No. SC-CV-57-14
No. SC-CV-58-14

SUPREME COURT OF THE NAVAJO NATION

Dale Tsosie,
Petitioner-Appellant,

v.

Christopher Deschene,
Real Party In Interest,

Hank Whitethorne,
Petitioner-Appellant,

v.

Christopher Deschene,
Real Party In Interest,

BRIEF OF CHRIS DESCHENE

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SEPTEMBER 26, 2014

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STATEMENT OF THE ISSUES PRESENTED

Case No. SC-CV-57-14 presents the following two issues:

(1) Sections 24(A) and 341(A) of the Navajo Election Code, 11 N.N.C. §§ 1 *et seq.*, require that a candidate for the same position file his or her challenge to the Navajo Election Administration's (the "NEA's") certification of another candidate as being qualified with the Office of Hearings and Appeals (the "OHA") within 10 days of the NEA's certification. On September 5, 2014, Messrs. Dale Tsosie and Hank Whitethorne (collectively, "Petitioners," and each individually a "Petitioner") filed their respective Statements of Grievance (collectively, the "Grievances," with each a "Grievance") with the OHA to challenge the NEA's certification of Mr. Chris Deschene on April 25, 2014. Accordingly, the first issue presented by the Grievances is whether the OHA's dismissal was appropriate pursuant to 11 N.N.C. §§24(A) and 341(A).

(2) To be sufficient on its face, a Statement of Grievance filed pursuant to 11 N.N.C. § 341(A) must state with specificity what election law is alleged to have been violated, contain sufficient factual allegations to support the asserted violation and provide sufficient evidence to demonstrate—on just the face of the Statement of Grievance and the supporting materials attached thereto—that the allegations made in the Statement of Grievance were otherwise proven by clear and convincing evidence. *Morris v. Navajo Election Admin.*, 7 Nav. R. 75, 77 (Nav. Sup. Ct. 1993). Petitioners filed Grievances that vaguely stated the election laws alleged to have been violated, provided minimal factual allegations and had unsworn and unverified supporting materials attached thereto, and were dated September 5, 2014. Accordingly, the second issue is whether, on the faces of the Grievances and their attachments, Petitioners otherwise proved by clear and convincing evidence that election laws had been violated to warrant hearings being conducted by the OHA concerning whether to overturn the results of the primary election.

STATEMENT OF THE REAL PARTY IN INTEREST

Despite Petitioners' having named Mr. Deschene as the Respondent-Appellee in the Opening Brief of Case Nos. SC-CV-57-14 and SC-CV-58-14, Mr. Deschene is not the proper party to be named the Respondent-Appellee in this consolidated action. Petitioners have requested relief from this Court that necessitates the OHA and the NEA,[1]

[1] Appellant's Br. 19 ("The Court should overturn the OHA . . . , should order that he be removed from the ballot and should order that the candidate who received the next highest votes in the primary election preceding the general election be placed as the new candidate . . . in the general election . . . ."); *see also In re the Navajo Nation Election Administration's Determination of Insufficiency*, No. SC-CV-24-09, slip op.

because such relief could only be secured and enforced against, as well as effectuated by the OHA and the NEA – rather than by Mr. Deschene. Thus, because—along with the rights of the Navajo electorate—Mr. Deschene's rights are implicated by this action, but the relief sought is not directly as against him, he is a Real Party in Interest to this action.[2]

STANDARDS OF REVIEW

Whether the OHA's dismissal of the Grievance was appropriate is a mixed question of fact and law. *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 321 (Nav. Sup. Ct. 1990); *see also* 26 Am. Jur. 2d §§ 432-436 (discussing standards of review in election contests). The standard of review for the OHA's dismissal of the Grievance is whether it is sustained by sufficient evidence on the record, 11 N.N.C. § 341(A)(4), or the OHA abused its discretion in summarily dismissing each Grievance for insufficiency (rather than conducting a hearing before determining dismissal was warranted). *Pioche v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 360, 364-65 (Nav. Sup. Ct. 1991); *see also* 26 Am. Jur. 2d §§ 434-435 (discussing clearly erroneous and abuse of discretion standards). To overturn an OHA dismissal without a hearing, an appellant must demonstrate to this Court that the allegations, factual assertions and

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at 4 (Nav. Sup. Ct. June 22, 2009) (discussing relief—there, a writ—as "appropriate when a lower court or tribunal over which we have appellate review 'abuses its discretion in such an egregious way that only immediate raction by the Court will remedy the damage done to a party'") (quoting *In the Matter of A.P.*, 8 Nav. R. 671, 678 (Nav. Sup. Ct. 2005)). Furthermore, Petitioner's request necessarily implicates the NEA. In essence, Petitioner has requested this Court to conclude that the NEA either failed to "review, verify and determine" that Mr. Deschene is qualified to be a candidate for President or that the NEA's determination was incorrect pursuant to 11 N.N.C. § 23(A).

[2] *E.g.*, 59 Am. Jur. 2d Parties § 8 (2014) (discussing proper parties); 67A C.J.S. § 2 (2014) (defining and classifying proper parties to an action); 26 Am. Jur. 2d § 381 (discussing election contest generally); *id.* at § 428 (discussing judgments in election contests and effects thereof); *see also Nelson v. Initiative Comm. to Reduce Navajo Nation Council*, No. SC-CV-03-10, slip op. at 4 (Nav. Sup. Ct. October 18, 2010) (holding Council was Real Party in Interest; relying on Nav. R. Civ. P. Rule 17(a)); Benjamin J. Conley, Note, *Will the Real Party in Interest Please Stand Up?: Applying the Capacity to Sue Rule in Diversity Cases*, 65 WASH. & LEE L. REV. 675, 686-89 (2008) (discussing rules for real party in interest and capacity in an action); Charles E. Clark and Robert M. Hutchins, *The Real Party in Interest*, 34. YALE L. J. 259, 260-63 (1925) (discussing classic rules for proper parties plaintiff (vis-à-vis proper parties defendant) in equity actions).

supporting materials for his or her Statement of Grievance to the OHA were proven by clear and convincing evidence on just the face of the initial pleading and supporting attachments submitted to the OHA. *Morris v. Navajo Election Admin.*, 7 Nav. R. 75, 77 (Nav. Sup. Ct. 1993). As with its predecessor statute, 11 N.T.C. § 321.B.4, "[t]he [current] statute [11 N.N.C. § 341(A)(4)] assumes . . . a legally correct decision." *Pioche*, 6 Nav. R. at 365. Only if the Court determines that the OHA abused its discretion in dismissing the Statement of Grievance for insufficiency on its face, will the matter be remanded to the OHA for a hearing of the allegations and factual assertions made within the four corners of the initial Statement of Grievance pursuant to 11 N.N.C. § 341(A)(2). 11 N.N.C. § 341(A)(4); *Secatero v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 385, 389-90 (Nav. Sup. Ct. 1991).

