “jurisdiction shall also extend beyond its territory... in the exercise of the Band’s inherent sovereignty” clearly conveys an expansive approach to jurisdiction.

As this is the first instance where the NHBP Tribal Court has reviewed jurisdiction in relation to conduct occurring remotely, in whole or in part, within the context of a Pandemic, this is an issue of first impression. In reviewing the language on its face within the context of the Pandemic, the jurisdiction mandate in the Constitution can be read as follow, “[t]he jurisdiction of the Band

shall...extend and be exercised to the fullest extent consistent with tribal self-determination, including without limitation... to all activities and matters within the Band's territory" and "shall also extend beyond its territory... in the exercise of the Band's inherent sovereignty".

The exercise of the Nation's inherent sovereignty is important to this analysis. We can turn to the decision in *Kelsey v. Pope* to assist with analyzing jurisdiction. Norbert Kelsey was a Citizen of the Little River Band of Ottawa Indians ("LRBOI") and Member of the LRBOI Tribal Council at the time he committed the crime of misdemeanor sexual conduct. Kelsey filed a petition for writ of habeas corpus, alleging that LRBOI, a federally-recognized American Indian Tribe, did not have jurisdiction because the conduct occurred at the LRBOI Community Center on land owned by LRBOI that was not held in trust. The excerpts below involve key holdings, as well as identify key considerations for this jurisdictional inquiry, with the spacing intentional to visually reflect excerpts with footnotes:

On appeal, Kelsey challenged the Tribal Court's jurisdiction, arguing that the Band lacked authority to exercise criminal jurisdiction over his specific conduct because it occurred outside of the Band's Indian country. The Tribal Court of Appeals affirmed tribal criminal jurisdiction over Kelsey's offense based on the Band's inherent sovereign authority to prosecute its members. It also found that a jurisdictional mandate in the Tribal Constitution required extending jurisdiction to Kelsey's off-reservation conduct. In its order, the Tribal Court of Appeals noted the significant impact this case had on the Band's internal affairs and self-governance. (*Kelsey v. Pope* at 4 with Footnote 1 Directly Following).

"The interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a Tribal employee in a public setting openly visible to other employees and Tribal members who were present. It also involves a Tribal Court finding that Defendant exercised political influence affecting the victim and the Tribe's welfare." R.9, Tribal Court App'x at 11-14, PID 1537-40. The Tribal Court of Appeals also referred to the "tribal nature of all the activities that have occurred at the Community center" due to its status as a "community gathering point." Id. at 1539. (*Kelsey v. Pope*, Footnote 1 to Excerpt Above at 4).

And Kelsey offers no persuasive reason why these cases—which do consider territory as a significant factor in determining the contours of tribal sovereignty—do not instead stand for the contrary proposition that tribal power is at its zenith where territory and membership intersect. Finally, neither Kelsey nor the district court can simply wish away the language in *Wheeler* and *Duro* that establishes membership as the historical determinant of who falls within the ambit of tribal criminal jurisdiction. That tribes maintain their inherent authority to try and punish their members for off-reservation conduct is neither surprising nor hard to accept given the "voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Duro*, 495 U.S. at 694. (*Kelsey v. Pope* at 9)



Defining the scope of retained inherent sovereignty, *Montana* held that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” Id. at 564 (emphasis added in *Kelsey v. Pope*). (*Kelsey v. Pope* at 14 with Footnote 8 Directly Following).

The terms “internal” and “external” are not used in a territorial sense. See Wheeler, 435 U.S. at 322 (discussing the tribe’s “right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions” when referring to the internal affairs of a tribe, not to conduct within tribal boundaries). The Government Amicus offers another example of how conduct outside the reservation boundaries may plainly affect the tribes’ “internal” affairs. “For example, when a tribe authorizes absentee voting in tribal elections by members residing outside the tribe’s reservation, the voting is internal to the tribe, notwithstanding its off-reservation location. Likewise, a tribal prosecution of a member for off-reservation election fraud would be, in the words of the Supreme Court, the enforcement of an internal criminal law[.]” Government Amicus Br. at 17. (*Kelsey v. Pope*, Footnote 8 to Excerpt Above at 14).

In determining whether extending criminal jurisdiction to off-reservation conduct is consistent with *Montana*’s view of retained tribal sovereignty, it is important to determine exactly what the Band is and is not arguing with respect to the scope of their jurisdictional power. Here we have no express congressional delegation granting the Band extra-territorial criminal jurisdiction. The Band is cognizant that a free-floating, membership-based jurisdiction over any criminal conduct could run headlong into *Montana*’s holding that retained tribal power (i.e. criminal jurisdiction) is only that which is “necessary to protect tribal self-government or control internal relations.” Id. at 564. Therefore, the Band advocates for a more limited scope of extra-territorial criminal jurisdiction, arguing that its inherent authority to prosecute members for off-reservation conduct extends at least where the offenses “*substantially affect[] its self-governance interests.*” Band Br. at 3, 41–42. (*Kelsey v. Pope* at 14 with Footnote 9 Directly Following).

*Kelsey* would have us read the Band’s view of membership-based jurisdiction as extending to criminal conduct “based only on the fact of tribal membership.” *Kelsey* Br. at 2, 13, 30. Through this overbroad characterization, *Kelsey* portrays a “sweeping” membership-based jurisdiction that would permit the Band to prosecute members “half a mile outside of its reservation borders or halfway around the world.” *Kelsey* Br. at 13. However, this clearly ignores the Band’s framing of the issue—that criminal conduct must “substantially affect[] [tribal] self-governance,” Band Br. at 3, 41–42—and the limitations described in *Montana*’s characterization of retained tribal sovereignty post-incorporation. See *Montana*, 450 U.S. at 566–67. (*Kelsey v. Pope*, Footnote 9 to Excerpt Above at 14).

We agree with the Band that Kelsey’s conduct clearly implicates core governmental concerns and substantially affects the tribe’s ability to control its self-governance. Not only was Kelsey a member of the Band’s nine-person legislative Tribal Council, but his victim was a tribal employee discharging her official duties at an official tribal elders’ meeting. The criminal conduct took place at the Community Center, “the center of Tribal community activities ever since it was purchased,” serving to formerly house elements of the tribal judiciary and “provid[ing] tribal office space for the conduct of the business of a tribal sovereign.” R. 9, Tribal App’x at 13, PID 1539. This is no run-of-the-mill criminal conduct, but conduct visited on the Band’s employee by the Band’s *own elected official* during an official tribal function: in pure form, this was an offense against the peace and dignity of the Band itself. While certain applications of extra-territorial criminal jurisdiction might well be incompatible with the tribes’ status as dependent sovereigns—that is, where they tangentially impact tribal self-governance or fail to implicate core internal relations, see *Montana*, 450 U.S. at 564—the instant exercise of criminal jurisdiction does not fall within that category. (*Kelsey v. Pope* at 15).

The conduct involved in *Kelsey* clearly and significantly differs from the present case at NHBP. However, the fact that courts are reserved in their review of criminal jurisdiction as it involves one of the greatest potential consequences – the loss of a person’s freedom or in some instances the loss of a person’s life – minimizes concerns with applying that analysis to non-criminal matters.

This Court carefully selected the above excerpts from *Kelsey v. Pope* due to the applicability of the considerations of the Sixth Circuit Court of Appeals that can be applied to the jurisdictional analysis in the present case. In finding LRBOI had jurisdiction over the Defendant for a crime that was committed on land owned by the Tribe that was not held in trust, the Court acknowledged the importance of being a Tribal Citizen, noting that “the language in Wheeler and Duro that establishes membership as the historical determinant of who falls within the ambit of tribal criminal jurisdiction”. While the Court acknowledged the status of Tribal Citizens, the Court explained that additional factors to be of important consideration, namely that jurisdiction relate to “the Band’s inherent sovereign authority to prosecute its members” for prosecution of a Tribal Citizen for crimes committed off of Tribal land.

The Sixth Circuit Court of Appeals also highlighted “a jurisdictional mandate in the Tribal Constitution [that] required extending jurisdiction to Kelsey’s off-reservation conduct”. This finding supports this Court’s consideration and interpretation of language in the Constitution, such as “extend and be exercised to the fullest extent consistent with tribal self-determination”, “without limitation”, and “extend beyond its territory” as a mandate for broadly interpreting jurisdiction.

