ENTERED on
7/1/2024 tls
in the SSM Chippewa Tribal Court of Appeals

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

Aaron Payment v. The Election Commission of the Sault Ste. Marie Tribe of Chippewa Indians

APP-2024-03

Decided: June 17, 2024

BEFORE: BIRON, BUTTS, CORBIERE, DIETZ, and DEMOORE Appellate Judges.

Opinion and Order

DeMoore, Christina Appellate Judge, who is joined by Biron, Karrie, Chief Appellate Judge, and Appellate Judge Butts, Corbiere, and Dietz.

For the reasons set forth below, the Sault Ste. Marie Tribe of Chippewa Election Commission's (*"Election Commission"*) April 9, 2024 decision *("Election Commission Decision")* finding that Appellant Payment violated the campaigning provision of STC § 10.113(9) is hereby vacated and reversed.

Facts and Procedural History

On January 26, 2024, the *Election Commission,* formerly the Election Committee, under its authority granted pursuant to STC § 10.104(1) and STC § 10.104 (8)(e), issued a Notice of Election advising that a tribal election would "be held for the Tribal Chairperson and Board of Directors" with May 23, 2024 set as Primary Election Day and June 27, 2024 set as General Election Day. (*Sault Ste. Marie Tribe Of Chippewa Indians Notice Of Election, January 26, 2024* at 1).

On March 20, 2024 and, in advance of the Primary Election Day, Appellant, Dr. Aaron Payment, Candidate for a Unit 1 Tribal Board of Directors' position, ran an advertisement in support of his candidacy in the tribal newspaper, Win Awenen Nisitotung. In pertinent part, the ad indicated, "Aaron Payment Paid For & Endorsed This Ad." The referenced advertisement is included in full as **Exhibit A** to this Opinion and incorporated herein by reference.

On March 21, 2024, Tribal member Edward Furton submitted a Complaint (*"Election Complaint"*) to the *Election Commission* alleging that Appellant Payment's March 20, 2024 ad was a "violation of election code 10.114(9) also his personal Facebook page And [sic] Sault tribe Truth." Specifically, Mr. Furton's *Election Complaint* and attachment cite the following language in Appellant's ad as the referenced violation: "Will work with Chairman Lowes, Betty & New Board." (*Id.*) In support of his allegation, Mr. Furton includes the following portion of STC § 10.113(9), again erroneously cited as STC § 10.114(9), in his *Election Complaint*:

"(Candidates, or non-candidate registrants [sic] name) endorse this advertisement." (*Id.*)

Mr. Furton then includes the entirety of paragraph (9) in his attachment, as follows:

> "(9) All campaign advertisement material must have placed upon its face in a conspicuous manner the endorsement of the Candidate or the Non-Candidate Registrant responsible for the advertisement. Any campaign advertisement that endorses or opposes more than one Candidate must be endorsed by the Candidates or the Non-Candidate Registrants responsible for the advertisement as well as by any other Candidates endorsed by the campaign advertisement. The endorsement shall specifically state:
>
> '[Candidate's or Non-Candidate Registrant's name] endorses this advertisement.'"

On April 3, 2024, the *Election Commission* held an "open" Special Meeting "pursuant to Tribal Code 10.121 (1)" (*Election Commission Decision* at 2) to "review the grounds" (*Id.*) alleged in Mr. Furton's *Election Complaint*, among other filings. A review of the audio of that meeting reflects that the *Election Commission* members unanimously adopted the recommendation of their attorney, Ryan Mills, in this matter without discussion.[1] The Minutes of that meeting, dated April 18, 2024 and signed by Lou Ann Dougherty, confirm that, on a roll call vote, all members approved sending "Candidate Payment his 1st violation notice." (*Sault Tribe Election Commission Special Meeting Minutes, April 3, 2024* at 1).

On April 9, 2024, the *Election Commission* Chair sent Candidate Payment a letter advising of its determination erroneously citing a violation of STC § 10.113(2) but specifying that Candidate Payment had failed "to get the endorsement of Chairman Lowes and Director Freiheit on (his) recent advertisement that ran in the Tribe's paper (March Edition)." (*Election Commission Letter*, *April 9, 2024* at 1). The letter further advised that, as a "First [sic] offense," this "Notice to Rectify" was sent per the *Election Commission Sanction Schedule* and "while there is no fine levied for a first violation…further violations of Chapter 10.113 will result in fines imposed against you and may disqualify you from running for office." (*Id.*)

On April 9, 2024, the *Election Commission* also issued its *Election Commission Decision* detailing its findings and decision. In its *Election Commission Decision*, the *Election Commission* sets forth the scope of Mr. Furton's *Election Complaint* noting it alleges "that the following text in Candidate Payments [sic] advertisement under the heading of OUR TOP TRIBAL PRIORITIES FOR OUR FUTURE is in violation of 10.113 (9); 'Will Work with Chairman Lowes, Betty, & New Board'" (*Election Commission Decision* at 1) and cites the content of STC § 10.113(9) in full:

