Levon Henry, Chief Legislative Counsel
Office of Legislative Counsel
Post Office 3390,
Window Rock, AZ 86515
(928) 871-7166
E-mail: levonhenry@navajo.nsn.gov

Steven C. Boos
Maynes, Bradford, Shipps & Sheftel, LLP
835 East Second Avenue, Suite 123
P.O. Box 2717
Durango, Colorado 81301/2
(970) 247-1755 / Facsimile: (970) 247-8827
E-mail: sboos@mbssllp.com

IN THE SUPREME COURT OF THE NAVAJO NATION

DALE TSOSIE AND HANK WHITETHORNE,

Petitioners,

vs.

NAVAJO BOARD OF ELECTION SUPERVISORS AND NAVAJO ELECTION ADMINISTRATION,

Respondents; and

CHRISTOPHER DESCHENE,

Real Party in Interest.

No. SC-CV-68-14

Regarding OHA Case Nos. OHA-EC-05-14 and OHA-EC-07-14 and this Court's Prior Opinion in SC-CV-57-14 and SC-CV-58-14

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR ORDER TO SHOW CAUSE

I. Introduction

On October 8, 2014, the Navajo Nation Supreme Court entered an opinion that the Diné fluency requirement applicable to candidates running for President of the Navajo Nation stated in 11 N.N.C. §8(A)(4) is valid. The opinion was based only on an analysis of the rights of

candidates for public office[1]; the Court neither analyzed nor discussed how the more fundamental rights of the Diné ("the People", below) as voters might change the conclusion reached in *Tsosie*.

Following the decision in *Tsosie*, both the Office of Hearings and Appeals (OHA) and the Navajo Nation Board of Election Supervisors (NNBOES) attempted to interpret and implement the decision. On October 9, 2014, OHA issued an order disqualifying Chris Deschene as a presidential candidate, primarily because he refused to participate in a test of OHA's devising to determine his Diné fluency. The OHA order stated that it "expected" NNBOES and the Navajo Election Administration (NEA) to comply with the Order of October 9th by removing Mr. Deschene's name from the ballot for the November 4, 2014 general election.

NNBOES wrestled with its understanding of its duty under the Election Code to "interpret the Election Code consistent with Navajo Nation laws"[2], especially the fundamental right of the People to choose their own leaders, as expressed in numerous prior decisions of the Supreme Court. NNBOES was concerned that it would *not* be consistent with Navajo Nation laws to ignore the rights and wishes of the People expressed during the primary election of August 26, 2014, and through early voting in the general election by choosing Mr. Deschene. While struggling with this conundrum, NNBOES reserved action on whether to remove Mr. Deschene from the ballot.

On October 23, 2014, the Supreme Court entered a further decision ordering the NEA, but not NNBOES, to reprint the ballots for the November 4th general election and opining that

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[1] *Tsosie v. Deschene*, No. SC-CV-57-14, slip op. at 8 – 10 (Nav. Sup. Ct. October 8, 2014) ("[W]e find that the requirement for fluency in the Navajo language is a reasonable regulation of a *candidate's right* to participate in the political system." (Emphasis supplied)).

[2] 11 N.N.C. §321(A)(6).

the election itself would need to be postponed; however, the Court issued no order to any person or entity to actually take specific steps to postpone the election.[3]

On October 27, 2014, the Petitioners filed a Motion to Hold Respondents in Contempt of Court and to Issue an Order to Show Cause (Motion for Order to Show Cause) asking that the Supreme Court impose a variety of severe, coercive sanctions against NEA and NNBOES for failing to comply with the order contained in the decision of October 23, 2014. The Court then issued an Order to Show Cause on October 28, 2014, ordering the Respondents to file a single, consolidated response to the Motion for Order to Show Cause.

II. Navajo Nation laws as articulated by this Court, which the Respondents are bound to follow, mandate that the People must be the final judges of whether a presidential candidate has sufficient fluency in the Diné language.

The Respondents do not contest the prior conclusion of this Court that the Diné language is embedded in *Diné bi Beenahazáanii* and is an appropriate requirement for leadership within the Navajo Nation government.[4] But the Respondents have a statutory duty to ensure that the Election Code is interpreted in a manner consistent with *all* laws of the Navajo Nation[5], especially *Diné bi Beenahazáanii* as it has been applied by this very Court. Consequently, it is the duty of the Respondents to determine how the fluency requirements of the Election Code and *Diné bi Beenahazáanii* should be implemented to ensure all rights of the People are respected.