Mr. Kelsey attempted to create the fear of Tribes being unchecked in their prosecution of Tribal Citizens for any criminal conduct anywhere in the world. The Sixth Circuit Court of Appeals rejected this characterization, in part by examining jurisdiction of Tribal Citizens beyond the borders of the Tribe’s land held in trust when jurisdiction related to the inherent sovereignty of the Tribe. The Court emphasized that the LRBOI Tribal Court of Appeals “noted the significant impact this case had on the Band’s internal affairs and self-governance” with “[t]he interests of the

Tribe... very strong here” because the “case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a Tribal employee in a public setting openly visible to other employees and Tribal members who were present” and that the “Defendant exercised political influence affecting the victim and the Tribe’s welfare”. The Court repeatedly stressed that LRBOI “advocates for a more limited scope of extra-territorial criminal jurisdiction, arguing that its inherent authority to prosecute members for off-reservation conduct extends at least where the offenses “*substantially affect[] its self-governance interests*”. (Emphasis in original).

The Sixth Circuit Court of Appeals examined how the criminal prosecution of Kelsey related to the Tribe’s self-governance in finding that “Kelsey’s conduct clearly implicates core governmental concerns and substantially affects the tribe’s ability to control its self-governance”. The Court recognized that “[n]ot only was Kelsey a member of the Band’s nine-person legislative Tribal Council, but his victim was a tribal employee discharging her official duties at an official tribal elders’ meeting”, as well as that “[t]he criminal conduct took place at the Community Center”. The Court quoted the LRBOI Brief to highlight that this Community Center served as “the center of Tribal community activities ever since it was purchased” and served to “formerly house elements of the tribal judiciary and ‘provid[ing] tribal office space for the conduct of the business of a tribal sovereign’”.

The factors identified as key in *Kelsey v. Pope* in determining that LRBOI had criminal jurisdiction over a Tribal Citizen and Member of Tribal Council for conduct in a building owned by the Tribe that was not held in trust lend insight into the factors that should be considered here to determine whether the April 22, 2021 Tribal Council Meeting and April 24, 2021 Annual Meeting of Tribal Citizens, held remotely via Zoom, were subject to the jurisdiction of the NHBP Election Code. Before engaging in this detailed analysis of jurisdiction of the Election Code over the remote Meetings in question, however, the Court shall address jurisdiction over the individuals who made comments at these Meetings.

Jurisdiction of the NHBP Election Code over the individuals who made statements at the April 22, 2021 Tribal Council Business Meeting and April 24, 2021 Annual Meeting of Tribal Citizens is not at issue as certain Constitutional provisions ensure jurisdiction over the individuals who made statements, both directly, as made by the Chair, and indirectly as made by Tribal Citizens through the submission of comments to be read at these Meetings. We shall first discuss jurisdiction over the Chair. The Constitution requires in Article IV § 1 (a) that, “[t]he governing body of the Nottawaseppi Huron Band of the Potawatomi shall be a Tribal Council comprised of five (5) Tribal Members meeting the qualifications prescribed in Section 4 of this Article, who are elected at large by eligible tribal voters” with Article IV § 4 (a) incorporating this requirement by beginning with “Band members must possess the following qualifications in order to be nominees or hold any office on the Tribal Council” as the start of the enumerated qualifications required. Although the type of immunity Members of Tribal Council enjoy, and the parameters of that immunity, are currently on appeal to the NHBP Supreme Court, the fundamental consideration for the purpose of this analysis is that Members of Tribal Council must be NHBP Tribal Citizens to run for election as a Member of Tribal Council.

The Constitution also indirectly indicates jurisdiction of the NHBP Election Code over the individuals who submitted comments to be read aloud at Tribal Council Meetings and the Annual Meetings of Tribal Citizens. The Constitution states in Article IV § 7 (e) that “[a]ll meetings of the Tribal Council shall be open to all Tribal Members except when the Tribal Council meets in Closed

Session”. The Constitution also states in Article V § 1 (a) that, “Elections shall be held in the month of April in conjunction with the annual meeting of the General Membership for those Tribal Council seats whose holders' terms are expiring or for seats otherwise vacant”, thus the Annual Meeting is not only specifically for Tribal Citizens, but Constitutionally mandated to be held each year, in April, and in conjunction with the Election of Tribal Council. While there were questions raised in a previous case as to whether the NHBP Election Code applies to Tribal Government employees who are not NHBP Tribal Citizens, the Court does not address this here; it simply affirms that the NHBP Election Code applies to the individuals who made comments at the April 22, 2021 Tribal Council Meeting and April 24, 2021 Annual Meeting as NHBP Tribal Citizens as no claims of immunity, qualified or otherwise, have been made in the present cases.

In now turning to the comprehensive analysis of jurisdiction over the Tribal Council Business Meeting and Annual Meeting of Tribal Citizens, we begin by noting that the foundational inquiry has already been done with this Court finding that there is a mandate in the NHBP Constitution to apply a broad interpretation to a jurisdictional analysis. Specifically, “[t]he jurisdiction of the Band shall...extend and be exercised to the fullest extent consistent with tribal self-determination, including without limitation... to all activities and matters within the Band’s territory” and “shall also extend beyond its territory... in the exercise of the Band's inherent sovereignty”.

Although there is a Constitutional mandate to broadly interpret jurisdiction, we turn to the guidance in *Kelsey v. Pope* to identify and apply the crucial considerations involving whether the purpose of the convening relates to the inherent sovereignty of NHBP. We need to examine the activity and conduct to determine whether it relates to the “internal affairs” of the Tribe with the specific inquiry whether the activity or conduct “*substantially affects the self-governance*” of NHBP. Other than perhaps an exercise of jurisdiction as it relates citizenship, this Court cannot identify topics more related to tribal self-determination than the April 22, 2021 Tribal Council Business Meeting and April 24, 2021 Annual Meeting of Tribal Citizens with the latter a Constitutionally mandated gathering that is directly related to electing the leadership of the Nation and the former involving the meetings of elected leaders. As these Meetings clearly meet the requirement of exercising the inherent sovereignty of this Native Nation with these Meetings, and the 2021 Election, specific avenues of reporting to and engaging Tribal Citizens for establishing the paths for self-determination, it is unlikely that this inquiry would be necessary at either Tribal Council Business Meetings or Annual Meetings of Tribal Citizens if held in person.

With the sole reason for challenging jurisdiction for application of the NHBP Election Code being that the Meetings were held remotely, the Court must analyze the issue of jurisdiction over remote NHBP Meetings by returning to the context of why these Meetings were being held remotely: the COVID-19 Pandemic. As previously noted, there has been a significant – to almost complete – reliance on technology throughout the Pandemic to meet the day-to-day needs of individuals, families, governments, service providers, agencies, businesses, and other entities struggling to exist throughout the Pandemic, in part because the primary avenue to reduce the risk of contracting or spreading COVID-19 has been isolation.

NHBP has continued to provide essential services of the Tribal Government throughout the Pandemic with the majority of Government Staff in the Executive and Legislative Branches working remotely. While there have also been personnel onsite – such as Health Department Staff providing COVID-19 testing and now also the two-dose vaccine, Department of Public Works Staff disinfecting daily while installing safety measures such as hands-free sanitizing stations, six feet (6’) social distancing markers, and clear barriers between work stations, Housing Staff to assist

Elders with obtaining basic necessities like groceries, and Law Enforcement Personnel to protect the safety of the community during increasingly dangerous times, to name but a few of the extraordinary actions taken over this past year – the majority of Government Staff has worked remotely. Even with the Court open onsite every day of the Pandemic, with rotating one Court Staff Person daily to maintain onsite access while promoting safety, the remainder of Court Staff worked from home except for Victim Services Staff who frequently worked offsite in shelters, hospitals, homes, and other locations to assist victims with the Pandemic intensifying both the number and needs of victims.

The tasks to exercise the Band’s inherent sovereignty – whether directly implemented by Tribal Council through a majority vote on resolutions presented at Tribal Council Meetings, policies enacted pursuant to the applicable authority, standards developed collectively through Leadership Meetings, “Best Practices” developed by the experts in the applicable Department, or by order of the Chief Judge after consultation with the appropriate Staff and stakeholders – the day-to-day actions of the Executive, Legislative, and Judicial Branches involve the exercise of the Band's inherent sovereignty with most of those actions performed in whole or in part remotely since shortly after the Pandemic began. Through remote technology, Tribal Council has consistently met, managed the Tribal Government, participated in partnerships with Tribal, state and federal partners, operated Tribal businesses, and fulfilled other duties, such as managing multiple Grants, remotely throughout the Pandemic.