Moreover, because Petitioners are, in essence, requesting that this Court overturn the result of the primary election,[3] there is a presumption that the primary election results are valid and that the OHA's decision stands pursuant to Petitioners' having failed to prove the assertions of the Grievance by clear and convincing evidence. *See Chee v. Navajo Election Admin. and Navajo Bd. of Election Supervisors*, No. SC-CV-67-10, slip op. at 3 (Nav. Sup. Ct. December 28, 2010); *see also Pioche*, 6 Nav. R. at 365 ("The statute assumes . . . a legally correct decision"). The standard of review for the OHA's legal determinations that Mr. Deschene is qualified and eligible to be President of the Navajo Nation and that Petitioners' Grievances failed to satisfy the requirements of 11 N.N.C. §§ 24(A) and 341(A)(1) is *de novo*. *See, e.g., Nelson v. Initiative Comm. to*

[3] Appellant's Br. 19 ("The Court . . . should order that [Mr. Deschene] be removed from the ballot and should order that the candidate who received the next highest votes in the primary election preceding the general election be placed as the new candidate . . . in the general election . . . .").

Reduce Navajo Nation Council, No. SC-CV-03-10, slip op. at 6 (Nav. Sup. Ct. June 28, 2010) ("When 'addressing the legal interpretations of ... administrative bodies," this Court applies "a *de novo* standard of review' . . . Whether OHA appropriately dismissed Mr. Nelson's grievance is a question of law") (quoting *Begay v. Navajo Nation Election Admin.*, 8 Nav. R. 241, 250 (Nav. Sup. Ct 2002), with *Begay* citing *Morris v. Navajo Board of Election Supervisors*, 7 Nav. R. 75, 78 (Nav. Sup. Ct. 1993)).

STATEMENT OF THE CASE

Upon Mr. Deschene having received 9,831 votes and moving forward into the general election pursuant to 11 N.N.C. § 41(B), on September 5, 2014, Petitioners filed their Grievances with the OHA pursuant to 11 N.N.C. §§ 24(A) and 341(A)(1). Then on September 10, 2014, in accordance with 11 N.N.C §§ 24(A) and 341(A)(1), the OHA dismissed the Grievances for being beyond the 10 day limit for such challenges and insufficient on the faces of the filings. Moreover, the OHA issued written determinations that same day in accordance with 11 N.N.C. § 341(A)(3). Thereafter, Petitioner Tsosie appealed to this Court and filed his Opening Brief of Appellant with this Court on September 19, 2014. Petitioner Whitethorn also appealed and filed his Brief with this Court on September 21, 2014. On September 22, 2014, this Court issued its Order of Consolidation and Revision of Briefing Schedule. Accordingly, Mr. Deschene has filed a Motion for Dismissal of the Appeals and now files this Brief in Response.

STATEMENT OF FACTS

Chris Deschene is qualified to be the President of the Navajo Nation. He resides in the Navajo Nation and has for "at least three years prior to the time of [primary] election." 11 N.N.C. § 8(A)(1); 2 N.N.C. § 1004(B). He is neither a felon, a person who

has been convicted of any crime of moral turpitude, nor has he been indicted by a federal grand jury. 11 N.N.C. §§ 8(A)(6)-(7), (10). And although he has served his community of Lechee and the Navajo Nation's entities as an attorney, *id.* at § 8(A)(5), but for being President, he will not otherwise be employed by the Navajo Nation during his term, *id.* at § 8(A)(9), and will not "be in the permanent employment of the United States or any state or subdivision thereof; nor be an elected official of the United States or any state or subdivision thereof [during the general election or his term as President.]" *Id.* at § 8(A)(11).

Chris Deschene is Diné, and can "fluently speak and understand Navajo and read and write English," *id.* at §§ 8(A)(2), (4), as well as "a registered voter . . . ," *id.* at § 8(A)(2), who will be "at least 30 years of age at the time of general election." *Id.* at § 8(A)(3); 2 N.N.C. § 1004(A). In 2008, Chris Deschene was elected to the Arizona House of Representatives serving Legislative District 1 including 55 Navajo Nation Chapters in Arizona. There is no doubt, nor has any doubt ever been expressed that he has always maintained "unswerving loyalty to the Navajo Nation and [been] competent and capable of upholding the oath of office." 11 N.N.C. § 8(A)(8). Accordingly, on April 14, 2014, Mr. Deschene properly filed his application to become a candidate for President of the Navajo Nation. The NEA appropriately certified Mr. Deschene to be qualified and eligible to run for President on April 25, 2014 pursuant to 11 N.N.C. § 23(A). Pet'r's App. A at 1. The NEA certified Mr. Deschene as a candidate for President after having "review[ed], verif[ied] and determine[d], on the face of [his] candidate application, [that Mr. Deschene is] qualif[ied] [to be the President of the Navajo Nation.]" 11 N.N.C. § 23(A).

But Mr. Deschene is more than just basically qualified to become President of the Navajo Nation. He is an engineer, who obtained his bachelor's of science from the United States Naval Academy, which is amongst the elite institutions of higher learning. Upon graduation, he then became a United States Marine officer. He served honorably, and obtained the rank of Major. But Mr. Deschene was not complacent, and went on with his education to obtain not just a master's of science in mechanical engineering, but also a juris doctorate or law degree. He is an attorney licensed to practice in the Navajo Nation and the State of Arizona. It has been said that Chris Deschene is the most accomplished person to compete to become the President of the Navajo Nation.[4]

Although "other applicants for the same position . . ."[5] could have otherwise challenged his certification until the close of business on Friday, April 4, 2014,[6] no one challenged his qualifications or eligibility to be President of the Navajo Nation. Nor did any candidate for President—nor anyone at all for that matter—put forth a challenge to Mr. Deschene's qualifications or credibility to be President during the numerous candidate forums and extraordinarily transparent primary campaign he conducted to become President of the Navajo Nation. In fact, it was not until over five months (154 days) after the cut-off for challenging his certification that Petitioner filed his Grievance with the OHA. Pet'r's App. B at 1.

[4] Dr. Karletta Chief, Navajo Times, February 20, 2014 (stating "We need a leader who is grounded in Navajo culture, highly educated, well rounded with diverse background a, and is a problem solver. Only one name rises to the top of my list when I think integrity, education, honor and leadership: Chris Deschene").

[5] 11 N.N.C. § 24(A).