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[3] *Tsosie v. Navajo Board of Election Supervisors, et al.*, No. SC-CV-68-14, slip op. at 10 (Nav. Sup. Ct. October 23, 2014).The Respondents adopt and incorporate by reference the arguments stated in the dissent of Associate Justice Irene Black showing the Supreme Court lacked jurisdiction to consider the writ of mandamus entered in that case and, consequently, also lacks jurisdiction to take any action on the present Motion for Order to Show Cause.

[4] *Tsosie*, No. SC-CV-57-14, slip op. at 8 – 10.

[5] 11 N.N.C. §321(A)(6).

This Court has held that the Fundamental Law statute enshrines the basic right of the People "to choose leaders of their choice."[6] The leaders of the People have an obligation to ensure that all fundamental rights of the People, including the right to choose their leaders, are protected.[7]

This places the authority to weigh the qualifications of candidates for public office squarely in the hands of the People alone. If the People do not believe a candidate is sufficiently knowledgeable of Diné culture and life-ways, they will reject that candidate through their vote and choose another leader, as is their sole right under the Fundamental Law. The Court articulated this reasoning in the *Vern Lee* decision:

> If the People are concerned that candidates unfamiliar with Navajo life run in elections, they are free not to vote for that candidate. The candidate's ignorance of the Navajo experience will be immediately apparent when the candidate campaigns and discusses the issues with the People. It is not for the [leaders] to restrict the People's ability to judge the value of a candidate's message . . . . The People can, and will, make that judgment.[8]

This reasoning applies here with equal force to a candidate's fluency in the Diné language. A candidate's lack of fluency in the Diné language will also be immediately apparent when the candidate campaigns, and it will then be a matter for only the People to judge, not their leaders, whether they wish to vote for that candidate.

The Election Code contains restrictions that do not violate this fundamental right of the People to choose their own leaders; however, this Court has recognized that those restrictions are

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[6] *In re Appeal of Vern Lee,* No. SC-CV-32-06, slip opn. at 5 (Nav. Sup. Ct. August 11, 2006) (citing 1 N.N.C. §203(A))
[7] *Nelson v. Initiative Committee to Reduce Navajo Nation Council,* No. SC-CV-03-10, slip opn. at 16 (Nav. Sup. Ct. June 2, 2010) ("The People have a fundamental right to choose their leaders and leaders have the obligation to ensure those rights.")
[8] *Vern Lee,* slip opn. at 7.

procedural in nature, including such things as filing deadlines and reporting requirements.[9] But any restrictions on the right of the People to weigh the basic qualifications of candidates "is in irreconcilable conflict with those rights . . . if it defeats the ability of the people [sic] to elect leaders of their choosing and candidates to run for office" and such restrictions "must yield" to the right of the People.[10]

This is especially true in determining the qualifications of presidential candidates, including the Diné language fluency of those candidates. As this Court has also recognized, there is a direct relationship between the People and the President, or *shi nat' ahí*, in which the *shi nat' ahí* has a direct relationship with all the People.[11] The nature of this direct relationship makes it essential that every Diné judge for himself or herself, without restriction, whether a candidate is suitable to fill the role of *shi nat' ahí*.

This outcome is also consistent with the fundamental principle of Navajo participatory democracy, recognized by this Court, that the ultimate authority to make and define Navajo Nation laws lies with the People: the People are supreme and all residual power lies with the them.[12] This is so because egalitarianism is the fundamental principle of Navajo participatory democracy.[13] The People as a whole will determine the laws by which they are governed.[14] This Court recognizes that the power over the structure of Navajo government "is ultimately in the

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[9] *Vern Lee*, slip opn. at 6.
[10] *Vern Lee*, slip opn. at 5.
[11] *Office of Navajo Nation President and Vice-President v. Navajo Nation Council*, No. SC-CV-02-10, slip opn. at 45 (Nav. Sup. Ct. May 28, 2010).
[12] *Nelson*, No. SC-CV-03-10, slip opn. at 12 (citing *Halona v. McDonald*, 1 Nav R. 189 (Nav. Ct. App. 1978)).
[13] *Office of Navajo Nation President and Vice-President v. Navajo Nation Council*, No. SC-CV-02-10, slip opn. at 29.
[14] *Id.*at 30.

hands of the People and it will look to the People to guide it."[15] And in the specific context of an election, the office of an elected official belongs to the voting public.[16]

In its prior decisions in this case, this Court did not analyze the right of the People to choose their own leaders in attempting to resolve this case; instead, it limited itself to an examination of the rights of candidates. Yet that absolute right of the People, which the Court failed to consider, is the very one that the Respondents were bound to follow in their implementation of the Election Code.