NHBP has expended Tribal resources to both obtain remote technology, purchase equipment necessary for Tribal Government Staff to work from home, and improve technological capabilities on the residential reservation so that those tasked with the sacred duties to care for the NHBP Tribal Government, NHBP Tribal Citizens, NHBP lands, NHBP resources, and the community-at-large had the abilities to fulfill these sacred duties as articulated in the NHBP Constitution, Laws, Court Rules, policies, procedures, protocols, and other documents establishing fundamental duties for this Native Nation, as well as federal law where applicable.

In looking specifically at the two Meetings in question – with the purpose of both Tribal Council Business Meetings and the Annual Meetings of Tribal Citizens firmly rooted in NHBP exercising the inherent sovereignty of this Nation – it is also a factor that these Meetings were hosted by the NHBP Government. With being over one year into the Pandemic and use of remote technology for the operation of the Tribal Government, these meetings were convened remotely pursuant to the standard practices that have been developed by the NHBP Tribal Government so that the NHBP Tribal Government could continue to operate during the COVID-19 Pandemic. The fact that there were Comments made by Tribal Citizens at the April 24, 2021 Annual Meeting of Tribal Citizens that incorporated knowledge of comments made at the April 22, 2021 Tribal Council Business Meeting demonstrates on their face that NHBP Tribal Citizens participated in the April 22, 2021 Meeting remotely, thus were aware that the Meeting was being held remotely and had been provided information on how to participate in the remote Meeting.<sup>9</sup>

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<sup>9</sup> The Court recognizes that there was no “evidence” presented regarding the operation of the Tribal Government in this case. The findings presented here are open and obvious through the ongoing existence of the NHBP Tribal Government, information available to the public on the NHBP website, and information available to the public on the FireKeepers Casino Hotel website, including press releases. In addition, the remote operation of the Judicial Branch is available in public documents, such as the Administrative Orders and notices of policies during the Pandemic sent to the parties issued by the Chief Judge, with these documents amended throughout the Pandemic as scientific information became known, scientific information on protecting against contracting and spreading the

The Court finds that Tribal Council, other Tribal Government Leaders, and Tribal Government Staff have continued to fulfill the duties mandated in the Constitution and other Government documents throughout the COVID-19 Pandemic. Fulfilling these duties has been achieved, in part, through expending Tribal resources to obtain new and enhanced equipment, and new and enhanced access to technology, as it relates to the operation of the Tribal Government on Tribal lands, the operation of the Tribal Government by Staff working remotely, and the day-to-day use as needed by all those living on the residential reservation. Recognition of the ongoing fulfillment of these duties weighs in the Court's findings as, to adopt the proposed standard that the NHBP Election Code did not apply to the April 22, 2021 Tribal Council Business Meeting and April 24, 2021 Annual Meeting of Tribal Citizens held remotely via Zoom would contradict the Constitutional mandate in Article II § 2 (a) that "[t]he jurisdiction and sovereign powers of the Band shall... extend and be exercised to the fullest extent consistent with tribal self-determination" and "shall also extend beyond its territory whenever the Band is acting pursuant to jurisdiction... in the exercise of the Band's inherent sovereignty". The Court further notes that adopting the proposed standard that the NHBP Election Code did not apply to conduct at the April 22, 2021 and April 24, 2021 Meetings because the Meetings were held remotely via Zoom and "not on Tribal land" would threaten the validity of all laws, policies, procedures, and protocols adopted during the Pandemic, appropriations made, the submission of grant applications, reports, and reimbursements, and all other actions taken since the NHBP Tribal Council authorized the NHBP Tribal Government to primarily operate remotely on March 13, 2020.

#### **STANDING OF TRIBAL COUNCIL AND CHAIR IN OFFICIAL CAPACITY – ANALYSIS OF *PARENS PATRIAE***

The next issue in this case that must be addressed is standing for the NHBP Tribal Council and the Chair of the NHBP Tribal Council to file an action against the NHBP Election Board.

Petitioner NHBP Tribal Council and Chairman Stuck in his official capacity argue they have standing to file this Petition based on the following:

Petitioners have standing to bring suit. Chairman Stuck has standing because he is an eligible voter. The Election Code provides that "[a]ny aggrieved candidate or eligible voter may seek expedited judicial review of any final decision of the Election Board by filing a petition for review in NHBP Court." *Id.* § 3.1-41.A. Eligible voter means, "[a] duly enrolled member who has or will have attained the age of 18 years on the date of an election." *Id.* § 3.1-4; *see also* NHBP Const., art, V, § 3(a). Chairman Stuck is a duly enrolled member who was over 18 years old on the date of the election.

The NHBP Tribal Council has standing on its own and as *parens patriae* on behalf of its members. See *Quapaw Tribe of Okla. V. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1180 (N.D. Okla. 2009) ("A tribe can have standing to sue to protect its own interests or, in appropriate situations, the interests of its members through a *parens patriae* action.") Tribal Council has the Constitutional responsibility to "carry out the sovereign powers of the Band and to promote

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COVID-19 was refined, and access to personal protective equipment, technology, and resources for those without the economic or technological resources to participate in the remote processes of the Court were obtained.

and protect the health, safety, education, and general welfare of the Band and its members.” NHBP Const. art. VI, § 1(a). It also has a duty to promulgate rules and regulations to “ensure that Tribal elections are conducted in a manner that is consistent, fair and efficient.” NHBP Const. art. V, § 2(b). The Constitution protects Tribal citizens from “any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition for a redress of grievances.” NHBP Const. art. VII, § 1(a)(1). Consistent with its Constitutional duties and the rights of the Tribal citizens, the Tribal Council seeks to protect its Constitutional interests to ensure the integrity of the NHBP election process and to pursue claims on behalf of the Tribal citizens to protect their individual rights to free speech and to vote.

This election challenge arises from Chairman Stuck’s comments while presiding over meetings in his official capacity. The Election Board’s erroneous Decision harms the Tribal Council’s sovereign interests and erodes trust in its legitimacy, including its proprietary interests by undermining its ability to conduct business and maintain governing operations.

(Petitioner NHBP Tribal Council, Chairman Stuck, and Stuck Brief at 6-7).

The Court is not persuaded by the arguments for standing presented for the NHBP Tribal Council and the official capacity of the Chair. It finds the NHBP Election Board’s argument below more compelling, including that Tribal Council is not an eligible voter:

Only eligible voters have standing to appeal final decisions of the Election Board... In support of their argument that the Tribal Council should be allowed to stand in *parens patriae* on behalf of all Tribal citizens, Petitioners Stuck and NHBP Tribal Council cite *Quapaw Tribe of Oklahoma v Blue Tee Corp.*, 653 F.Supp.2d 1166 (N.D. Okla. 2009) (“*Quapaw*”). A careful reading of *Quapaw* reveals that the Petitioners reliance on this case places more weight on it than it can bear.

In *Quapaw*, the Quapaw Tribe was seeking to bring damages on behalf of its citizens against a mining company on the theories of “public nuisance, private nuisance, trespass, strict liability, and negligence against defendants.” *Quapaw*, 653 F.Supp.2d at 1174-75. The Quapaw Tribe argued that it had a right to bring actions on behalf of its citizens based on a theory of *parens patriae*. *Id.* at 1175. In evaluating whether the Quapaw Tribe could bring an action on behalf of its members based on the doctrine of *parens patriae* the Quapaw court utilized the three-prong test set forth in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (“*Snap*”).

The *Snap* decision held that a sovereign can bring an action on behalf of its citizens based on a theory of *parens patriae* by “alleg[ing] the following three elements: (1) the State must have ‘alleged injury to a sufficiently substantial segment of its population;’ (2) the State ‘must articulate an interest apart from the interests of particular private parties;’ and (3) the State ‘must express a quasi-sovereign interest....The governmental entity must also show that the threatened injury is not speculative.” *Id.* at 1178-79 (internal citations and quotations omitted).

There is nothing in the Stuck Petition which comes anywhere close to satisfying the test set-out in *Snap*. See Stuck Petition, at 6. Petitioners Stuck and NHBP Tribal Council fail to state how re-running an election, a remedy called for in the Election Code passed by the NHBP Tribal Council, can possibly damage its sovereign powers or impair the Tribe's interests as a sovereign. See *id.* It is difficult to see how they ever could, considering the entire election challenge process has unfolded in accordance with the expression of the sovereign's power, i.e., the Election Code. See §3.1-28. The instant election challenge has proceeded exactly as set forth in the Election Code, the Tribal Council merely disagrees with the Election Board's decision. The Tribal Council qua Tribal Council has no interest in the particular outcome of an election, or election challenge that is different or unique than its citizens and therefore cannot satisfy the elements set forth in *Snap* to file suit based on a theory of *parens patriae*. The NHBP Tribal Council should be dismissed as a party to this action because it lacks standing.