> "All campaign advertisement material must have placed upon its face in a conspicuous manner the endorsement of the Candidate of the Non-Candidate Registrant responsible for the advertisement. Any campaign advertisement that endorses or opposes more than one Candidate must be endorsed by the Candidate or the Non-Candidate Registrant responsible for the advertisement as well as by

[1] April 3, 2024 *Election Commission* Special Meeting Audio Recording at 5:09-6:43.

any other Candidates endorsed by the campaign advertisement. The endorsement shall specifically state:

> **'[Candidate's or non-Candidate Registrant's name] endorses this advertisement.'"**

In the *Election Commissions'* analysis, it notes that "To determine whether the advertisement language placed in the paper by Candidate Payment is in violation of Chapter 10.113(9) it must be determined whether the language at issue constitutes an 'endorsement' of Chairman Lowes and Director Freiheit." (*Id.* at 2) Acknowledging the lack of a definition of "endorsement" in Chapter 10, the *Election Commission* looked to Merriam Webster's definition of endorse – "to approve openly" or "to express support of approval of publicly and definitely" and thereby deriving two elements, "1. approval/support and 2. doing so in public." (*Id.*)

The *Election Commission* goes on to assess other aspects of Candidate Payment's advertisement in this context beyond the scope of the single line complained of by Mr. Furton. Specifically, the analysis cites the introduction:

> "My entire career has been in service to Our Sault Tribe People and to benefit all Indian people. I am prepared to word (sic) hard to support a team effort with Chairman Lowes, Treasurer Isaac McKechnie, Board Members Betty Freiheit, Rob McRorie and the rest of the New and Improved Board." (*Id.*)

And, the photo:

> "Further, the top left portion of the advertisement includes a photo of Candidate Payment, Director Freiheit, and Chairman Lowes presenting a check for the Sault Tribe Golf Scholarship with the caption reading in relevant part, 'Austin and Betty are partners in giving.'" (*Id.*)

The *Election Commission* also considered the internal procedure of the Tribal Newspaper during election cycles, cited in relevant part as follows, "During the election cycle, we will not consider publishing photo submissions including candidates, which may be viewed as use [sic] for promotional/publicity purposes." (*Id.*) While noting that a substantially similar photo to the one on the present facts submitted to the newspaper by a Unit Director was rejected while Candidate Payment's photo was published, the *Election Commission* noted, "It is a reasonable conclusion that they would have the same effect on a member of the public, namely that they are used for publicity purposes and the showing [sic] support (ie [sic] endorsement) of specific candidates." (*Id.* at 3)

Given the foregoing, the *Election Commission* assessed that "Specifically naming certain Board of Directors while not naming others supports a reasonable interpretation of support or endorsement of the named individuals" and therefore determined, "It would appear that Candidate Payment is endorsing Chairman Lowes and Director Freiheit as determined under the definition established." The *Election Commission* concluded:

> "This advertisement is certainly done in a public forum and the above language taken in context with the entirety of the advertisement is a strong indication of support/endorsement of Chairman Lowes and Director Freiheit. Candidate Payment did add his endorsement of the ad, but should have sought and added the endorsement of Chairman Lowes and Director Freiheit." (*Id.*)

As a result, and as indicated in its letter of April 9, 2024, the *Election Commission* made a determination pursuant to STC § 10.121 (2)(c) that Candidate Payment violated the campaigning provision of STC § 10.113 (9) by failing to get the endorsement of Chairman Lowes and Director Freiheit.

On April 12, 2024, Candidate Payment filed a Notice of Appeal of the April 9, 2024 *Election Commission Decision*. On that same date, this Court filed a Notice of Expedited Briefing Schedule in response to which both Appellant Payment and Appellee *Election Commission* timely filed their respective briefs with the Appellant requesting oral argument.

On April 22, 2024, Appellant Payment filed his Brief of Appeal (*Appellant Brief*) and took "issues [sic] with the extraordinarily broad definition of 'campaign' and 'endorse' as applied by the Election Commission in this case." (*Appellant Brief* at 1). Appellant first argues that the "application of the Election Code is unconstitutional as applied to these facts." (*Id.* at 2) Citing *Federal Election Commission v. Wisconsin Right to Life, Inc*., 551 U.S. 449 at 447, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007), Appellant argues that "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (*Id.*) While Appellant acknowledges that "governing elections and campaigning" is a corollary of tribal sovereignty, he contends that "any such restrictions on the free speech rights of members, and candidates must be narrowly tailored to meet an important governmental need, and it must not leave people guessing as to what is, and is not permitted speech." (*Id.*) As such, Appellant Payment submits that, "applying a strict scrutiny standard, the application of this Election Code provision to these facts alleged should not stand." (*Id.*)