III. Man-made law can never displace or alter the fundamental rights of the Diné to choose their own leaders.

This Court has made clear that the Fundamental Law, including the rights of the People to choose the structure of their government and to choose their leaders, can never be redefined or changed by man-made laws.[17] Yet, by adopting a fluency standard and ordering the OHA to determine the Diné fluency of a presidential candidate according to this standard, rather than leaving it to the People, as the Fundamental Law requires, this Court essentially allowed a man-made law to redefine and change the right of the People to choose for themselves.

In *Tsosie*, the Court adopted a fluency standard that was offered by Petitioner Hank Whitethorne as follows:

> *"Da dilkǫǫhgo, t'áá k'idahineezláago, t'áá chánahgo, diits'a'go, háálá Diné Binanit 'a 'i idlį́go éi lahdóó baa yajilti'* (talk about), *nabik'i yájilti'* (analysis speech), *bich 'į' yájilti'* (to talk about), *hach 'į' yálti'* (to be talked to), and *Dine k'ehgo bik'izhdii'tį́į́h* (comprehending the substance in the Dine language)."[18]

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[15] *Id.*at 26.
[16] *Id.*at 45.
[17] *Office of Navajo Nation President and Vice-President v. Navajo Nation Council,* No. SC-CV-02-10, slip opn. at 15 - 16.
[18] *Tsosie,* No. SC-CV-57-14, at 11.

The Court provided no further guidance on its meaning or how the OHA should apply it.

Even for Navajo speakers, the exact interpretation of the above phrase is because the phrase in its entirety is subject to various interpretations. The ambiguity is demonstrated by the fact that the OHA and the parties struggled to establish a test for this standard upon remand.

Additionally, while the phrase is an attempt to provide clarity to the parties, it has the potential to cause even more disharmony. It appears to require that presidential candidates have knowledge of particular aspects of Navajo culture in order to be considered fluent. As asserted by Petitioner Hank Whitethorne in his brief in *Tsosie,* there was a creation of four Navajo languages which established additional *saad* (Navajo language).[19] Collectively, these languages serve as a foundation of *Diné Bizaad* and *Diné bi Beenahazáanii*[20]. Whitethorne asserted, among other things, that there is an element of belief *(joodlą́)* and that this is how we are able to communicate with our Creator through prayer and songs.[21] He then asserted that this level of knowledge of *Diné Bizaad* is what a Navajo President must possess.[22] It is unclear from the Court's opinion in *Tsosie* whether it intended to adopt this additional language in its fluency standard.

If the Court did mean to adopt Whitethorne's full standard, even if clear, this standard limits the individuals who could be considered fluent in the Navajo language to a select few. Some Navajo speakers could be disqualified from running for President if they cannot articulate traditional beliefs in Navajo. This would adversely affect individuals who were raised to speak Navajo but in a non-traditional manner *(Diné ła éi Diné bi beenahaz'áanii doo joodla da),*

[19] Whitethorne Brief at 12-13.
[20] *Id.*
[21] *Id* at 14.
[22] *Id.*

thereby never learning the Navajo terms for certain traditional beliefs. There are also Navajo speaking traditionalists, who do not possess that level of *Diné Bizaad* that is articulated in the standard. These traditionalists would not meet the fluency standard and therefore would be disqualified to run for President.

While the standard articulated by the Supreme Court was created in an attempt to clarify the fluency requirement and restore harmony among the parties, it has only created confusion, dissension and significant disharmony among the People in the weeks leading up to the general election. The standard has the potential to divide the People and to create classes within Navajo society based on the principle that certain native Navajo speakers are the only ones fluent enough to hold leadership positions within the Nation.[23]

This is a predictable outcome of trying to impose a man-made restriction, making the OHA the final arbiter of fluency, on the exercise of an "immutable" fundamental right held only by the People and extended to them by the Holy People.[24] This kind of "top down" approach has always previously been rejected by the Court, as discussed above. The Respondents were then faced with the issue of how to comply with the order of the Court and yet fulfill their duty to ensure that the Fundamental Law is protected.[25]

IV. This Court's decision of October 23, 2014, ordering the removal of Chris Deschene from the general election ballot, had the potential for disenfranchising Diné who had already cast their vote for Deschene.