[6] *Id.*

Petitioners filed their Grievances on September 5, 2014, despite the unambiguous "period of 10 days during which sworn challenges"[7] could have been filed with the OHA, and despite having frequently been around and spoken with Mr. Deschene during the several months of the primary campaign. And even then, after having sat on their challenges for all those months, Petitioners' Grievances were hodge-podges of false statements with few materials attached in support thereof, with such allegations and materials stating Petitioners' assumptions and uninformed beliefs rather than legally sufficient evidence to suggest that a violation of any election had occurred. For instance, in support of his Grievance, Petitioner Tsosie provided a "petition" putatively containing the signatures of voters, all of whom, coincidentally, all support either Joe Shirley, Jr., Russell Begay or Donald Benally – the other candidates who finished in the top four of the primary election and the other candidate in the general election for President of the Navajo Nation. On September 10, 2014, because Petitioners did not provide any real evidence within or attached to their Grievances to meet their burden of proof by clear and convincing evidence, the OHA dismissed the Grievances for being insufficient on the face of the filings.

The OHA's dismissals of the Grievances for insufficiency on the face of the documents were due to the immediately present facts that the Grievances were filed on September 5, 2014, despite the NEA having certified Mr. Deschene as a candidate on April 25, 2014. But Petitioners did not accept the OHA's dismissals, and have appealed to this Court to overrule the OHA, arguing that their Grievances were not insufficient on the face of the documents, and therefore, should not have been dismissed without a

[7] 11 N.N.C. § 24(A).

hearing. On September 22, 2014, this Court issued its Order of Consolidation and Revision of Briefing Schedule. Accordingly, Mr. Deschene has filed a Motion for Dismissal of the Appeals and now files this Brief in Response to the Opening Briefs.

ARGUMENT

The OHA appropriately dismissed Petitioners' Grievances in Case Nos. OHA-EC-005-14 and OHA-EC-007-14, and this Court affirming the dismissals in the consolidated appeals Case Nos. SC-CV-57-14 and SC-CV-58-14 is appropriate. Mr. Deschene can "fluently speak and understand Navajo" (as well as "read and write English") for purposes of 11 N.N.C. § 8(A)(4), and he meets all of the other requirements to become President of the Navajo Nation. Although untimely filed and insufficient on their faces, Petitioners' Grievances were not brought because Mr. Deschene does not "fluently speak and understand Navajo . . . ." 11 N.N.C. § 8(A)(4). Instead, Petitioners file their Grievances because Mr. Deschene does not speak Navajo fluently or smoothly enough for their subjective tastes and standards.

However, neither of Petitioners Tsosie or Whitethorne is the arbiter of whether Mr. Deschene speaks Navajo fluently or smoothly enough to be President of the Navajo Nation. Instead, it is the Navajo People who are the arbiters of whether Mr. Deschene speaks Navajo well enough for their liking. And in the primary election, 9,831 Navajo voters decided that Mr. Deschene fluently speaks and understands Navajo well enough to receive their votes to become President of the Navajo Nation.

To grant Petitioners' requests and disqualify Mr. Deschene as a candidate in the general election to become President would abridge both his right to participate in his government and the rights of the Navajo People to choose their leaders. It would be particularly egregious here, because it would nullify the choices made by each of the Navajo voters for Mr. Deschene. Furthermore, it would occur pursuant to one criterion among several criteria, which is perhaps the most vague and ambiguous of the criteria set forth within 11 N.N.C. § 8(A). Accordingly, affirming the OHA's determinations is also otherwise appropriate here, because 11 N.N.C. § 8(A)(4) is void for vagueness and—as used in the Grievances—would conflict with Mr. Deschene's fundamental right to participate in his government and the fundamental rights of the Navajo People to choose their leaders.

The OHA's dismissals of Case Nos. OHA-EC-005-14 and OHA-EC-007-14 were appropriate pursuant to either of the 10-day standards set forth at 11 N.N.C. §§ 24(A) and 341(A)(1). If the appropriate standard is that set forth at 11 N.N.C. § 24(A), then Petitioners plainly failed to assert their Grievances on or before May 6, 2014 (10 days after the NEA's certification on April 25, 2014).

Even if the appropriate standard is that set forth at 11 N.N.C. § 341(A)(1), then Petitioners likewise failed to assert their Grievances within 10 days of the dates that each of them alleges he believed Mr. Deschene did not speak Navajo fluently enough for Petitioners' subjective likings. Pursuant to 11 N.N.C. § 341(A)(1), Petitioners had 10 days from the date that each of them believed a violation of the Navajo Election Code had occurred. In their Opening Briefs, Petitioners Whitethorne (Br. at 5) and Tsosie (Br. at 5-6) both state that they believed Mr. Deschene could not fluently speak Navajo in

May. However, the Grievances speak for themselves and are dated September 5, 2014. Regardless of which of the dates Petitioners state he believed Mr. Deschene did not fluently speak and understand Navajo, Petitioners failed to file any challenge within 10 days of all the dates asserted in their Opening Briefs. Accordingly, whether pursuant to either or both of 11 N.N.C. §§ 24(A) and 341(A)(1), the OHA's dismissals were appropriate and are appropriately affirmed by this Court in this consolidated action.

I. MR. DESCHENE IS QUALIFIED AND ELIGIBLE TO BECOME THE NEXT PRESIDENT OF THE NAVAJO NATION.

A. Mr. Deschene Satisfies all of the Requirements Set Forth in 11 N.N.C. § 8(A) and He Can "Fluently Speak and Understand Navajo and Read and Write English" in Accordance with 11 N.N.C. § 8(A)(4).

Chris Deschene is Diné[8] and he can "fluently speak and understand Navajo . . . ." 11 N.N.C. § 8(A)(4). Because he satisfies this and all of the other criteria set forth within 11 N.N.C. § 8(A),[9] he properly filed his candidate application with the NEA pursuant to 11 N.N.C. § 21, and in accordance with 11 N.N.C. § 23(A), was appropriately certified on April 25, 2014.

As he had before being certified, Mr. Deschene demonstrated throughout the four months of the primary campaign for President of the Navajo Nation that he both understands and can speak Navajo. The primary campaign was perhaps as public a

[8] Chris Deschene is a full-blood Navajo with four distinct Navajo clans. Chris Deschene's parents are and were completely fluent in the delivery and conversation of Dine' Bizaad. From birth, Chris Deschene has been immersed, ingrained and raised with the native tongue of his Dine' elders under the teachings of his parents. As a young Navajo, Chris Deschene was raised on the Navajo Reservation and in the traditions of his father's Native American Church, his mother's corn pollen prayers, songs and ceremonies. At 43 years of age, Chris Deschene has sufficiently acquired the teachings and the basic communicative language skills to speak, read, write and understand Navajo.

[9] Including the hard and fast requirements, *e.g.*, be "at least 30 years of age . . . ," *id.* at § 8(A)(3) (he is 43), and the more vague criteria, *e.g.*, "[m]ust have served in an elected Navajo Nation office . . . or must have been employed within the Navajo Nation organization," *id.* at § 8(A)(5); *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 325-27 (Nav. Sup. Ct. 1990) (holding requirement void for vagueness and inconsistent with due process) (he has served as an attorney for Lechee Chapter and Diné Power Authority).

manner in which anyone can be presented and have his or her qualifications and eligibility to be President of the Navajo Nation questioned and tested. Mr. Deschene campaigned for four months across the Navajo Nation and in cities and towns in close proximity to the Navajo Nation.