Appellant further argues that the findings of the *Election Commission* were arbitrary, capricious and against the great weight of the evidence. (*Id.* at 3) While acknowledging that Candidate Payment's advertisement at issue here was "campaigning," Appellant maintains that at no point did he "expressly advocate for the electoral support of any of the persons named. He does not say 'vote for" or 'support' any of the candidates." (*Id.*) Instead, Appellant maintains that he "clearly identified who his potential political allies would be if he is elected," akin to a party affiliation. (*Id.*) Citing the same definitions of "endorse" from Merriam Webster as set forth in the *Election Commission Decision*, Appellant indicates that his identification in the relevant campaign ad of "who he would align himself with politically included some board members not up for reelection, some who are candidates in this cycle, and some who had not even been elected yet." (*Id.* at 4) Appellant suggests that an essential issue/question on the present facts is "whether Aaron Payment's communication was intended to endorse or advocate for those candidates, or to advocate for himself." (*Id.* at 3-4)

Again, citing the US Supreme Court decision in *Wisconsin Right to Life, Inc.*, *supra* at 464, Appellant advocates for application of the "objective 'appeal to vote' test for determining whether a communication is a functional equivalent of express advocacy." (*Id.* at 4) The test was set forth in the case at 469-470 by Chief Justice Roberts who explained that "a court should find that [a] communication is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." (*Id*.) Appellant argues that, in this case, the *Election Commission* "patched together assumption, supposition and guesswork to divine that Aaron Payment was advocating or endorsing a specific candidates [sic] for election, rather than solely for himself" (*Id.* at 5) noting that the *Election Commission* "failed to seek any other reasonable interpretation of Aaron Payments [sic] communication, and failed to recognize multiple different ways that these words could be interpreted." (*Id.* at 4) Appellant maintains that the subject of this appeal "does not constitute the type of clear campaigning abuse that this Code was designed to prevent" and therefore, that the decision of the *Election Commission* is arbitrary and capricious. (*Id.*) As such, Appellant seeks a reversal of the *Election Commission Decision*, which he submits "unfairly den(ies) (his) right to engage in political free speech" and is "well outside any of the acceptable restraints on political speech identified by this Court, or the Federal Court system." (*Id.* at 5)

Appellee *Election Commission* filed its Brief on Appeal (*"Appellee Brief"*) on April 30, 2024. In its introduction, Appellee reiterated the Background and Analysis set forth in the *Election Commission Decision* and then provides Tribal Code references regarding who may appeal its decision (STC §82.201), the scope of this court's review on appeal (STC §82.203) and the standard of review on appeal (STC §82.212) along with a series of cases that define the abuse of discretion standard upon appeal. Appellee then argues that it "did not abuse its discretion in finding Candidate Aaron Payment in violation of Tribal Code provision 10.113(9) for failing to get the endorsement of Chairman Lowes and Director Freiheit in his campaign ad." (*Appellee Brief* at 8). Appellee submits that the issue before this Court is not whether its "decision improperly restricted his free speech," "whether there is another reasonable interpretation of Candidate Payment's communication" and/or "whether Candidate Payment expressly advocated for the electoral support of the named persons." (*Id.* at 9) Instead, Appellee contends that this Court must decide whether its decision "was clearly not supported by the facts in front of it." (*Id.*) Appellee delineated that those facts are:

> "…simply, that Candidate Payment in his advertisement expressly names Chairman Austin Lowes and Unit Director Betty Freiheit three times and placed a picture of the three of them in his advertisement. Couple this with the fact that the Tribal Newspaper policy recently denied publication of certain sections of a unit report for a picture of the same nature (Austin Lowes and Betty Freiheit were pictured) and the Election Commission had a reasonable basis for its determination clearly based on the facts." (*Id.* at 9-10)

Appellee suggests that it "does not matter if there is an alternative interpretation if the decision on the facts is clearly supported by those facts" as its decision is not "overly broad or unconstitutional" as Appellant alleges. (*Id.* at 10) Appellee argues that the strict scrutiny standard put forth by Appellant is "not the standard of review for determinations of the Election Commission" but, if it were, it would be met on the present facts because Tribal Code 10.113 (9)

is "a narrowly tailored law" and the Commission has "a compelling interest in enforcing that law." (*Id.*) Appellee argues that the "reasonable mandate" of STC §10.113 (9):

> "…restricts candidates from freely aligning themselves with other candidates without the permission of the other candidates. In a scenario where a candidate for office wishes to align themselves [sic] with a popular incumbent to garner more support, it is reasonable to mandate that the incumbent provide a statement of endorsement to both limit abuses of campaign advertisements and to provide to the voters a clear statement that these two candidates are officially aligned. Nothing about this is unconstitutional or chills political speech." (*Id.*)

Appellee rebuts what it terms Appellant's "preposterous argument" arguing that "supporting a political party and supporting specific candidates are distinguishable" and that Tribal Code Chapter 10 "does not restrict a Candidate from broad sweeping statements…but does limit certain specific endorsements in very limited instances." (*Id.* at 11) As such, Appellee suggests that:

