APP-08-05

BEFORE: GABLE, HARPER, KRONK, NOLAN and WINNICK, Appellate Judges.

OPINION

Kronk, Chief Appellate Judge, who is joined by Appellate Judges Gable, Harper and Nolan. Appellate Judge Winnick joins the majority as to Parts I-IV, but dissents as to Part V and the conclusion of the majority opinion.

Based on the broad grant of standing to any tribal member under Tribal Code Section 10.118(6), Janet Liedel and Betty Freiheit ("Petitioners") have standing in this matter. Petitioners, however, failed to prove any concrete injury to their First Amendment rights under either the Tribal or U.S. Constitutions or that Resolution 2005-202 is void for failure to comply Tribal Constitution, Article IX. Petitioners are successful on their claim that Tribal Code Section 10.110(2) constitutes an illegal bill of attainder under 25 U.S.C. section 1302(9). Accordingly, Section 10.110(2) is stricken from the Tribal Code and the Sault Ste. Marie Tribe of Chippewa Indians Election Committee ("Election Committee") should certify Bernard A. Bouschor as a candidate for Unit One in the upcoming tribal election.

DISCUSSION

I. Factual Background

The present matter involves the claims of two tribal members, Petitioners, that their rights under tribal and federal law were violated as a result of the Election Committee's decision not to certify Bernard A. Bouschor as a Unit One candidate for the Tribal Board of Directors ("Tribal Board"). On February 11, 2008, Bouschor filed the required materials to be certified as a Unit One candidate for the Tribal Board. Tribal Code Section 10.110(2) provides that:

> No individual may run for election to office who is currently a Defendant in Chippewa County Circuit Court Case No: 04-7606-CC, in which the Tribe is pursuing civil litigation against the Defendants, including claims involving fraud, breach of lawful authority, breach of fiduciary duties owed to the Tribe, and conversion of over $2.6 Million until such litigation has been finally resolved.

Given that Bouschor is currently a defendant in Chippewa County Circuit Court Case No: 04-7606-CC, the Election Committee determined that it could not certify Bouschor as a Unit One candidate due to the prohibition contained at Tribal Code Section 10.110(2). On February 27, 2008, Bouschor timely filed with this Court an appeal from the Election Committee's decision not to certify him as a Unit One candidate. On March 7, 2008, this Court issued a decision rejecting Bouschor's arguments on this issue regarding the equal protection clause and declined to overrule the Election Committee's decision. (hereinafter "*Bouschor* I").

Accordingly, on March 17, 2008, Petitioners appealed the Election Committee's refusal to ratify Bouschor as a Unit One candidate. Petitioners contest the Election Committee's decision as of right pursuant to Tribal Code Sections 82.113(1), 10.118(6) and 10.121(4). Petitioners brought their appeal within the allotted 30 days. Tribal Code Section 10.120(2). Petitioners contend that Tribe Code Section 10.110(2), which precluded the certification of Bouschor as a Unit One candidate, violates their fundamental First Amendment rights to vote and freedom of political association under the Tribal Constitution, Article VII, the U.S. Constitution, the protections of which are incorporated into the Tribal Constitution through Article VII, and the Indian Civil Rights Act. Petitioners also allege that the Tribal Board violated Article IX of the Tribal Constitution by failing to obtain the affirmative vote of seven Tribal Board members. Finally, Petitioners allege that Tribal Code Section 10.110(2) constitutes an illegal bill of attainder. We address each of these arguments in order.

II. Standing

Before addressing the merits of Petitioners' claims, however, it is necessary to first determine whether Petitioners have standing to bring these claims. The Tribal Election Code confers broad standing to any tribal member to appeal a decision of the Election Committee. Specifically, Tribal Code Section 10.118(6) provides that "[t]he decision of the Election Committee following any Contest may be appealed by any Member in accordance with Section 10.121(4)." Attached to Petitioners' original filing with this Court is evidence that Petitioners are members of the Sault Ste. Marie Tribe of Chippewa Indians, and would therefore be allowed to challenge the Election Committee's decision under Tribal Code Section 10.118(6).

The Election Committee and Tribal Board (collectively "Respondents") argued that Petitioners do not have standing in the present matter because they have failed to allege a particularized injury. In other words, because all tribal members will be affected by the Election Committee's failure to certify Bouschor as a Unit One candidate, Petitioners have failed to show that they have been uniquely harmed by the Election Committee's decision.