He was tested, answered questions and spoke publicly every day. There is no shortage of media materials from the months of the primary election to validate that Mr. Deschene's qualifications to be President—*all of them, and on an almost constant basis*—were inspected and tested by the Navajo electorate to determine whether they would cast their votes for him. After the months of campaigning, speaking and answering questions at numerous candidate forums, community events and in Navajo voters' homes; 9,831 Navajo voters decided that Mr. Deschene fluently speaks and understands Navajo sufficiently to earn their votes and become a candidate in the general election for President pursuant to 11 N.N.C. § 41(B).

However, on September 5, 2014 – the tenth day after the end of the primary election, Petitioners file their Grievances in Case Nos. OHA-EC-005-14 and OHA-EC-007-14. They claimed Mr. Deschene did not fluently speak and understand Navajo during the primary campaign for purposes of 11 N.N.C. § 8(A)(4). They claimed to have (supposedly) known and believed this from May 2014 onward.

Although neither Petitioner could provide any sort of generally accepted standard to reliably determine whether one "fluently speaks and understands Navajo;" nonetheless, on September 5, 2014, they still made their claims that Mr. Deschene does not fluently speak and understand Navajo – in the face of Mr. Deschene's having publicly demonstrated otherwise in the preceding months.

Petitioners did not file their Grievances on the bases of any real evidence or generally accepted standards for what crosses the threshold of "fluency" for purposes of being a qualified candidate. The Grievances merely stated Petitioners' subjective opinions and provided unsupported assertions that others may agree with them.

From their lack of precision and evidence, it can naturally and reasonably be inferred that Petitioners filed their Grievances with the OHA for—among other reasons—Mr. Deschene's not speaking Navajo as fluently or smoothly as they might otherwise prefer. However, Petitioners are not the arbiters of whether Mr. Deschene's fluency in speaking and understanding Navajo passes muster for purposes of being a qualified candidate for President of the Navajo Nation. The NEA is the body empowered to make such a determination in the first instance pursuant to 11 N.N.C. § 23(A). Ultimately, it is the Navajo People who have the right and are empowered to choose their leaders.

B. Mr. Deschene Has the Has the Right and Interest to Participate in the Political Process by Running for Office and the Navajo People Have the Right to Choose Their Leaders.

As acknowledged by Navajo law, the fundamental rights of the Diné to participate in government and the political process have always been central to the Diné life and culture. As stated in 1 N.N.C. § 202:

> Dine bi beenahaz' aanii preserves, protects and enhances the following inherent rights, beliefs, practices and freedoms:
>
> A. The individual rights and freedoms of each Diné (from the beautiful child who will be born tonight to the dear elder who will pass on tonight from old age) as they are declared in these laws; and
>
> B. The collective rights and freedoms of the Diyin Nihookaa Diné as a distinct people as they are declared in these laws; and
>
> C. The fundamental values and principles of Diné Life Way as declared in these laws; and

D. Self-governance . . . ."

Id.; *see In the Matter of the Appeal of: Vern R. Lee*, slip op. at 5 ("under Diné bi beenahaź'áanii, Navajo candidates have a liberty interest to participate in the political process by running for office").[10]

Although "some regulation of . . . rights [is necessary for] the Navajo election system [to] function . . . , [t]his Court has stated that these rights are protected by requiring that restrictions on the rights must meet a reasonableness standard." *Id.* at 6 (citing *Rough Rock Comm'y Sch. Bd., Inc. v. Navajo Nation*, 7 Nav. R. 168, 172-73 (Nav. Sup Ct. 1995)). Prior to amendments to Titles I and VII of the Navajo Nation Code, standards that were reasonably ascertainable by the ordinary person determined whether a requirement was sufficiently defined to not otherwise be void for vagueness or inconsistency with the principles of Dine bi beenahaz' aanii. *See, e.g., Bennett v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 319, 327 (Nav. Sup. Ct. 1990) ("Statutes which confer rights grounded upon Navajo liberties must contain ascertainable standards. That is, they must sufficiently describe standards and requirements for the exercise of the right so that the ordinary person will know what they are and be able to satisfy them"). Upon the amendment of Titles I and VII, however, the:

> general rules of statutory construction changed with Council passage of Resolution Nos. CN--69-02 (November 13, 2002) (Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Dine) and C0-72- 03 (October 24, 2003) (Amending Title VII of the Code), which mandate that we interpret statutes consistent with Navajo Common Law. We have applied this mandate when the plain language of a statute

[10] *see also Begay v. Navajo Nation Election Admin.*,No. SC-CV- 27- 02, slip op. at 3 (Nav. Sup. Ct. July 31, 2002)("For purposes of due process of law under Navajo common law, the right to participate in the political process is considered a protected liberty right"); *Bennett v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 319, 325 (Nav. Sup. Ct. 1990) ("There is no property right to hold public office, although a candidate may have a due process right which arises out the Navajo Nation election law").

> does not cover a particular situation or is ambiguous, but have applied the plain language directly when it applies and clearly requires a certain outcome.

Tso v. Navajo Housing Authority, No. SC-CV-10-02, slip op. at 5-6 (Nav. Sup. Ct. August 26, 2004). However, when the rights of the Navajo People to choose their leaders are implicated in a matter (especially one in which they have Navajo voters have already made selections), the rights of the Navajo voters to make their own judgments are given paramount importance. *See, e.g., In the Matter of the Appeal of Vern Lee*, slip op. at 6, No. SC-CV-32-06 (Nav. Sup. Ct. August 11, 2006) ("The People can, and will, make that judgment . . . ."); *In re the Navajo Nation Election Administration's Determination of Insufficiency*, No. SC-CV-24-09, slip op. at 6-7 (Nav. Sup. Ct. June 22, 2009) (discussing and extending maximum importance to the rights of the Navajo People).