> "Candidate Payment could have easily stated he would work with his fellow Board of Directors and gotten the same point across in his advertisement, but he did not. Instead he chose to align himself with specific incumbent candidates (and non-candidates) in three specific instances. The Election Commission reasonably found that this met the definition of endorse defined as "to approve openly" or to express support or approval of publicly and definitely." (*Id.*)

Appellee reiterates that the Meriam Webster "definition encompasses two elements, 1. approval/support and 2. doing so in public." (*Id.*)

Appellee distinguishes STC § 10.113 (9) from STC § 10.113 (10) indicating the provision at issue here does not require that "Candidate Payment 'expressly endorse'" and maintains that Appellant's argument that there was no express endorsement or support of the named candidates "is not what Tribal Code was enacted to prevent. It was enacted to prevent any candidate from using advertisements to freely endorse or oppose other candidates without the code required specific endorsement statement." (*Id.*) Appellee also distinguishes this Court's decision in *Hollowell v. Elections Commission*, APP 14-02 (2014) from the matter currently before this Court as, here, "the Election Commission was not determining whether Candidate Payment violated the much narrower definition of express endorsement as used in 10.113(10), but rather whether he violated the much broader definition of endorse as used in 10.113 (9) and as defined by the commissions as 'to approve openly' or 'to express support or approval of publicly and definitely.'" (*Id.* at 12)

Appellee submits that the *Election Commission* made a "reasonable determination as justified by the facts," noting that, "if 10.113(9) required an express endorsement, the Commission may have ruled differently, but it does not." (*Id.*) Therefore, the Appellee requests that the decision of the *Election Commission* be upheld noting, as follows:

> "The Election Commission is charged with administering Tribal Elections and in enforcing violations of the Election Ordinance. *It must do so based on the facts in front of it and*

within the plain meaning of the Tribal Code provisions and so must this Court. The Commission's decision was clearly based in fact, was clearly in line with the language in Tribal Code Chapter 10 and was not arbitrary, capricious, or contrary to law and this Court should defer to that decision (*emphasis added*)." (*Id.* at 13)

As a part of this Court's Notice of Expedited Briefing Schedule on April 12, 2024, oral arguments were set for and went forward on May 8, 2024. Both Appellant and Appellee, by and through their respective legal counsel, were present.

Standard of Review

STC § 10.121(8), formerly § 10.120(7), allows for direct appeal, to this Court in limited original circumstances. Under STC § 10.121(8), decisions of the *Election Commission* "issued pursuant to subsection (2)(c) or (d) may be appealed to the Sault Tribe Chippewa Tribal Court of Appeals pursuant to Chapter 82."

Chapter 82 "establishe[s] the procedures by which appeals are taken from decisions of . . . the Election Committee."[2] (STC §82.101) Section 82.201 also establishes who may appeal the decision of the Election Committee and the limitations of such an appeal: (1) A challenge to the decision of the Election Committee must allege that the Election Committee acted contrary to Tribal law; and (2) the allegation of injury must be personal to Appellant and not a generalized grievance. Section 82.202 sets forth that an appeal is proper before this Court if it "concerns a final decision of the Election Committee rendered pursuant to Tribal Code Chapter 10.121 at Section (2)(c) or (d)." Accordingly, this Court has limited jurisdiction to hear appeals where an Appellant has filed a proper challenge or contest in accordance with STC §10.120(1) and the *Election Commission* has rendered a decision in writing in accordance with STC §10.121 (2) (c) or (d). Pursuant to STC §82.203, in reviewing a matter on appeal, this Court "may affirm, modify, vacate, set aside or reverse any decision" of the Election Committee or "remand the matter and direct entry of a new decision or require such further proceedings as may be just and equitable under the circumstances."

Under the newly revised STC § 82.212, formerly STC § 82.210, the "Court shall review the Election Commission's decision under the abuse of discretion standard which shall be defined as the Election Commission rendering a decision that was arbitrary, capricious, and contrary to tribal law." This Court will not substitute its judgment for the judgment of the Election Committee, unless the Election Committee's actions were arbitrary or unreasonable, *Hollowell, supra* at 2, and result "in an Appellant being unfairly denied a substantial right or being caused to suffer an unjust result." [3] *William Joseph Perault v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa*, APP-2023-06 (December 29, 2023). Furthermore, this Court will not entertain arguments that were not first the subject of an election contest from which a written decision resulted. *Isaac McKechnie v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa Indians*, APP-16-05 (July 15, 2016).

[2] By way of clarification, in this Opinion, the Election *Committee* and the Election *Commission*, one and the same entity, are alternatively referred to depending on the Tribal Code section and/or source material referenced.

[3] While the amendment of STC §82.212, formerly STC §82.210, omits this language, it has become precedent based upon previous Court of Appeals decisions akin to other guiding principles such as the Seven Grandfather Teachings.

In every matter before this Court, our Anishinaabe teachings of *nibwaakaawin* (wisdom-use of good sense), *zaagi'idiwin* (practice absolute kindness), *minadendmowin*, (respect – act without harm) as well as *ayaangwaamizi* (careful and cautious consideration) must guide this Court's decision-making. *Payment v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa Indians*, APP-2022-02 (December 5, 2022), hereafter *Payment 1*.