Many Diné have already cast their votes[26] and many of those votes were cast for Chris

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[23] Such classes may also violate the Equal Protection clause of the Navajo Nation Bill of Rights.
[24] *Office of Navajo Nation President and Vice-President v. Navajo Nation Council,* No. SC-CV-02-10, slip opn. at 18.
[25] Fn. 7.
[26] Exhibit One. On October 28, 2014, the NEA was reporting that 8000 votes had already been cast in the general election.

Deschene.[27] The Respondents knew that if the general election were postponed, those votes would be set aside and those voters who cast them effectively disenfranchised. Perhaps more importantly, disregarding those ballots would have been an insult to the fundamental right of those voters to judge the qualifications of candidates for public office and to choose their own leaders. As a result, this was not simply a theoretical restriction on the exercise of a fundamental right held exclusively by Diné voters, but a concrete and real attack on a right that had already been exercised. The Respondents were faced with a problem of how to protect that right and protect the Fundamental Law for voters who had already cast their vote.

V. Conclusion

The Motion for Order to Show Cause essentially alleges that the Respondents willfully disobeyed an order of this Court.[28] Nothing is farther from the truth.

The Respondents were between a rock and a hard place. On the one hand, there was an order from the Supreme Court opining that the general election would need to be postponed. On the other hand, the Respondents knew that this order was based only on an analysis of the rights of candidates and did not take into account the Fundamental Law and the right of the People to choose their own leaders, as that right has been explained by this Court. Yet, the Respondents were legally bound to respect those rights in how they implement the Election Code. The Respondents were put in an impossible position where compliance with the Court's order meant violating the Fundamental Law. This was not willful disobedience to an order of the Court, but a decision to respect the Fundamental Law as having precedence over man-made law, as Navajo

[27] Exhibit Two.

[28] "Respondents have blatantly defied the Orders of this Court." Motion to Show Cause at 2.

leaders have been instructed is their absolute duty. The Respondents had good cause and should not be held in contempt.

There is a better solution to the present controversy. The Navajo Nation courts have repeatedly stated that what distinguishes them from Western courts are concepts like *hozho*, talking things out, and restorative justice rather than the punitive, coercive, winner-take-all approach of Western jurisprudence.[29] The Motion for Order to Show Cause is an example of the very worst of this Western approach, with its requests for police, arrests, jailing and stripping people of their elected offices. This kind of approach should be anathema in the Navajo Courts, yet it is one that has somehow succeeded and brought us to this present hearing.

The better approach would be for the Court to now hold that the Diné fluency requirement is one that should be determined by the People through their vote in the general election, as was done in the primary election, rather than by trying to impose that requirement top down, through the coercive, punitive approach advocated by the Petitioners. That approach is wrong and disrespects the Fundamental Law and *Diné bi Beenahazáanii.* The Motion should be denied, this case should be dismissed and the general election should be allowed to continue on November 4th with an unaltered ballot so that the People may exercise their fundamental right to choose their own leaders.

Date: 10-30-14

Levon Henry, Chief Legislative Counsel

Date: 10/30/14

Steven Boos
MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP
Attorney for NNBOES

[29] Hon. Robert Yazzie, Life Comes from It: Navajo Justice Concepts. 24 N.M. L. Rev. 175 (1994)

CERTIFICATE OF DELIVERY

I hereby certify that on the 30th day of October, 2014, a true and correct copy of the foregoing MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR ORDER TO SHOW CAUSE was delivered via U.S. Mail, first class, postage pre-paid and via e-mail, to the following:

David R. Jordan, Esq.
The Law Offices of David R. Jordan, P.C.
P.O. Box 840
Gallup, New Mexico 87305-0840
david@jordanlegal.com
rhonda@jordanlegal.com

Justin Jones, Esq.
The Law Offices of Justin Jones, P.C.
P.O. Box 2240
Farmington, New Mexico 87499
justinjoneslaw.gmail.com

by: _____