The Navajo People are the ultimate arbiters of whether, among the other qualifications he possesses and requirements his satisfies, Mr. Deschene speaks Navajo well enough for each of them to be qualified to serve as President of the Navajo Nation. *In the Matter of the Appeal of: Vern R. Lee*, slip op. at 6 n. 2; *see also In the Matter of the NEA's Determination of Insufficiency*, No. SC-CV-24-09, slip op. at 5-7 (discussing the fundamental rights of Navajos to express their views, participate in their government and determine the selection of their leaders).[11]

In the face of opinions such as those exhibited by Petitioners, the proper decision makers to determine whether Mr. Deschene is indeed capable of fluently speaking and

[11] To this point, Navajo law provides Petitioners with the same power vote for whomever they choose based upon their own determinations of who the best candidate in the general election is to be President of the Navajo Nation. *See, e.g., In the Matter of the Appeal of Vern Lee*, slip op. at 7 ("("If the People are concerned that candidates unfamiliar with Navajo life run in elections, they are free not to vote for that candidate").

understanding Navajo are the Navajo People who vote for President of the Navajo Nation. *See, e.g., In the Matter of the Appeal of: Vern R. Lee*, slip op. at 6 ("The candidate's ignorance of the Navajo experience will be immediately apparent when the candidate campaigns and discusses the issues with the People . . . The People can, and will, make that judgment"). On August 26, 2014, Navajo voters made their judgments and Mr. Deschene earned 9,813 of their endorsements to move forward into the general election for the next President of the Navajo Nation.

This Court has stated "every word is powerful, sacred, and never frivolous. Under this principle a contracting party cannot give their word in one section of a contract and take it back in the next. *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated School Dist. No. 22*, 8 Nav. R. 501, 505 (Nav. Sup. Ct. 2004). Likewise, "we have said that Navajo common law requires people to keep their word and honor their promises." *Benally v. Broken Hill Property Ltd.*, 8 Nav. R. 171, 176 (Nav. Sup. Ct. 2001). "Navajo understanding of the English words adopted in statutes may differ from the accepted Anglo understanding. ... we have applied federal interpretations but have augmented them with Navajo values, often providing broader rights than that provided in the equivalent federal provision." *Navajo Nation v. Rodriguez*, 8 Nav. R. 604, 614 (Nav. Sup. Ct. 2004).

Further, Petitioners allege only one legal claim – that 11 NNC § 24 is invalid. By correlation, Petitioners also allege the OHA erred by not disqualifying Mr. Deshene for his alleged admission he was not fluent in Navajo. This presumes that the OHA was duty bound to disqualify a candidate on their own motion by reaching back into time to disqualify Appellee based upon out of court statements that were never before the OHA.

These sections of the Code in 11 NNC § 24 do not give rise to a legal claim based upon an alleged error caused by a refusal to disqualify. More specifically, the allegation there was error is refuted by Petitioners' own admissions that no one else brought a challenge in the 10 day time period between April 25, 2014 and May 6, 2014. Petitioners are asking this Court to collapse all the challenge provisions into a newly proposed law that would give rise to 16 other candidates also bringing challenges—based upon Mr. Deschene's statements—and Petitioners' intimations that all such other candidates were also aware of what Petitioners have alleged at the inception of each of their campaigns, but about which they each did nothing either within 10 days of certification, while on the campaign trail, or, perhaps more critically, when they attended the multiple candidates' forums widely broadcast to the voting public and other listeners.

C. Petitioners Request Relief That Threatens the Rights and Freedoms of the Navajo Voters to Have Their Votes Considered and Mr. Deschene to Participate in the General Election Upon Having Been Selected by the Navajo Voters to Be Among the Two Candidates Left for President.

Mr. Deschene is more than just basically qualified to become President of the Navajo Nation. He is a Marine veteran, an engineer who obtained his bachelor's of science from the United States Naval Academy, and an attorney. He has served honorably and, thankfully, returned home safely; accomplished what his elders encouraged in the way of higher education, and has been honored by the determinations of 9,813 Navajo voters that he is worthy to continue as one of two candidates—out of the 17 who were in the primary election—for President from which the Navajo People will make their selection in November.

To grant Petitioners' requests and disqualify Mr. Deschene as a candidate in the general election would abridge both his right to participate in his government and the

rights of the Navajo People to choose their leaders. It would be particularly egregious here, because it would nullify the choices made by each of the Navajo voters here for Mr. Deschene to be considered for President of the Navajo Nation. Furthermore, it would occur pursuant to one criterion among several criteria, which is perhaps the most vague and ambiguous of those set forth within 11 N.N.C. § 8(A). Thus, because 11 N.N.C. § 8(A)(4) lacks reasonably ascertainable standards, this Court may otherwise conclude that it is unduly vague and ambiguous as part of affirming the OHA's dismissals.[12]

Accordingly, affirming the OHA's determinations is appropriate here, because it will protect and promote the rights of the Navajo People to participate in and guide their government. To otherwise grant Petitioners' requests would be contrary to this.

D. Petitioners' Appeal is Contrary to the Egalitarian Principle, or the Ability of the Navajo People, As a Whole, to Make Law.

Petitioners assert that Dine Bi Beehazaani (Natural Law) is somehow being manipulated. However, it is Petitioners who have attempted to manipulate Diné Fundamental law into a western legal sword to be used for personal gain. For example, Petitioners contend Mr. Deschene should be disqualified for making a false statement. However, the standard for determining whether a false statement has been made can be made by the Navajo People. The issue of what "fluency" means comes down to a standard or definition that does not exist in the text of the applicable law, and so it is the Navajo voters who are the proper arbiters of what the term means here.

[12] *See Begay*, No. SC-CV-27-02, slip op. at 9 (discussing concept that statute may be invalidated if vague); *Rough Rock Community School Bd., Inc.*, 7 Nav. R. at 173-175 (concluding provision requiring interest, experience and ability in educational management void for vagueness and pursuant to unreasonable restriction on Peoples' rights to seek election); *Howard v. Navajo Nation Bd. of Election Supervisors*, 6 Nav. R. 380, 382-83 (Nav. Sup. Ct. 1991) (Austin, J. concurring) (concluding provision disqualifying candidates for misdemeanors involving welfare of children void for vagueness); *Bennett v. Navajo Bd. of Election Supervisors*, 7 av. R. 3 19, 325 (Nav. Sup. Ct. 1990) (holding provision restricting Presidential and Vice-Presidential candidates to only those who served in elected tribal office or were otherwise directly employed by the Navajo Nation void for vagueness).

This Court has previously announced: "that if any ambiguities exist in an election statute, the presumption lies in favor of the candidate." *Begay*, No. SC-CV-27-02, slip op. at 9. This Court has also determined "[o]ne of the major differences between Western principles of adjudication and Navajo legal procedure as participatory democracy is that it is essentially egalitarian. Egalitarianism is the fundamental principle of participatory democracy. The egalitarian principle is the ability of the people as a whole to make law." *Judy v. White*, 8 Nav. R. 510, 530 (Nav. Sup. Ct. 2004) (quoting *Downey v. Bigman*, 7 Nv. R. 176, 177 (Nav. Sup. Ct. 1995)). Moreover,

> Through time, our traditional form of participatory democracy has given way to non-Navajo formality; this flexibility is necessary to accommodate the ever-changing face of Navajo governance and its attendant complexities. But the acceptance of formality does not circumscribe the absolute right of the Navajo citizen to complain about the manner in which he or she is governed. We have said before that participatory democracy does not come from the non-Navajo, and today we aver that it also does not come from the Council. It comes from a deeper, more profound system of governance: ***the Navajo People's traditional communal governance*** [emphasis added]. Whether governance occurred at a public meeting place, a windmill, someone's homestead, the final day of a traditional ceremony or at a chapter meeting, the root of that process comes from the Diné Life Way. Our narratives on the Diné Life Way are replete with allusions to communal or participatory governance. Nowhere in our life journey narratives is there any indication that one was denied the privilege to speak, nor shunned for asking.