Similarly, Petitioner Stuck has standing (as do all eligible voters) to bring a suit to challenge a final decision of the Election Board. §3.1-28(C). There is nothing in the Stuck Petition which states how filing an appeal of an election challenge would be within his official duties as Tribal Council chairman. Indeed, if the Tribal Council lacks standing to bring suit, it is almost certainly true that an individual Tribal Council member would not have standing in their official capacity to do what the Tribal Council in its official capacity could not.

(NHBP Election Board Response & Brief at 16-17).

In addition to finding that neither the NHBP Tribal Council nor the Chairperson has standing to file an appeal of *Election Board Decision – Election Challenge 2021-A*, this Court also finds that Tribal Council does not have standing because the Tribal Council vote to file this Petition is invalid on its face as a conflict of interest.

#### **STANDING OF TRIBAL COUNCIL AND CHAIR IN OFFICIAL CAPACITY – ANALYSIS OF TRIBAL COUNCIL VOTE**

In the case of *TenBrink and TenBrink v. NHBP Election Board*, three of the four (3 of 4) Candidates for Tribal Council, with one of these Candidates not participating fully in the Court processes, challenged sections of the NHBP Election Code as a violation of freedom of speech and expression as guaranteed by the NHBP Constitution and appealed the NHBP Election Decision that removed them from the ballot for violating the NHBP Election Board for what was described as a holding a “primary election” that it found violated the Election Code. The Trial Court dismissed the case, finding that the Plaintiffs had not presented evidence or arguments, including requesting admission of the transcript from the hearing before the Election Board, sufficient for the Court to rule on the substantive issues. The NHBP Supreme Court began the analysis as follows:

Any reading of Section 2.5 subsection 2, 3, 4, 6 of the NHBP Election Code leads one to the conclusion these subsections interfere with NHBP member's



rights guaranteed by [the] NHBP Constitution. Article VII, Section 1 a), Individual Rights, subsection 1 of the NHBP Constitution provides:

The Band, in exercising the powers of self-government, shall not make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech or of the press, or the right of the people to peacefully assemble and to petition for redress of grievances. (*TenBrink and TenBrink v. NHBP and NHBP Election Board*, Opinion of the NHBP Supreme Court, Decided on July 13, 2013 at 6).

In addressing Election Code Section 2.5 subsections 3, 4, and 5 that required submission of all campaign materials prior to their use, the Supreme Court found that “[r]equiring a candidate to obtain approval of campaign materials abridges or limits a tribal members’ freedom of expression” and that, “[e]ven if the Election Board does not censor campaign materials, the requirement of submission has a chilling effect”. (*TenBrink and TenBrink v. NHBP and NHBP Election Board*, Opinion of the NHBP Supreme Court, Decided on July 13, 2013 at 6-7). The Supreme Court went on to state:

In light of [the] requirement that NHBP elections must provide for the free expression of community will, fundamental fairness and the interpretation of similar language by other tribal courts, the court determines that Section 2.5 of the NHBP Election Code acts as an abridgement of NHBP members to free expression of speech and peacefully assemble, and is, therefore, void. (*TenBrink* at 7).

The Supreme Court then analyzed the Election Board’s disqualification of Candidates who participated in the gathering of some NHBP Tribal Citizens with shared values had for the purpose, in part, to narrow down the number of Candidates with shared values running to improve the chances of their election of those Candidates. The Election Board interpreted these efforts as a “primary election” that violated the NHBP Election Code’s requirement that only the Election Board hold elections. The Supreme Court went on to conduct a strict scrutiny analysis of the Election Board’s actions:

Once the court determines an action by the tribal government is inconsistent with the NHBP constitution, the tribal government must establish it has a compelling interest in restricting speech and that the limitation is narrowly tailored to meet the tribal government’s interest. (*TenBrink* at 8).

Although the Supreme Court found that, “[n]othing in the briefs or in oral argument by counsel provides a basis to justify the significant restrictions on NHBP members’ right to free speech and peaceably assembly” (*TenBrink* at 8), the Court declined to provide the relief requested of overturning the election and restoring the disqualified Candidates to the ballot for a multitude of reasons that reveal the increased burden for overturning the results of an election. The circumstances of the present case differ significantly in that the Petitioners in *TenBrink* with the Petitioner in *TenBrink* failing to file an action with this Tribal Court before the ballots were mailed nor did any disqualified Candidate or Tribal Citizen file a challenge after the Election and before the Members elected to Tribal Council took the Oath of Office. The Supreme Court stated, “[t]o invalidate the election at this late date would throw the NHBP into chaos”. (*TenBrink* at 9).

From the Supreme Court holding in *TenBrink*, it appears that the Court has the authority – and the duty – to rule on issues that are apparent on their face. What is not readily apparent to this Court is what issues trigger the Court’s authority and duty to address an issue on its face independent of the evidence and/or arguments presented. However, this Court surmises from the Supreme Court *TenBrink Opinion* that, at minimum, the Court has the authority and duty to address issues involving the fundamental rights that are guaranteed by the NHBP Constitution with the right to vote clearly a fundamental right of every Tribal Citizen. Further, although not articulated in the same manner as this Court’s analysis, there have been several arguments raised as to concerns with incumbent Candidates having advantages that other Candidates do not have related to their positions on Tribal Council, as well as allegations of advantages through the support of other Members of Tribal Council, with the latter the foundation of the challenge filed by Candidate Jeff TenBrink.

This inquiry is important with Tribal Council arguing that it was filing this action *parens patriae* with the interest claimed being ensuring compliance with the law in elections. The argument that ensuring compliance with the law is too general to fulfill the requirements of the test established in *Quapaw*.

Further, this Court finds that the Tribal Council vote to initiate this action was invalid on its face. The NHBP Tribal Council is established in Article IV of the NHBP Constitution. Three (3) of the five (5) seats on Tribal Council are open with all three (3) of the Tribal Council Members running for re-election. Although the Election Results of the April 24, 2021 Election resulted in all three incumbents having the highest number of votes, the Election Board overturned the Election results for all but Dr. Jeff Chivis, finding that, “Jeff Chivis received the highest number of votes (315 votes)... [s]ince there were a total number of 52 in-person ballots, and Jeff Chivis received 87 more votes than the second-place candidate, the Board finds that Jeff Chivis was not affected by the April 22nd and April 24th comments at issue in this election challenge”. (*Election Board Decision – Election Challenge 2021-A* at Page 11).

With all three of the five (3 of 5) seats on Tribal Council open in the 2021 Election and all three (3) of these current Members running for reelection, these three Members of Tribal Council have a direct interest in the decision for Tribal Council to file an action to overturn the decision of the Election Board and uphold the initial results of the Election that would result in all three incumbents being reelected to Tribal Council. The following was the vote on whether to file an action pursuant to the Brief submitted by incumbent Candidate Dr. Jeff Chivis, reportedly taken during a Closed Session of Tribal Council, thus he did not reveal the identity of the individual Members of Tribal Council in relation to their votes: three (3) votes to file the action; one (1) vote against filing the action; and one (1) abstention.

The NHBP Tribal Council Bylaws contain a Code of Ethics. This Code of Ethic addresses conflicts of interest in § 1.1-6 (H) (4):

Code of Ethics. The enrolled tribal members of the Nottawaseppi Huron Band of the Potawatomi are entitled to have complete confidence in the loyalty and integrity of their Tribal Council. To that end, this Code of Ethics is to establish clear standards for the ethical conduct and behavior of the Tribal Council.

- (4) Tribal Council members shall not vote on any motion, resolution, or other official action of the Council that involves an immediate family member or creates a conflict of interest.

The NHBP Tribal Council Bylaws define a “conflict of interest” in § 1.1-2 as follows:

CONFLICT OF INTEREST — The reasonable likelihood that any personal or economic interest of a Tribal Council member will be affected in any materially different manner from the interest of the general public, or by any decision, enactment, agreement, award or other official action or function of any governmental body, entity or political subdivision of the Nottawaseppi Huron Band of the Potawatomi.