Constitutional Considerations

Article VIII of the Constitution of the Sault Ste. Marie Tribe of Chippewa Indians ("*Constitution"*) provides, as follows:

> "All members of the Sault Ste. Marie Tribe of Chippewa Indians shall be accorded *equal protection* of the law under this constitution. *No member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States, including but not limited to …freedom of speech,…and due process of law*. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of an Indian entity in the exercise of its powers of self-government shall apply to members of the tribe (*emphasis added*). (*Constitution* at 8).

As such, "due process protections apply to the Tribe by virtue of the Indian Civil Rights Act, which the Tribe incorporates into tribal law at Article VIII of the Tribe's Constitution and Bylaws."[4] *Hollowell, supra* at 3. By the terms of Article VIII, First Amendment rights of free speech are similarly protected. "To be sure, the Constitution, Article VIII, must guide the application of the Election Ordinance and the conduct of the Election Committee when deciding…complaints." *Payment 1, supra* at 4. "There is no doubt that the Appellant is a tribal member cloaked with the protections of Article VIII and that this Court has been granted jurisdiction to hear and decide such matters pursuant to Chapter 82 of the Sault Tribal Code." *Payment 1, supra*.

Political speech is "at the core of what the First Amendment is designed to protect." *Morse v. Frederick,* 551 U.S. 393, 403, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) citing *Virginia v. Black,* 538 U.S. 343, 365, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (plurality opinion). The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm*., 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971). Since speech is an "essential mechanism of democracy" (*Citizens United v. Fed. Election Commission*, 130 S. Ct. 876, 175 L. Ed. 2d 753, 558 U.S. 310, 339 (2010)), "political speech must prevail against laws that would suppress it by design or inadvertence." (*Id.*

[4] "This Court is further informed by our Elders that the Anishinaabe achieve wisdom through their understanding of the 'ordinances of creation.' The tenets represented in the rhythm of the earth and all of creation, are utilized in our established systems of governance and can be used to identify the principles of due process. For example, the Anishinaabe are no stranger to respectful listening to the position of all interested persons on any important issue. To be sure, one only need to look to the Seven Grandfather Teachings of the Anishinaabe to understand that Indian nations did not learn 'due process' and 'fairness' from Anglo–American cultures. (See e.g., *Begay v. Navajo Nation*, 6 Nav. Rptr. 20, 24–25 (Navajo Nation Sup.Ct. 1988) ('The concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act . . . The Navajo people have an established custom')." *Payment 1, supra* at 4-5.

at 340) Hence, laws that burden political speech are "subject to strict scrutiny" which requires the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Wisconsin Right to Life, Inc*., *supra* at 452.

When it comes to defining what speech qualifies as the functional equivalent of express advocacy, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." (*Id*. at 457) "In light of these considerations, *a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate* (*emphasis added*)." (*Id*. at 469-470) Applying that test, the Supreme Court in *Wisconsin Right to Life, Inc*., *supra,* held:

> "Because WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy…." (*Id.* at 476)

Discussion

At oral argument, Appellant took the position that STC § 10.113(9) is facially valid and passes strict scrutiny but argues that the *Election Commission* was arbitrary and capricious in its application on the present facts, "patching together assumption, supposition and guesswork" to "unfairly deny Aaron Payment's right to engage in political free speech…well outside any of the acceptable restraints on political speech identified by this Court, or the Federal Court system." Appellee contends that this Court must decide whether its decision "was clearly not supported by the facts in front of it." (*Appellee's Brief* at 9). This Court is unclear as to the source of this standard put forth by Appellee for decision making; however, even had sourcing been provided, the guarantees of the Tribal Constitution supersede. As this Court in *Payment 1, supra* at 4, indicated, "Chapter 10 of the Sault Tribe Code, entitled Election Ordinance, sets forth the obligations and the authority of the Election Committee. STC Ch. 10, Section 10.108 [10.104, as amended]. Such authority must be exercised with due care and arguably cannot exceed the constitutional authority enjoyed by the Board of Directors."

As in *Hollowell*, *supra,* the *Election Commission* here considered the entirety of the Payment advertisement although the *Election Complaint* referenced a single sentence. At oral argument, counsel for Appellant stipulated that he preferred consideration of the entire advertisement; hence, that is the consideration here. Also, akin to *Hollowell*, *supra,* this Court limits its review of the *Election Commission Decision* to the source and definition of "endorse" set forth by the Commission as, in accord with due process, this is the standard of which the Appellant had notice for purposes of this appeal, allowing fair notice and an opportunity for his response. That definition and Appellee's "derivation" of the same was, as follows:

> "Merriam Webster's definition of endorse – "to approve openly" or "to express support of approval of publicly *and definitely*" and thereby deriving two elements, "1. approval/support and 2. doing so in public (*emphasis added*)." (*Election Commission Decision* at 2).