Judy, 8 Nav. R. at 531.

Mr. Deschene further denies the allegation of making a false statement and provides the following reminders: (1) Petitioners were provided notice that Mr. Deschene was a certified by the NEA as a candidate on April 25, 2014, but Petitioners did nothing to challenge Mr. Deschene's candidacy within 10 days; (2) Petitioners said nothing during his campaign about Mr. Deschene's alleged lack of fluency; (3) Petitioners has supplied no evidence either was not given the right to speak or express his views before

the public about Mr. Deschene's alleged lack of fluency; and, finally, (4) by signing the declaration of candidacy, Petitioners certified that each of them would follow all laws, including 11 NNC § 24, which acknowledges their willingness to submit challenges under the required time period. Yet Petitioners failed to do so.

II. THE OHA APPROPRIATELY DISMISSED PETITIONERS' GRIEVANCES PURSUANT TO THE NAVAJO ELECTION CODE AND GOVERNING STANDARDS OF LAW.

A. The OHA Appropriately Dismissed Petitioners' Grievances for Failure to Comply with the 10 Day Limitation of 11 N.N.C. § 24(A).

Section 24(A) provides:

> The Navajo Election Administration shall hold the candidate applications of all candidates it has certified as eligible for a period of 10 days during which sworn challenges may be filed with the Office of Hearings and Appeals by other applicants for the same position . . . .

Id. The term "shall" is mandatory or required rather than permissive or optional language.[13] Moreover, where a statute is clear and unambiguous, its plain language is controlling. *In the Matter of the Appeal of: Vern R. Lee*, No. SC-CV-32-06, slip op. at 6 n. 2 (Nav. Sup. Ct. August 11, 2006) (citing *Tso v. Navajo Housing Auth.*, No. SC-CV-10-02, slip op. at 5-6 n. 1, 9 (Nav. Sup. Ct. August 26, 2005); *Nelson v. Initiative Comm. to Reduce Navajo Nation Council*, No. SC-CV-03-10, slip op. at 5 (Nav. Sup. Ct. October 18, 2010). Section 24(A) could not be clearer: "10 days during which sworn challenges may be filed with the Office of Hearings and Appeals . . . ." *Id.*

[13] *See, e.g., Sandoval v. Navajo Election Administration*, No. SC-CV-62-12, slip op. at 5-6 (Nav. Sup. Ct. February 26, 2013) (applying term "shall" as requiring dismissal for facial insufficiency pursuant to 11 N.N.C. §§ 24 and 341(A)(1), but otherwise requiring hearing of challenge pursuant to 11 N.N.C. § 341(A)(2)); *Chee v. Navajo Election Admin. and Navajo Bd. Of Election Suprvisors*, No. SC-CV-67-10, slip op. at 5 (Nav. Sup. Ct. December 28, 2010) (same).

The NEA certified Mr. Deschene's candidacy on April 25, 2014. Therefore, Petitioners had until May 6, 2014 to file a challenge to the NEA's certification of Mr. Deschene as a qualified candidate. However, Petitioners' Grievances speak for themselves. The Grievances were filed on September 5, 2014. Accordingly, because Petitioners failed to file their Grievances on or before 10 days after the NEA certified Mr. Deschene's candidacy, the OHA appropriately dismissed Case Nos. OHA-EC-005-14 and OHA-EC-007-14 pursuant to 11 N.N.C. § 24(A), and are appropriately affirmed by this Court.

B. The OHA Likewise Appropriately Dismissed Petitioners' Grievances for Failure to Comply with the 10 Day Limitation of 11 N.N.C. § 341(A)(1).

Section 341(A)(1) states that:

> [w]ithin 10 days of the incident complained of or the election, the complaining person must file with the Office of Hearings and Appeals a written complaint setting forth the reasons why he or she believes the Election Code has not been complied with. If, on its face, the compliant is insufficient under the Election Code, the complaint shall be dismissed by the Office of Hearings and Appeals.

Id. Section 341(A)(1) uses the mandatory language "must" for a candidate's filing of a complaint "[w]ithin 10 days of . . ." *id.*, when he or she believes a violation of the Navajo Election Code has occurred. Mandatory language is properly interpreted to require that action be taken. *Sandoval*, slip op. at 5-6; *Chee*, slip op. at 5. Moreover, where a statute is clear and unambiguous, its plain language is controlling. *In the Matter of the Appeal of: Vern R. Lee*, slip op. at 6 n. 2 (citation omitted); *Nelson*, slip op. at 5. Accordingly, where a person believes the Navajo Election Code has been violated, he or she is required to file a complaint with the OHA within 10 days of the alleged violation pursuant to 11 N.N.C. § 341(A)(1).

The requirement of 11 N.N.C. § 341(A)(1) has long been a mandate set forth in the Navajo Nation's election laws. Although the Navajo Board of Election Supervisors (the "NBOES") formerly performed the role of the OHA in the current Navajo Election Code, the requirements of 11 N.N.C. § 341(A)(1) were previously set forth (in nearly verbatim language) at 11 N.T.C. § 321(B)(1). Just as 11 N.N.C. § 341(A)(1), Section 321(B)(1) of Title 11 of the former Navajo Tribal Code stated: "[w]ithin ten days of the incident complained of or the election, the complaining person must file with the Board a written complaint setting forth the reason why he believes the Election Code has not been complied with." *Id.*

The Supreme Court of the Navajo Nation held that the substantially similar language to that of Section 341(A)(1) that was formerly set forth at 11 N.T.C. § 321(B)(1) required: "that if a candidate knows of an Election Code violation before an election, he or she must take action within ten days of such incident rather than do so after the election." *Haskie v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 336, 339 (Nav. Sup. Ct. 1991). However, a candidate "who has 'sat on his rights' . . . [and not] immediately assert[ed] [his or her] complaints within the ten-day period allowed by the statute . . . waive[s] them." *Id.* at 340 (relying on the doctrine of laches to affirm administrative forum's dismissal). Because Petitioners themselves stated that they each believed a violation of the law had occurred well before August 26, 2014, their Grievances of September 5, 2014 failed to comply with the 10-day requirement of 11 N.N.C. § 341(A)(1).