In the present case, three of the Members of Tribal Council have both a personal and economic interest in the outcome of the case that Tribal Council has filed against the Election Board as, if the Petitioners prevail, all three Members whose seats are up will return as Members of Tribal Council, positions of distinction for which they will receive a salary and benefits. Despite the uncontested difference in interest from that of the general public who will not receive the title, salary, and benefits that these three Members of Tribal Council will receive if the suit filed by Tribal Council succeeds in overturning the Election Board Decision for the election results to be upheld, only one Member of Tribal Council upheld the requirement of keeping confidential the details of the vote as it was taken during a Closed Session of Tribal Council, thus this Court is not aware of how the incumbent Candidates voted. However, whatever their vote two (2) incumbent Candidates voted when it was a conflict of interest on its face to vote.

The Court notes that the conflict of interest is apparent on its face due to the response it received during Oral Arguments when the Court asked if it was a conflict of interest for two incumbent Candidates to vote on filing suit against the Election Board. The Petitioners responded that no one had raised the issue. The Court states here as it did at Oral Arguments that the Court is raising the issue *sua sponte* because the conflict of interest is apparent on its face.

This Trial Court interprets the Supreme Court decision in *TenBrink* to identify the duty of the Trial Court to rule on issues that involve fundamental rights on their face. Here, the right to elect the leaders of this Native Nation is at stake. Finding that Members of Tribal Council may vote on whether to expend Tribal funds to challenge the decision of the Election Board when they are Candidates, especially when the relief requested will result in these Members of Tribal Council retaining their seats, establishes a dangerous precedent that could wreak havoc on elections and deny Tribal Citizens their duly elected representatives.

To begin, there is the obvious issue that the majority of Tribal Council seats – three of the total number of five Tribal Council seats – are open in alternating Tribal Council Elections. As such, if Members of Tribal Council running for reelection are permitted to vote on decisions relating to the outcome of an election, it would enable Members of Tribal Council with terms expiring who lost their seats, either because the Election Board denied any challenges and certified the results where the incumbent Candidates did not receive the votes needed or because the Election Board found a challenger met its burden to set aside the election results where the incumbent Candidates won, to expend Tribal funds to retain their seats. Put simply, the majority of Tribal Council could use Tribal funds to secure returning to Tribal Council or, in the alternative, delay seating of the rightfully elected Council Members, thereby retaining the position and authority of being Members of Tribal Council, along with the salary and benefits of these full-time positions.

Of equal, if not greater, concern is that finding Tribal Council has standing in this case would set the precedent for the majority of Tribal Council whose seats are expiring having the authority

to utilize Tribal funds to appeal their loss whether appealing an Election decision similar to the present case where the Election Board found a new Election for two of the three seats is necessary, an appeal when the Election Board has rejected a challenge and certifies Election results where one or more of the incumbent Candidates lost, or otherwise use Tribal funds to oppose their loss. Members of Tribal Council with expiring terms who are running for reelection being permitted to vote on whether to file an appeal as the NHBP Tribal Council and authorize expending Tribal funds for retaining counsel both gives incumbent Candidates an unfair advantage over non-incumbent Candidates and harms the fundamental rights of Tribal Citizens, including the financial expenditure of Tribal resources.

There are several considerations that should be noted for clarification. First one (1) incumbent abstained from voting on the issues of authorizing the filing of an appeal of the *Election Board Decision – Election Challenge 2021-A* and expending Tribal funds to file the appeal, including retaining outside counsel to represent Tribal Council, Jamie Stuck as the Chairperson, and Jamie Stuck as an individual NHBP Tribal Citizen (“Petitioners Tribal Council, Chairman Stuck and Stuck”).

Second, all three incumbent Candidates have retained their own counsel with incumbent Candidates Rios and Smit jointly retaining an attorney to file an appeal of *Election Board Decision – Election Challenge 2021-A* and incumbent Candidate Chivis retaining counsel to file as a Respondent. Personal retention of counsel demonstrates ethical behavior on the part of all incumbent Candidates.

The third consideration important to note is that payment of counsel, while significant, is not the only advantage an incumbent Candidate has if Tribal Council is found to have standing to file an appeal of an Election Board decision in these circumstances. One example of this advantage is the ability to characterize the action for guaranteeing reelection as the action that secures the rights of NHBP Citizens. The message below was sent via the Tribal Government messaging system:

Bozho,

Tribal Council has filed an expedited appeal to challenge the Election Board decision to overturn the election. After careful review, Tribal Council has concluded that the Election Board decision is arbitrary and without evidentiary support, and if allowed to stand will undermine the will of the voters, not just in this election but in all elections to come. The purpose of this challenge is to protect the voting rights of the Tribal Members and to preserve and protect the election results for all elections. Tribal Council believes that overturning the election would result in unprecedented harm and fundamentally undermine the will of the people and their right to choose their elected representatives. Tribal Council has authorized Chairman Stuck to act as plaintiff in this case, in his official and personal capacity as an eligible voter.

Tribal Council has selected Akin Gump Strauss Hauer and Feld as the law firm best able to represent the Tribe on behalf of the membership in this matter.

A copy of the petition will be available on the Members Only website. For additional information please contact Chief Legal Officer John Swimmer, at [john.swimmer@nhbp-nsn.gov](mailto:john.swimmer@nhbp-nsn.gov) or 269-704-8309. (Chivis Brief, Exhibit B).

The message above characterizes *Election Board Decision – Election Challenge 2021-A* as “arbitrary and without evidentiary support” that, “if allowed to stand will undermine the will of the voters, not just in this election but in all elections to come”. This message went beyond the purpose of informing Tribal Citizens that Tribal Council was filing an appeal of *Election Board Decision – Election Challenge 2021-A*. It aligned the official Tribal Government position with that of incumbents Candidates Rios and Smith. In so doing, the message indirectly communicated that incumbent Candidate Dr. Chivis was not duly elected, potentially putting his rightful election into question if this Court upholds the *Election Board Decision – Election Challenge 2021-A*. This message also discredits the challenge and, therefore, the challenger, as well as discredits the Members of the Election Board and any Candidate they support – or are perceived to support – within the conduct permitted by the Election Code. Additionally, the message provides the contact information for the Chief Legal Officer, a salaried employee of the NHBP Tribal Government, thus another resource being used in support of retaining the incumbent Candidates that is not available to non-incumbent Candidates. The Court further questions whether the sending of the message and the language used may have also facilitated the fifty (52) Motions the Court received to join the appeal filed by Tribal Council, Chairman Stuck, and Stuck, in particular since the Chief Legal Officer’s contact information was provided in the message. The Court cannot confirm or rule out the latter as the fifty-two (52) Motions filed to join as petitioners did not provide any substantive information although the number of Citizens filing Motions, along with the names of those Citizens, have been noted as supporting the administrative appeal filed by Petitioners Tribal Council, Chairman Stuck, and Stuck.

Fourth, the appeal filed by Petitioners Tribal Council, Chairman Stuck and Stuck and the appeal filed by Petitioners Rios and Smit requests relief that is in direct opposition to the interests of incumbent Candidate Dr. Jeff Chivis. This is important for a multitude of reasons. It is a reminder that all votes on Tribal Council matter. While this Court points out that in years that three seats on Tribal Council are open and all three Members are running for reelection, there is a potential for these three incumbent Candidates to use Tribal resources to challenge Election Board decisions to remain in office if one, two or all are not reelected. This approach requires solidarity among the incumbent Candidates that may not exist. However, support by another Member of Council could achieve the same goal. Further, a majority of Tribal Council Members could utilize Tribal resources to appeal an Election Board decision that would deny a lawfully elected incumbent Candidate from taking office.

The Court further notes that there appeared to be a general understanding that all three Tribal Council Members running for reelection should not vote on other election-related issues before Tribal Council. This is evident in the comments of Chairperson Stuck at the April 24, 2021 Annual Meeting of Tribal Citizens. When discussing the vote on whether to release the Report on the independent investigation of the Election Board to Tribal Citizens, Chairman Stuck stated the following:

Comment by Chairman Stuck:

“Yeah. Right now, with the resolution as it stands -- and this is available to the public so this is not closed session item -- resolution number 04-20-21-01 is a public record with the vote count. **You have one yes, one no, three abstentions. There was, of course, three conflicts of interest on that.** And it’s up to Tribal Council to – if they want, they can bring it back for action again, but, again, you can do a special meeting. Special meetings require, one, either the Tribal Council

chair can bring back the topic, or two, members of council can bring it back. So it can be brought back to the table for future action.” (*Election Board Decision – Election Challenge 2021-A* at 6; Emphasis added).