Notably, the Appellee's two-point "derivation" of the definition provided omits "and definitely." The same source, Merriam Webster, defines "definitely" as "in a way *free of all ambiguity,*

uncertainty, or obscurity *(emphasis added).*"[5] Merriam Webster further indicates that *"ENDORSE suggests an explicit statement of support (emphasis added)."*[6]

In *Hollowell*, *supra* at 7, this Court considered whether "the contents of Director Hollowell's unit report…violate Tribal Code Section 10.112 (10)," now STC § 10.113(10), requiring an "express endorsement." The definition used by the Election Committee (now *Election Commission*) in that case stated that "something is express if it is 'directly and distinctly stated rather than implied or left to inference.'" Since the Election Committee was unable to point to a "direct or distinctly stated" statement in the subject unit report, this Court concluded that the Election Committee "*implied* an endorsement based on the totality of statements in Director Hollowell's unit report" and that the same was "unreasonable." *Hollowell, supra* at 8.

While the current case involves the use of the term "endorse" in STC § 10.113 (9), not Tribal Code Section 10.112 (10), now STC § 10.113(10), which was the subject of *Holloway*, the reasoning of this Court in that decision extends to the present facts. Similarly, the *Election Commission* here considered the statements contained in Appellant's advertisement "in their totality" (*Hollowell, supra* at 8) and put forth a definition to support their decision. That definition required not only two elements, "1. approval/support and 2. doing so in public," as the *Election Commission* asserts but also the important modifier, "*definitely* (*emphasis added).*" As in *Hollowell*, *supra*, the *Election Commission* here has not pointed to a "definite" statement of endorsement but has implied an endorsement based on its interpretation of the totality of statements in Appellant's advertisement. This conclusion is "contrary to the definitions supplied" *(Hollowell, supra)* and "clearly not supported by the facts" before the *Election Commission*, i.e. the standard proposed by Appellee. (*Appellee's Brief* at 9).

Under all of the US Supreme Court case law cited above, it is clear that, under the United States Constitution, the content of the ad on the present facts constitutes "political speech" protected by the First Amendment. It is also clear that the right of free speech is a protected right under the Article VIII of the Tribe's *Constitution*, and, as set forth in *Hollowell, supra* at 3, through the Indian Civil Rights Act. The body of case law that interprets those First Amendment protections guides this Court "to err on the side of protecting political speech rather than suppressing it." *Wisconsin Right to Life, Inc*., *supra* at 457. Applying the *Wisconsin Right to Life*, *supra*, functional equivalency test, it cannot be said that Appellant's ad is "susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate." Therefore, this Court finds the *Election Commission Decision* to be contrary to the protections of Article VIII of the *Constitution* and therefore arbitrary, capricious and an abuse of discretion on the facts of this case.

And, this Court would further echo the dicta in *Hollowell*, *supra*, as follows, which proves to be prescient here:

---

[5] *Definitely*, Merriam Webster Dictionary, retrieved May 14, 2024, online: https://www.merriam-webster.com/dictionary/definitely

[6] *Endorse,* Merriam Webster Dictionary, retrieved May 14, 2024, online: https://www.merriam-webster.com/dictionary/endorse

> "The Court is not unsympathetic to the tenuous position the Election Committee finds itself in…To avoid similar problems in the future, it may be helpful for the Election Committee to provide written guidance on these Code provisions." (*Id*. at 8)

While Appellee states that the *Election Commission* must act "within the plain meaning of the Tribal Code provision" (*Appellee's Brief* at 13), this presents difficulty when the meaning of "endorse" per STC § 10.113 (9) in application is anything but plain, free of ambiguity and/or uncertainty.

While not dispositive of this matter, to meet *Constitutional* muster, this Court submits that STC § 10.113 (9) must make clear to Tribal members subject to its directives what conduct will be prohibited, e.g. in lieu of "endorse," specifically indicating that campaign advertisements that include the name and/or photo of another candidate or non-candidate are covered by the provision. As Appellant argued, an ordinance "must not leave people guessing as to what is, and is not permitted speech." (*Appellant Brief* at 2). On the present facts, "[p]eople 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Citizens United, supra* at 324 citing *Connally v. General Construction Co*., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Due process requires clarity of understanding regarding what the ordinance allows and disallows. Absent that clarity, the definition of "endorse" within STC § 10.113 (9) may continue to be a moving target on application going forward.[7] As such, that clarity will also proactively avoid inadvertent inconsistency in application of those directives and potential associated claims of equal protection violations. As a corollary, this Court suggests that providing such clarity and notice promotes foreseeability and compliance, thereby reducing violations.