In their Grievances and Opening Briefs, Petitioners-Appellants Tsosie and Whitethorne state that they believed Mr. Deschene had (supposedly) violated 11 N.N.C. §

8(A)(4) long before August 26, 2014. In his Grievance filed in Case No. OHA-EC-005-14, Petititioner Tsosie stated: "DURING THE ELECTION CAPAIGNE [sic] CHRISTOPHER DESCHENE STATED IN THE NAVAJO TIMES, DATED 1 MAY 2014 THAT HE COULD NOT SPEAK NAVAJO. DURING THE CAMPAIGN THE PEOPLE LISTED BELOW HEARD CHRISTOPHER DESCHENE STATE THAT HE COULD NOT SPEAK NAVAJO." *Tsosie v. Deschene*, No. OHA-EC-005-14, Order at 6 (Ofc. Hrgs. & Appls. September 10, 2014). Likewise, in his Opening Brief Concerning Case No. OHA-EC-007-14, Petitioner Whitethorne states: "[o]n May 29, 2014, during the first Candidate's [sic] Forum, [Mr. Deschene] publicly admitted that his was not fluent in speaking and understanding Navajo . . . [Petitioner Whitethorne] could not have filed a grievance . . . until twenty-three (23) days after the ten (10) day window had closed." Pet'r's Br. 5. Accordingly, both Petitioners have made clear they allegedly had reason to believe that Mr. Deschene (supposedly) did not meet the requirements set forth at 11 N.N.C. § 8(A)(4) as early as in May of 2014.

Petitioners' admissions reveal that they each "believe[d] the Election Code ha[d] not been complied with," 11 N.N.C. § 341(A)(1) as early as May of 2014. However, Petitioners' admissions also disclose that they did nothing and sat on their rights until after the primary election, when they filed their Grievances to try and sandbag Mr. Deschene's candidacy in the general election, on September 5, 2014. In sitting on their rights for months and not filing anything with the OHA until after the primary election of August 26, 2014, when 9,813 Navajo voters cast their ballots for Mr. Deschene, Petitioners waived their rights to properly file the Grievances. Therefore, pursuant to Petitioners' actions, the requirements of 11 N.N.C. § 341(A)(1) and the doctrine of

laches, the OHA's dismissals of Case Nos. OHA-EC-005-14 and OHA-EC-007-14 were appropriate. Accordingly, this Court affirming the OHA's dismissals for the same reasons, among others, is appropriate here.

C. As in this Action, Petitioners Had the Burden of Proof to Sufficiently Establish That Their Grievances Should Not Be Summarily Dismissed, Which They Failed to Satisfy Pursuant to 11 N.N.C. § 341(A)(1)-(2).

The OHA appropriately dismissed Petitioners' Grievances in Case Nos. OHA-EC-005-14 and OHA-EC-007-14, and this Court affirming the dismissals in the consolidated appeals Case Nos. SC-CV-57-14 and SC-CV-58-14 is appropriate. Petitioners had "the burden of proving the allegations contained in the [Grievance] by clear and convincing evidence." 11 N.N.C. § 24(F); *Morris*, 7 Nav. R. at 77. Clear and convincing evidence is "'[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Chee*, slip op. at 3 (quoting BLACK'S LAW DICTIONARY 636 (9th ed. 2009)). Plainly, Petitioner's filings did not meet this standard.

Both Grievances speak for themselves and are clearly dated September 5, 2014. The fact that they were filed four months after the cut-off date to have asserted such challenges to Mr. Deschene's qualifications of May 6, 2014 pursuant to 11 N.N.C. § 24(A) in-and-of-itself made the OHA's dismissals for insufficiency appropriate. But this was certainly not the only reason that Petitioners' Grievances did not satisfy their burden of proof by clear and convincing evidence.

Petitioner Tsosie's Grievance was a one-page block of hand-written assertions, mimicked by a one-half-page statement typed in all caps, that essentially asserts that Mr.

Deschene "cannot speak fluent Navajo" and "is [un]qualified as per 11 N.N.C. § 8(A)." Pet'r's App. B at 2. To support these assertions, Petitioner Tsosie provided an assortment of unidentified (perhaps only partial) documents and a "petition" containing unsworn, unattested and otherwise unverified signatures; which he claimed were from "over 90 Navajo Nation voters who also state that Christopher Deschene cannot speak fluent Navajo." Pet'r's App. B at 2. Petitioner Whitethorne provided even less than this to support his Grievance, attaching a one-page statement with three paragraphs asserting Mr. Deschene violated 11 N.N.C. §§ 8(A)(4), 8(A)(5) and 21(B)(2).

Petitioners' pleadings, which may be a combined page or a page-and-a-half of the same allegations repeated several times, cannot reasonably be considered allegations and factual assertions to demonstrate it is "highly probable or reasonably certain"[14] that Mr. Deschene violated the provisions set forth by Petitioners in their Grievances. Furthermore, because of Petitioner Tsosie's "petition" containing pages of unsworn, unattested and otherwise unverified signatures unattested signatures he claimed were from "over 90 Navajo Nation voters who also state that Christopher Deschene cannot speak fluent Navajo," Pet'r's App. B at 2, collectively, Petitioners provided perhaps seven pages of disjointed and largely incoherent materials to support their allegations that Mr. Deschene had violated 11 N.N.C. §§ 8(A)(4), 8(A)(5) and 21(B)(2). As with the minimal allegations and factual assertions set forth in the Grievances, Petitioners' attached papers with little relevance and no verification of their accuracy likewise fail to show it is "highly probable or reasonably certain" that Petitioners' allegations are true

[14] *Chee*, slip op. at 3 (quoting BLACK'S LAW DICTIONARY 636 (9th ed. 2009)).

and correct to meet their "burden of proving the allegations contained in the [Grievance] by clear and convincing evidence." 11 N.N.C. § 24(F); *Morris*, 7 Nav. R. at 77.

These unsupported statements and unsubstantiated materials do not establish that it is "highly probable or reasonably certain" that the NEA's certification of Mr. Deschene was unlawful. They certainly do not justify invalidation of the result of the primary election for President of the Navajo Nation. Instead, these unfounded statements and unverifiable materials are nothing more than—at best—a set of repetitive false assumptions and uninformed beliefs of candidates who were not chosen by Navajo voters to move on into the general election for President.

The Grievances do not sufficiently prove any violation of Navajo law. Instead, if anything, Petitioners' materials more aptly demonstrate Petitioners' having "allowed opportunity to escape, '*bil ch'i'níyá*,'" *Begay v. Alonzo,* No. SC-CV-40-08, slip op. at 4 (Nav. Sup. Ct. November 7, 2008), when they frequently interacted and spoke with Mr. Deschene—yet sat on making any challenge—for four months after the final day to submit their Grievances to the OHA.