The comment that preceded Chairman Stuck’s comments above demonstrate a general understanding about Tribal Citizens expectation that Tribal Council Members running for reelection would abstain when voting on election-related resolutions and issues:

The last comment is from Kaitlyn Perry in Galesburg, Michigan:

“With the majority of Tribal Council unable to vote on the disclosure of the resolution and the reports from the April 20th special closed session meeting, once the voting is completed, can that be readdressed to meet the quorum?” (*Election Board Decision – Election Challenge 2021-A* at 5-6).

The comments of Chairman Stuck and Tribal Citizen Kaitlyn Perry above both acknowledge that there is a conflict of interest in a Member of Tribal Council voting on an action directly related to the Election Board and process, here the release of a Report, and the expectation that a Member of Tribal Council running for reelection would not vote on an issue directly related to the election. With the action in question voting on whether to appeal an Election Board decision that directly impacts your status as a Tribal Council Member by setting aside the election where you received a sufficient number of votes to retain your seat on Tribal Council is, without question, a greater conflict of interest than the release of a Report.

#### **ANALYSIS – JUDICIAL REVIEW OF ELECTION BOARD DECISION**

The NHBP Election Code addresses challenges to an Election in Article IX § 3.1-28:

§ 3.1-28. Challenge procedure.

- A. An election challenge is a dispute that directly challenges the integrity or accuracy of the outcome of an election, based on a violation of this code or tribal law, and seeks a new election.
- B. No election challenge may be brought over an Election Board determination to grant or deny a certificate of candidacy.
- C. Any eligible voter may file an election challenge and seek a new election.
- D. The challenge must be presented to the Band's Election Board within fourteen (14) calendar days following election day.
- E. In all cases, the challenger shall have the burden of proving, by clear and convincing evidence, that:
  - (1) The challenged conduct violates one or more provisions of this code or tribal law; and
  - (2) That violation has affected the fairness and integrity of the election process to such an extent that it calls into question the outcome of the election.
- F. The Election Board shall provide a response to the election challenge within fourteen (14) calendar days of receiving the challenge. If the Election Board

reasonably believes the election challenge may have merit, the Board shall schedule and conduct a hearing on the election challenge.

- G. The Election Board has the authority to investigate any challenge presented to it, including by reviewing relevant evidence and taking testimony. The Election Board shall not make assumptions or decisions based on hearsay alone.
- H. All hearings shall be on the record and shall be promptly transcribed by an official reporter.

Jeff TenBrink, an eligible voter and Candidate, filed a challenge with request for a new Election based on several allegations within fourteen days (14 days) of the 2021 Election. The Election Board fulfilled its duties in Article XV § 3.1-28 (F) by issuing a written notice within fourteen days (14 days) of receiving Candidate TenBrink's challenge, that detailed the allegations in the challenge, discussed and dismissed allegations it found had no merit, identified the allegations that the Election Board reasonably believed may have merit, and provided the details for the Hearing. In addition to informing Tribal Citizens generally, the Election Board sent notice of these details to all Candidates.

The Election Board issued a written decision on May 31, 2021 that detailed the procedural information of the challenge. The Election Board identified and analyzed Chairman Stuck's comments detailed earlier in this *Opinion* as follows:

The Election Code contains a broad definition of "campaigning" under Section 3.1-4., which includes "all other activities which may reasonably be considered as intending to persuade voters." Chairman Stuck's comments were focused on the Election Board as opposed to particular candidates; however, as evidenced by the election-related comments submitted by Tribal Members and read at the annual membership meeting, references and inferences were made based on Chairman Stuck's comments at the April 22nd meeting, including the investigative report commented on by Chairman Stuck, allegations of misconduct and biases of the Election Board favoring certain candidates and against other candidates, and concerns about the proper functioning and integrity of the Election Board and the election process. Upon review of the evidence as a whole, including the timing of the comments, which were just two days before the election, the Board finds that Chairman Stuck's comments at the April 22nd Tribal Council business meeting could be viewed as intending to persuade voters and was therefore prohibited campaigning. (*Election Board Decision – Election Challenge 2021-A* at 9).

In its decision, the Election Board noted that it did not rule on objections of Petitioners Rios and Smit to Council Member Homer Mandoka, the sole witness to testify at the Hearing, but noted that "the Board did not consider the statements objected to by legal counsel, Attorney Davis, in this decision". (*Election Board Decision – Election Challenge 2021-A* at 9). However, the Election Board did take into consideration his testimony in other regards, especially as it related to disclosure of information from Closed Sessions of Tribal Council, stating that "[i]n the Board's view, the election-related comments made by Chairman Stuck at the April 22nd Tribal Council business meeting were violative of these closed session requirements and impacted the fairness

and integrity of the April 24th Tribal Council election”. (*Election Board Decision – Election Challenge 2021-A* at 9-10).

These discussions contributed to the totality of the circumstances that the Election Board considered as cited earlier in this *Opinion*. Another significant factor was the overall mandate in the Guiding Principles of the NHBP Constitution and the Purpose of the NHBP Election Code:

While the Board recognizes that a variety of factors can influence an election, the importance of NHBP traditional values and the Seven Grandfather Teachings guide us as a Native Nation to uphold these ideals to the best of our ability and not to undermine the purpose of the Election Code. As stated under the purpose of the Election Code, the Board has duties to conduct elections in harmony with MnoBmadezewen, guided by the Seven Grandfather Teachings, and to meet the requirements of NHBP law and due process for Tribal citizens. In striving to achieve both of these and viewing the evidence as a whole, the Board determines that, on balance, the election challenge should be upheld. Under the Election Code, if an election challenge is upheld, the only remedy provided is a reelection that takes place within sixty (60) days of the Board’s decision. (*Election Board Decision – Election Challenge 2021-A* at 11)

The Court includes a multitude of citations purposefully in this Opinion as they relate to the analysis this Court must conduct pursuant to the standard of review mandated in the NHBP Election Code for judicial review of an Election Board Decision. An appeal of an Election Board Decision may be filed with the Tribal Court pursuant to Article XV § 3.1-41:

§ 3.1-41. Expedited review by NHBP Court.

- A. Any aggrieved candidate or eligible voter may seek expedited judicial review of any final decision of the Election Board by filing a petition for review in NHBP Court.
- B. The petition for review shall be filed within ten (10) calendar days of the final decision of the Election Board.
- C. The NHBP Court shall hold unlawful and set aside any Election Board final decision that the Court finds, based on clear and convincing evidence, to be:
  - (1) Arbitrary, capricious, or an abuse of discretion;
  - (2) Contrary to a constitutional or statutory right or privilege;
  - (3) Without observance of procedure required by law;
  - (4) Unsupported by substantial evidence; or
  - (5) Lacking in fundamental fairness.
- D. The petitioner shall bear the burden of showing that the final decision must be set aside.

Petitioners Rios and Smit argue that no evidence was presented by Candidate TenBrink and that the Election Board did not cite any evidence.

Within the totality of the circumstances, the Election Board considered several factors. The totality of the circumstances analysis that is cited earlier in this *Opinion*, along with the citations



above from the Election Board Decision, demonstrate clear reasoning as to what the Election Board considered, as well as the weight it gave various these considerations. Specifically, the Election Board engaged in a detailed analysis of why it found that Chairman Stuck's comments constituted campaigning, as well as violated the Bylaws of Tribal Council, as a consideration in finding that "the challenged conduct violates one or more provisions of this code or tribal law" to satisfy the first prong of § 3.1-28 (E) (1). The Election Board also considered the timing of the comments made in relation to the 2021 Election. Further, the Election Board cited proof of the impact of the comments that Chairman Stuck made at the April 22, 2021 Tribal Council Business Meeting stating, "as evidenced by the election-related comments submitted by Tribal Members and read at the annual membership meeting, references and inferences were made based on Chairman Stuck's comments at the April 22nd meeting, including the investigative report commented on by Chairman Stuck, allegations of misconduct and biases of the Election Board favoring certain candidates and against other candidates, and concerns about the proper functioning and integrity of the Election Board and the election process". (*Election Board Decision – Election Challenge 2021-A* at 9). These comments from Tribal Citizens, also cited earlier in this *Opinion*, provide clear and convincing evidence that Chairman Stuck's comments did affect Citizens' views of the 2021 Election.