This Court also notes that, unlike STC § 82.201, which requires individuals appealing Election Committee decisions to this Court to allege an "injury…personal to said party," STC § 10.120(1) permits "any member" to submit a "[c]omplaint regarding alleged violations of the Election Ordinance." On the very specific facts of this case, its application may be overbroad as neither Chairman Lowes nor Director Betty Freiheit, the subject of the advertisement at issue who

---

[7] Also relevant for consideration here is the Supreme Court's analysis in *Wisconsin Right to Life, Inc*., *supra* at 469-470 of intent-based tests in the context of First Amendment protected political speech:

"Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech [127 S.Ct. 2666]..."

A test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another. See M. Redish, Money Talks: Speech, Economic Power, and the Values of Democracy 91 (2001) ("[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection"). "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). An intent test provides none.

Buckley [*Buckley v. Valeo,* 424 U.S. 1, 14, 43–44, 96 S.Ct. 612, 46 L.Ed.2d 659] also explains the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test "'puts the speaker...wholly at the mercy of the varied understanding of his hearers.'" 424 U.S., at 43, 96 S.Ct. 612. It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech."

could, arguably, have been negatively impacted, have complained regarding their inclusion.[8] Conversely, Mr. Furton, a Tribal member, has not alleged any "injury" he incurred due to the complained-of violation. In fact, there is no evidence on the record of any person adversely impacted by the subject advertisement. Given that Chairman Lowes and Director Freiheit didn't object, it is unclear how any Tribal member could have drawn an unfounded inference from the advertisement. While neither "injury" nor standing are required by STC § 10.120(1), generally speaking a legal impact is required for a complaint to move forward. Given the foregoing, we concur with the Appellant's observation that the present fact situation may "not constitute the type of clear campaigning abuse that this Code was designed to prevent." (*Appellant Brief* at 4). While not necessary to our decision making on the present facts, we note for the record that the lack of requirement of a legal "injury" or standing in support of a complaint or contest may enhance the likelihood of filings and/or litigation where a given complainant may not have a legally recognizable interest in the outcome.

While Appellant did not put forward any due process arguments, this Court observes, as an important aside, that the *Administrative Record* produced by the *Election Commission* in response to this Court's *Order to Produce* of April 30, 2024, did not include any public notice of the referenced April 3, 2024 Special Meeting nor did it include any specific notice to Candidate Payment of the same. The record is also devoid of any substantive discussion/debate among *Election Commission* members and/or input from the parties to this matter regarding the *Election Complaint* at the time of the Special Meeting or at any time prior to the filing of this appeal. STC § 10.121(1), formerly STC § 10.120(1), requires that a meeting of the *Election Commission* to review the grounds for a complaint "shall be open to the membership pursuant to the Open Meetings Ordinance," apparently an effort to adopt by reference Chapter 96, which, per STC § 96.102, "shall govern meetings of the Board of Directors pursuant to Article 1 of the Tribal By-laws." Even if arguably applicable to the *Election Commission*, the Open Meetings Ordinance doesn't prescribe how a Complainant, Appellant and/or Tribal members are to be advised of when and where a meeting scheduled pursuant to STC § 10.121(1) will be held other than the generic language set forth in STC § 10.104(8)(b).[9] The Bylaws of the *Election Commission* provide in Section 4.2-3(b) that "notice of all special meetings shall be provided to all Commission members in writing at least three (3) days prior to the scheduled date of the meeting" but are also devoid of any notice provisions for complainants or interested parties.

Respectfully, a meeting can only be open if those with interest to attend are given reasonable notice of the time and place and an opportunity to be heard;[10] there is no evidence of that in the record on the present facts. At a minimum, due process requires notice and an

[8] Hence, there is no evidence in the record on the present facts in support of Appellee's expressed concern of candidates "freely aligning themselves with other candidates without their permission." (*Appellee Brief, supra* at 10).

[9] STC §10.104(8)(b) requires the Election Commission to " [p]ublish a schedule for its regular meetings, establish an agenda for each meeting in accordance with Tribal Code Chapter 14, approve and maintain correct and accurate minutes of its deliberations, and rules and regulations of the Commission which shall be regularly posted on the Tribe's website.

[10] As this Court explained in *Payment 1, supra* at 5, "It could be said that the application of the Ojibway talking circle principles speak to the essence of due process - a governmental respect for all individuals subject to its authority. Like other Indian communities, this respect can be pragmatically translated in legal proceedings to mean notice and the opportunity to be heard when the deprivation of property or liberty is at stake. (*Zephier v. Walters*, No. 15A06 (Cheyenne River Sioux Tribal Ct. of App. 2017)."

opportunity to be heard where legal rights "as afforded under our Ojibway way of life and by Article VIII" may be infringed. *Payment 1*, *supra* at 6.While this case is decided based upon the political speech Constitutional considerations discussed above, this Court duly notes its due process concerns on the present facts and going forward as to the dearth of Tribal law and process to ensure that open meetings are, indeed, open and that interested Tribal members have meaningful notice of the same so that those voices can be heard and considered as an essential component of good governance.

ORDER

For the reasons specified above, the Appellee's *Election Commission Decision* of April 9, 2024 is reversed as arbitrary, capricious and contrary to Article VIII of the Tribal Constitution.