Even if one takes Petitioners at their word that they did not have any opportunity to assert their challenges before May 6, 2014, Petitioners would have certainly known from their many conversations and interactions with him during the primary campaign and election, if he could not fluently speak and understand Navajo. Petitioners and Mr. Deschene were, after all, competitors for several months in a very public pursuit – the primary election for President – not contestants in a game of hide and go seek or some other pursuit that would have made them reclusive and isolated from each other.

If they genuinely believed Mr. Deschene could not fluently speak and understand Navajo, Petitioners would have—and had an obligation to have—filed their grievances during the four months between the NEA's certification of Mr. Deschene and his being selected as one of two candidates to go into the general election for President of the Navajo Nation pursuant to 11 N.N.C. § 41(B). In any event, the Grievances were insufficient on the face of the documents and the OHA was required to dismiss them pursuant to 11 N.N.C. §§ 24(A) and 341(A). Accordingly, because Petitioners plainly failed to meet their burdens of proving the allegations in the Grievances by clear and convincing evidence, this Court affirming the OHA's dismissals—rather than remanding the Grievances for hearings—is appropriate.

D. Not Only Was The OHA Authorized to Summarily Dismiss the Grievances, But The OHA Was Required to Dismiss Petitioners' Grievances for Insufficiency Pursuant to 11 N.N.C. § 341(A)(1).

Section 341(A)(l) authorizes the OHA to dismiss a complaint that is insufficient on its face. Furthermore, the policy aims of the Navajo Election Code support—or rather, strongly encourage—summary dismissal of a challenge that does not satisfy the requirements of 11 N.N.C. § 341(A)(1). As this Court has said:

> the 'procedures established for resolution of election contests and disputes were not intended to be discretionary with the Board. The Tribal Council, for reasons of due process and speeding resolutions of election contests and disputes, intended that these procedures be followed.' *Mustach v. Navajo Board of Election Supervisors*, 5 Nav. R. 115, 118 (Nav.Sup.Ct.1987). Summary dismissals are needed for many reasons, including to protect the validity of the election, to avoid undue delay, and to avoid costly challenges.

Nelson v. Initiative Comm. to Reduce Navajo Nation Council, No. SC-CV-03-10, slip op. at 9 (Nav. Sup. Ct. October 18, 2010). Petitioners had 10 days from the NEA's

certification of Mr. Deschene as a qualified candidate on April 25, 2014, but failed to do so by May 6, 2014.

After the 10 day period of 11 N.N.C. § 24(A) has lapsed, a challenge for a candidate's alleged violation of a provision of the Election Code must be made pursuant to 11 N.N.C. § 341(A). Section 341(A)(1) states that:

> [w]ithin 10 days of the incident complained of or the election, the complaining person must file with the Office of Hearings and Appeals a written complaint setting forth the reasons why he or she believes the Election Code has not been complied with. If, on its face, the compliant is insufficient under the Election Code, the complaint shall be dismissed by the Office of Hearings and Appeals.

Id. Like 11 N.N.C. § 24(A), Section 341(A)(1) uses the term "shall," which is mandatory or required rather than permissive or optional language. *Sandoval*, slip op. at 5-6; *Chee*, slip op. at 5. Where a statute is clear and unambiguous, its plain language is controlling. *In the Matter of the Appeal of: Vern R. Lee*, slip op. at 6 n. 2 (citation omitted); *Nelson*, slip op. at 5. As with its predecessor, 11 N.T.C. § 321.B.1, the law requires "that if a candidate knows of an Election Code violation before an election, he or she must take action within ten days of such incident rather than do so after the election." *Haskie v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 336, 339 (Nav. Sup. Ct. 1991). However, a candidate "who has 'sat on his rights' . . . [and not] immediately assert[ed] [his or her] complaints within the ten-day period allowed by the statute . . . waive[s] them." *Id.* at 340 (relying on the doctrine of laches). Although they claim to have believed Mr. Deschene did not fluently speak and understand Navajo (to their likings) during the primary campaign, and admit as much, Petitioners failed to file any claim within 10 days of such supposed incidents. Thus, by their own admissions, Petitioners failed to assert their claims and waived their rights. Accordingly, pursuant to either or both of 11 N.N.C. §§

24(A) and 341(A)(1), the OHA appropriately dismissed Case Nos. OHA-EC-005-14 and OHA-EC-007-14. For similar reasons and because the OHA's dismissals were proper, this Court's affirming the OHA and dismissing the appeals here is appropriate.

III. PETITIONERS ARE NOT ENTITLED TO ATTORNEY'S FEES.

As stated by the Navajo Nation Supreme Court: "[t]here is a long-standing rule under Navajo law that each party is responsible for their own attorney's fees." *Shirley, et al. v. Morgan, et al.*, SC-CV-02-10, slip op. at 46 (Nav. Sup. Ct. May, 28 2010). The Navajo Nation Supreme Court has recognized only three narrow exceptions to this rule: (1) when mandated by statute; (2) when a case involves extraordinary circumstances; and (3) when "a pleading or document is not submitted in good faith, or contains material misstatements of fact or law, or it is not made upon adequate investigation or research." *Id.* (citing *Yazzie v. Herrick*, 5 Nav. R. 129, 131 (Nav. Ct. App. 1987); *see also, Brown v. Todacheeny*, 7 Nav. R. 37, 43 (Nav. Sup. Ct. 1992) (upholding rule that parties are solely responsible for their own attorneys' fees, absent extraordinary circumstances within recognized exceptions).

The Grievances and this action are both wrongfully brought with a lack of good faith by Petitioners. Mr. Deschene neither caused this action nor are Petitioners' bringing their actions against Mr. Deschene rightful or justified. Their actions do not present any of the narrow exceptions to the long-standing rule governing attorneys' fees. Accordingly, neither of Petitioners are entitled to the relief requested in his Petition or any attorneys' fees. Accordingly, the OHA's dismissals of the Grievances were appropriate, and this Court's denial of Petitioners' requests for attorney's fees, along with its issuing an order that affirms dismissal of the Grievances is appropriate.

CONCLUSION

Mr. Deschene respectfully requests that this Court deny Petitioners' requests for relief and dismiss their appeals with prejudice. Mr. Deschene further requests that this Court enter an order reflecting the OHA's actions here and in similar cases to presumptively be valid pursuant to 11 N.N.C. §§ 24(A) and 341(A)(1). Moreover, Mr. Deschene requests that this Court deny Petitioners' requests for attorneys' fees. Because Petitioners' pleadings demonstrate a lack of good faith, Mr. Deschene requests an award of attorneys' fees for this consolidated action. This Court's awarding Mr. Deschene attorneys' fees and costs is appropriate pursuant to Petitioners' bad faith filings and this Court's opinion in *Yazzie v. Herrick*, 5 Nav. R. 12(, 131 (Nav. Sup. Ct. 1987). Mr. Deschene requests that this Court grant any such further or alternative relief for Mr. Deschene as it deems just and proper.

RESPECTFULLY SUBMITTED,

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