The Court notes that incumbent Candidate Chivis provided detailed information on the actual votes cast with those numbers revealing that, had the 2021 Tribal Council Election been based on absentee ballots only, Candidate TenBrink would have been one of the top three Candidates who received the highest number of votes. The breakdown of the count lends support to the argument that Chairman's Stuck comments (and conduct of designating incumbent Candidate to read comments submitted by Citizens that were critical of the Election Board) impacted the Election. While the Election Board did not cite this breakdown specifically, it referenced the results generally, including the number of votes cast in-person. The Court agrees with the Petitioners that the number of persons voting for the first time lacks significance without evidence, such as testimony on the reasons for voting for the first time, especially as it relates to whether it was the first time the individual was of age to vote and whether the comments by Chairman Stuck caused the individual to vote.

The fact that Candidate TenBrink would have received the number of votes required to win one of the three open seats for Tribal Council in the 2021 Election without the in-person votes cast does not have significance in relation to the comments made by Chairman Stuck in-and-of-itself. There must be evidence presented connecting Chairman Stuck's comments to the votes cast especially with NHBP being a Native Nation with a relatively small voting population. The relatively small voting population means there are likely to be Elections in the future where there is a small margin between those who won versus lost the Election. Small margins alone, therefore, are not proof of influence in an Election. Further, the Election Board followed proper procedures to conduct a recount and verify the results in the 2021 Election.

Being a relatively small Tribe also means that it is likely for it to be generally known who a visible person within the Tribe supports in an Election. This is the underlying allegation in this case. While it is likely that Tribal Citizens know who Chairman Stuck supports, evidence must still be presented to prove the allegation Chairman Stuck was campaigning for a specific candidate or candidates in the public statements he made at the April 22, 2021 and April 24, 2021 Meetings in order for Candidate TenBrink's challenge to be supported by clear and convincing evidence. This does not mean that the public person must state the Candidate's name; other evidence, such

as testimony of individuals who heard the comments and interpreted them as supporting a specific Candidate and why, especially if it influenced their vote, could potentially help to meet the burden of clear and convincing evidence. In the present case, however, no such evidence was presented.

The Court notes that, from the questions asked at the Election Board Hearing, it appears that Candidate TenBrink planned to present evidence by testimony of ways that Chairman Stuck has allegedly supported two of the incumbent Candidates. These attempts were objected to by Petitioners Rios and Smit as going outside the scope of the Hearing. One specific fact that these Petitioners objected to was testimony on Chairman Stuck having Secretary and incumbent Candidate Nancy Smit read the comments from Tribal Citizens; comments that were highly critical of the Election Board. It appears to this Court that the Election Board disregarded this factor based on the objections of the Petitioners. This Court disagrees that this fact was outside the scope of the Hearing as it could have provided evidence of whether Chairman Stuck was campaigning. Like much of the analysis, however, this is speculation with the issue remaining that the Election Code requires the challenge to be proven by presenting evidence and arguments that meet the clear and convincing burden of proof standard.

It is within the duties of the law that this Court must review the *Election Board Decision – Election Challenge 2021-A* to determine if it was arbitrary, capricious, or an abuse of discretion; contrary to a constitutional or statutory right or privilege; without observance of procedure required by law; unsupported by substantial evidence; or lacking in fundamental fairness.

The Court engaged in this lengthy analysis for several reasons, beginning with explicitly discussing the considerations of the Election Board in this case to make clear what does and does not constitute evidence to meet the clear and convincing burden of proof. To be clear, the clear and convincing standard is the highest burden of proof standard for civil cases. This Court finds the standard in Michigan law, as cited by Petitioners Rios and Smit, helpful in explaining this standard:

Clear and convincing evidence is “the most demanding standard applied in civil cases.” *In re Martin*, 450 Mich 204, 227; 538 ND 399, 410 (1995). Evidence is clear and convincing when it “produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” *Id.* (citation omitted). Evidence “may be uncontroverted, and yet not be clear and convincing ... Conversely, evidence may be clear and convincing despite the fact that it has been contradicted.” *Id.* (internal quotation marks and citation omitted) (Petitioners Rios and Smit Brief at 7).

Challenger TenBrink alleged that the conduct and statements made at the April 22, 2021 Tribal Council Business Meeting and April 24, 2021 Annual Meeting of Tribal Citizens constituted improper campaigning for incumbent Candidates Rios and Smit. Challenger TenBrink did not present evidence that demonstrated that any Citizen who voted in-person did so because of Chairman Stuck’s comments or that any Citizen who voted in-person voted for incumbent Candidate Rios and/or Candidate Smit because of the comments. Although the actual tabulation of votes shows that Challenger TenBrink won on the absentee ballots alone, thus the in-person votes directly related to his loss, he did not provide any evidence to support his allegation that the in-person votes were a direct result of Chairman Stuck’s comments or the comments of Tribal

Citizens at the April 22, 2021 and April 24, 2021 Meetings, thus did not meet the burden of presenting clear and convincing evidence for the 2021 Election results to be set aside and a new Election required.

However, as noted in the NHBP Election Board Response & Brief, the Election Board did not find that Chairman Stuck's were campaigning for incumbent Candidates Rios and Smit, but rather, against the Election Board and the Election process:

As stated in its decision below, the Election Board received comments from Tribal Citizens which indicated that Petitioner Stuck's comments did indeed have an impact on the fairness and integrity of the election "to such an extent that it calls into question the outcome of the election." See Board Decision, at 6. (NHBP Election Board at 15).

The Court must now review *Election Board Decision – Election Challenge 2021-A* to determine if this Decision was: arbitrary, capricious, or an abuse of discretion; contrary to a constitutional or statutory right or privilege; without observance of procedure required by law; unsupported by substantial evidence; or lacking in fundamental fairness. The burden for the Election Board Decision remains that there must be clear and convincing evidence to set aside the 2021 Election Results.

Review of Chairman Stuck's comments in this light is different than the allegation that he was campaigning for a specific Candidate or Candidates. The Election Board is essentially finding that Chairman Stuck was campaigning for the purpose of putting the integrity of the Election into question and that he was so successful in those efforts, that it calls into question the outcome of the election. There is support for this finding by the Election Board as the language used by Chairman Stuck can be viewed as critical of the Election: "blew the whistle on the election board on some items"; "I want that to be stated for the record so our tribal membership knows that there was an investigation initiated back in 2020 pertaining to the conduct of election board members"; "Since the initiation of that investigation, we had three more whistleblowers come forward... I just want to say that we're not getting the full story as far as conduct of the election board through reports that Jared provides"; and then the following comment, along with additional praise that he gave to comments criticizing the Election Board:

"The resolution that we addressed in closed session is resolution number 04-20-21-01, authorizing the release of the closed session investigation and the exhibits of election board investigation. There was one vote yes, which I voted yes on, one no, and three abstentions. So this investigation will not be released to the tribal membership. Certain questions that have come up could have been answered by the releasing of this information to our tribal membership and truths. And the courage that it took to these four tribal members, one being an elder, is in vain right now because this investigation and the report is being buried by this action of the one no. And tribal membership will not see this report, will not be informed of what's going on and what's really going on or able to develop their own opinion on it."

"So I just wanted to let it be known for the record, you know, we always encourage people to tell the truth and be truthful and seek the truth, but how can you do that when the truth's not provided? So I want that to be stated for the record." (Above Four Paragraphs at 2-3).

The number of people who voted could be interpreted as supporting the allegation that Citizens voted because of Chairman Stuck's comments but only in theory as no direct evidence was presented at the Hearing. Such evidence could have included testimony of Tribal Citizens as to how they interpreted the comments critical of the Election Board and testimony of Citizens who voted for or against a specific Candidate because of how they interpreted the comments at the April 22, 2021 and April 24, 2021 Meetings.

Even with finding that *Election Board Decision – Election Challenge 2021-A* did not meet the burden of proof to sustain the challenge by Candidate TenBrink, a specific reason for conducting this lengthy analysis is to demonstrate that the Election Board's decision was not arbitrary or capricious. It did cite evidence and analyze that evidence in relation to how the statements at the April 22, 2021 and April 24, 2021 Meetings put the integrity of the 2021 Election into question. However, that was not the challenge filed by Candidate TenBrink nor the issue articulated in the Notice sent to the Candidates, and Tribal Citizens, as the purpose of the May 17, 2021 Election Board Hearing. As a result, the Candidates were denied due process by being denied the opportunity to address the issue of whether the comments made at the April 22, 2021 and April 24, 2021 Meetings that were critical of the Election Board "affected the fairness and integrity of the election process and rendered the results of the election uncertain", as well as present evidence in support of their arguments.