It is SO ORDERED.

EXHIBIT A

For Strong Local, Regional, Inter-Tribal & National Leadership.

Please Vote:

AARON PAYMENT PAID FOR & ENDORSED THIS AD

PAYMENT

~ Unit 1 ~ Sault Tribe Board of Directors ~

Over the years, I've given over $60K in Tribal Scholarships, and $25,000 for Children's Christmas Parties. Austin and Betty are partners in giving.

My entire career has been in service to Our Sault Tribe People and to benefit all Indian people. I am prepared to work hard to support a team effort with Chairman Austin Lowes, Treasurer Isaac McKechnie, Board Members Betty Freiheit, Rob McRorie, and the rest of the New & Improved Board. We have so much work to do. Please return me to the Board so we can get back to work.

~ Chi MeGwitch, Aaron

OUR TOP TRIBAL PRIORITIES FOR OUR FUTURE:

- Unify Sault Tribe Membership (Inside & At Large)
- Replenish & Grow Elder Fund to Increase Dividend$
- Increase/ Expand Benefits for ALL Tribal Members
- Will Work with Chairman Lowes, Betty & New Board
- Mentor/ Share Knowledge & Skills with New Board
- Attend ALL Conservation/ Treaty Fishing Meetings
- Return Unit 1 Monthly Member Meetings & Video Chats
- Restore Positive National Tribal Reputation
- Base MI Tuition Waiver on Enrollment Not 1/4 Blood
- Increase Tribal Higher Ed & Vocational Funding
- Sault Tribe Community College General Education
- Push for National Level Tribal Health Insurance Card
- Elder Mail Order Scripts & Medicare Supplements
- Tribal, Inter-Tribal & National Fight against Opiate Crisis
- Child Care Subsidy for Working Class Members
- Treaty & Tribal Membership Rights Enforced
- Standing in Tribal Court to Protect Your Tribal Rights
- Codify Tribal Preference in Hiring/ Set Goals
- Increase Pay Casino/ Enterprise / Govt Team Members
- Administrative Law Judge to Protect Your Job
- 3 Branch Government ~ Real Separation of Powers
- Create a Respectful Tribal Government *We can Trust*

EDUCATION & EXPERIENCE

Growing up on Shunk Road. I never dreamed I'd have the opportunity to serve you at the highest levels as...

- Unit 1 Tribal Board (2 terms), Tribal Chairperson (4 terms), Vice Chairperson (2 terms)
- National Congress of American Indians ~ 1st Vice President (2 terms), Secretary (2 terms), Regional VP
- President/ Vice President (10 years total) Mid-West Alliance of Sovereign Tribes
- President/ Vice President (12 years total) United Tribes of Michigan
- HHS Secretary Tribal Advisory Council (3 terms & Co-Chair) ~ NIH Tribal Advisory (Chair 2 terms)
- Substance Abuse & Mental Health Services Administration Tribal Advisory
- Health Resources Services Administration & Office of Minority Health Research Tribal Advisories
- Center for Indigenous Innovation and Health Equity Tribal Advisory
- Past President and Board Member of the Joseph K. Lumsden Tribal School Board
- Past Chippewa Ottawa Resource Authority Board
- Michigan Political Leadership Program Instructor on Tribal Government & Sovereignty (30 years)

All of My Jobs Have Been in Service To Our People and All Indian People...

- Vice President of Tribal Relations and Learning ~ Native Owned Tribal Consulting Management Firm
- Government Relations Director ~ National Indian Health Board (to IHS get advance appropriations passed)
- Deputy Executive Director & Judicial Branch Division Director (Sault Tribe)
- Federal - State Policy Administrator & Special Assistant to the Tribal Chairperson (Sault Tribe)
- LSSU Tenure Track College Instructor in Political Science & Native American Studies (taught statistics)
- MSU Native Student Services Coordinator ~ NMU Native American Retention Coordinator
- Housekeeping/ Groundskeeper/ Housing Rehabs and Janitor ~ (Sault Tribe)

A High School Drop Out at 15. I Earned my GED *at 16 & went on to Earn a Higher Education...*

- Doctorate Degree in Educational Leadership
- 3 Master's Degrees in Education Specialist, Higher Education & Master's in Public Administration
- Bachelor's Degree in Sociology ~ Minor in Psychology/Counseling

Chairman Payment is a dear friend and I have long been inspired by his leadership. Dr. Payment's voice has been critical in testifying before Congress about crucial tribal policies including funding during the government shut down and in securing the $ 8 Billion in Cares Act Funding with more to come to help Native Tribes. His voice is powerful and inspiring.

I am so grateful for all Aaron does for Indian Country. ~Congresswoman Deb Haaland

If you would like to Volunteer to help Elect Aaron Payment to the Unit 1 Sault Tribe Board, Please contact Me At:

PHONE: 906-203-5159 EMAIL: aaronpayment@yahoo.com ADDRESS: 1716 Shunk Rd., Sault Ste. Marie, MI 49783