Also problematic to the due process rights of Candidates is that the Election Board took into consideration statements that were not presented at the Hearing: that "[a] few Election Board Members received verbal feedback from some Tribal Members that the election-related comments made on April 22nd and April 24th were confusing and upsetting" and that it "is also aware of social media posts by Tribal Members after the April 22nd Tribal Council business meeting urging Tribal Members to watch the April 22nd meeting and to go vote". (*Election Board Decision – Election Challenge 2021-A* at 6). Unlike the historical information discussed earlier, considering statements not presented at the Hearing means that the person providing the statements is not known, the statements were not sworn testimony, and there was no opportunity for the Candidates to question the information being presented for consideration by the Election Board. In these circumstances, there is also the issue of not even being advised of the number of Citizens who made comments, their identity or the content of the statements, other than being characterized as finding the statements at the April 22, 2021 and April 24, 2021 Meetings "upsetting" and "confusing". The social media posts referenced are problematic as they were not presented as evidence at the Hearing nor the content even revealed in the Election Board Decision.

Without the opportunity to make arguments and present evidence on the issues ultimately considered by the Election Board, as well as challenge all of the evidence considered by the Election Board, the Candidates – including Candidate TenBrink – were denied due process with the *Election Board Decision – Election Challenge 2021-A* unsupported by substantial evidence, thus lacking in fundamental fairness.

The final reason that this Court has identified for the Election Board setting aside the 2021 Election Results is the Election Board finding that the conduct and comments at the April 22, 2021 and April 24, 2021 Meetings violated the traditional values of this Native Nation to the extent that a new Election is required.

As has been cited many times by this Court, the Guiding Principles in Article II § 2 (b) of the NHBP Constitution, the supreme law of this federally recognized American Indian Tribe, provide the sacred ideals and duties for this Native Nation:

- (b) Guiding Principles. In exercising the jurisdiction and sovereign powers of the Band, the Tribal Council and other institutions of the Band's government shall be guided by the following principles:
  - 1. Promote the preservation and revitalization of Bode'wadmimen and Bode'wadmi culture;
  - 2. Promote sustainable development strategies and practices to ensure the health and balance of the next seven generations of Tribal Members;
  - 3. Promote the health, educational and economic interests of all Tribal Members, especially our elders and children;
  - 4. Promote efforts that ensure the perpetual preservation and revitalization of the Band's sovereignty and self-determination; and
  - 5. Promote open and transparent governance by providing Tribal Members, and where appropriate, other persons subject to Tribal jurisdiction, with notice and opportunity to comment on financial, policy or legislative business under consideration.

As has been cited in previous appeals of Election Board Decisions, the Guiding Principles of the NHBP Constitution are reflected in the purpose of the NHBP Election Code as stated in Article I § 3.1-2:

- A. The purpose of this code is to ensure that NHBP elections are:
  - 1) Consistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings; and
  - 2) Conducted in accord with NHBP constitutional requirements.
- B. Unless otherwise specified, all NHBP elections are subject to the same rules as Tribal Council elections.
- C. In carrying out its constitutional authority to govern NHBP elections, the Election Board shall be guided by the Seven Grandfather Teachings:
  - 1) Wisdom.
  - 2) Love.
  - 3) Respect.
  - 4) Bravery.
  - 5) Honesty.
  - 6) Humility.
  - 7) Truth.

In this instance, the Court can only stress the importance of every Citizen and every Government action being conducted within the Guiding Principles of the NHBP Constitution with the reminder that this Nation has committed to every Citizen and every Government entity having the sacred duty keep the Seven Grandfathers Teachings as the foundation of the actions they take and statements they make. The Court finds it significant that every person or entity that has been heard directly through written documents or indirectly through the comments made and read at the April 22, 2021 and April 24, 2021 Meetings have professed the same ideal: that the “other side” is not honoring the traditional values of NHBP and the Seven Grandfathers Teachings.

The Court can review criminal conduct and easily identify how the offender is not following the Seven Grandfathers Teachings: a person who abuses their partner, child, parent, or vulnerable person, for example, is not demonstrating Respect. In the Court’s experience, such a person is also not demonstrating Love, Bravery, or Humility, although such findings are specific to the individual. However, differences in the interpretation of those traditional values, along with what living the Seven Grandfathers Teachings means as individual Citizens and as individuals with formal responsibilities to the Tribal Government and Citizens of NHBP, is a far different endeavor that has no guidelines within the law.

It is clear to this Court that each person and entity genuinely believes that “the other side” is not acting in accordance with the Seven Grandfathers Teachings and other traditional values of this Native Nation. This may be even more true because the conduct and statements involved relate to the Election process; a process that often serves to divide rather than unify. To “win”, people become entrenched in their own views while openly opposing the views of others to forward their ideals, candidates, and issues. The Election process at NHBP appears to be heading down the path of this opposition including the accusation of not acting in accordance with the traditional values of this Nation and the Seven Grandfathers Teachings; an accusation of severe consequence for which there is no equivalent in mainstream society. For fear that relations will deteriorate to that of mainstream society, the Court notes the guidance shared by many Elders from numerous Tribes over the years, that every person should begin with examining their own conduct and the words they have shared with others to determine how well they are honoring the traditional values of NHBP before evaluating others to help them approach those with opposing views in the spirit of the Seven Grandfather Teachings so that Tribal Citizens promote healing and unification to ensure that NHBP is deeply rooted in these values in the Seventh Generation to come.

#### **CONCLUSION:**

The NHBP Election Board must provide notice of all issues being considered at a hearing on an Election Challenge so that Candidates wishing to participate may present relevant evidence, including testimony, and arguments to support their claims.

The Candidate challenging the 2021 Election failed to provide clear and convincing evidence to support his allegation that comments made by Chairman Stuck and Tribal Citizens criticizing the Election Board at the April 22, 2021 Tribal Council Business Meeting and April 24, 2021 Annual Meeting of Tribal Citizens constituted campaigning for two of the incumbent Candidates.

The Election Board’s finding that Chairman Stuck’s comments constituted campaigning against the integrity of the Election process to the extent that it put the outcome of the Election into question violated the due process rights of the Candidates. This issue was beyond the scope

of the challenge and, thus, not in the Notice of the Election Hearing. The Election Board also violated the due process rights of Candidates and Citizens by considering evidence not presented at the Hearing in the form of Tribal Citizen comments made to Election Board Members and social media posts. With not being presented at the Hearing, the Election Board considered statements that were not sworn testimony with the Candidates denied the opportunity to question the witnesses, challenge the statements, present their own evidence, or even known the full content of the information considered in violation of their due process rights. For the same reasons, the Election Board considering social media posts without Candidates having the opportunity to challenge the content of those posts was problematic in relation to due process. With being denied the opportunity to challenge the evidence considered by the Election Board, the Election Board Decision was not supported by substantial evidence, thus lacking in fundamental fairness.

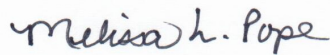
As people are still suffering from the COVID-19 Pandemic at the time this *Opinion* was issued, the Court recognizes and thanks NHBP Tribal Government Personnel for their ongoing commitment to caring for Tribal Citizens, the community, and Michigan residents, as well as recognizes and honors the many sacrifices and contributions of NHBP Tribal Citizens to caring for others throughout this Pandemic.

This Court continues to honor all those who have walked on since this Pandemic began and offers prayers for those who have endured the loss of a loved one and the immeasurable hardships with trying to honor the lives of their loved ones according to their sacred traditions while also having to adhere to the limitations created by the Pandemic.

The Court shall continue to issue Administrative Orders, documents, processes, and safety protocols based on the most current knowledge of COVID-19 and its variants with the continuing its fundamental commitment to ensuring that no person is denied access to justice because they cannot afford the technology being used or live in an area where technology is limited. With the conditions of the Pandemic still regularly changing, COVID-19 Pandemic sections in Court documents may be identical, with or without quoting other Court documents, slightly different, or dramatically different depending on the circumstances of the Pandemic when the document is written. The Court will include information whenever possible to maintain historical documentation on the COVID-19 Pandemic while highlighting the impact of the Pandemic on day-to-day life, this Tribal Court, and this Native Nation. The Court offers prayers of strength and healing to all.

**IT IS HEREBY ORDERED:**

July 6, 2021  
Date



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Hon. Melissa L. Pope, Chief Judge

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