This argument, however, fails for several reasons. First, unlike the federal cases that Respondents rely upon in their brief and at oral argument, there is no case or controversy requirement under tribal law. Accordingly, because the federal cases requiring a particularized injury relied upon by Respondents focus on the case or controversy requirement under federal law,[1] these cases are not persuasive regarding interpretation of tribal law, which does not have a similar requirement. Moreover, this interpretation of controlling tribal law is consistent with Tribal Code Section 10.118(6), which allows **any member** of the Tribe to appeal an Election Committee's decision.[2] This broad grant of

[1] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[2] Notably, Respondents failed to respond directly to this broad interpretation of standing under Tribal Code Section 10.118(6) through either their briefs or during oral argument. We therefore find Petitioners' argument persuasive based on the unambiguous language of Tribal Code Section 10.118(6).

standing to any tribal member is consistent with our understanding of the Tribe's custom and traditions. It is our understanding that historically the leaders of our Tribe welcomed the feedback from all tribal members on the wisdom of the decisions of tribal leaders. It would therefore be consistent with this tribal custom to allow any tribal member to challenge the decisions of the Election Committee, as decisions of the Election Committee are fundamental to the internal governance of the Tribe. While this broad grant of standing to any tribal member under Election Code Section 10.118(2) may seem inconsistent with state or federal law, it is consistent with our understanding of how our Tribe historically governed itself.

Next, Respondents assert that Petitioners do not have standing in the present matter because Petitioners failed to demonstrate third party standing. Here too Respondents' argument fails. As previously explained, Tribal Code Section 10.118(6) provides a broad grant of standing. Tribal Code Section 10.118(6) does not condition the ability to bring appeal on whether or not the tribal member is a third party to the contested matter. Accordingly, we cannot sustain Respondents' argument based on the statutory language, which is unambiguous on this point.

Moreover, Respondents' standing claim must ultimately be rejected because of their reliance on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Respondents' reliance on *Lujan* is misplaced. At its relevant part, *Lujan* focuses on the legitimacy of affidavits describing the intent of members of an organization, Defenders of Wildlife, to return to areas where endangered wildlife were allegedly being adversely affected by federal government action. *Lujan* at 563-564. The U.S. Supreme Court found these affidavits lacking because they included "someday intentions" instead of specific plans, and therefore the organizational members were not imminently threatened. *Id.* Conversely, the affidavits provided by Petitioners in this matter provide concrete evidence of Petitioners' intent to vote for Bouschor and, but for Tribal Code Section 10.110(2) that precludes the Election Committee from certifying Bouschor as an Unit One candidate, Petitioners would be able to vote for Bouschor in the upcoming tribal election. *See* Affidavit of Janet Liedel (March 14, 2008) ("I seek to vote for Bouschor and to associate politically with him as a Unit One candidate for the Tribal Board in the 2008 election."); Affidavit of Betty Freiheit (March 14, 2008) ("I seek to vote for Bouschor and to associate politically with him as a Unit One candidate for the Tribal Board in the 2008 election."). Accordingly, Petitioners have shown evidence of a concrete future plan and there is no concern of "someday intentions" such as those at issue in *Lujan*. Accordingly, Respondents' reliance on *Lujan* is misplaced and must be rejected.

Therefore, because tribal law does not require a case or controversy and Tribal Code Section 10.118(6) provides a broad grant of standing to any tribal member challenging an Election Committee action, Petitioners have standing in this matter.

III. Alleged Violations of First Amendment: Right to Vote and Freedom of Political Association

Petitioners allege that Tribal Code Section 10.110(2) violates their First Amendment right to vote and freedom of political association.[3] The burden is on Petitioners to prove that an abridgement of their constitutional rights occurred. Ultimately, we found the analysis on this argument lacking and are unable to see how specifically the Petitioners' First Amendment rights have been abridged. Counsel for Petitioners declined to develop this point further during oral arguments.

Accordingly, in the absence of a clear alternative direction, we defer to Respondents' analysis under *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), which is persuasive authority on this point of law. *Citizens for Legislative Choice* is analogous to the present matter in that it involved four Michigan voters and two public interest groups who challenged the constitutionality of a Michigan amendment that imposed lifetime term limits on state legislators. The voters who brought the claim in *Citizens for Legislative Choice* argued that they had voted for the legislators, who would be unable to run again because of the imposition of term limits, in the past and wished to vote for the same legislators in the future. *Id.* at 918. In relevant part, the court in *Citizens for Legislative Choice* determined that, "[a] voter has no right to vote for a specific candidate or even a particular class of candidates ... a state may permanently bar voters from voting for a particular classes of candidates." *Id.* at 921 (citations omitted). Accordingly, applying the court's holding in *Citizens for Legislative Choice* to the present, similar matter, the Election Committee and Tribe, through the Tribe's adoption of Tribal Code Section 10.110(2), did not violate the First Amendment rights of Petitioners by limiting Petitioners' ability to vote for a particular class of candidates – in this case, those individuals who are defendants in Chippewa County Circuit Court Case No: 04-7606-CC.[4] Accordingly, because Petitioners do not have a protected right to vote for and therefore politically associate with Bouschor, their claims based on the First Amendment must fail.

IV. Passage of Resolution No. 2005-202

The Tribal Board passed Tribal Resolution No. 2005-202 "Submission to Popular Referendum: Eligibility to Run for Office"[5] by a vote of six in favor and five against. Two Tribal Board members were not present at the meeting where the Tribal Board voted

---

[3] As previously explained, Petitioners rely on the First Amendment of the U.S. Constitution because the Tribal Constitution at Article VII specifically incorporates the protections of the U.S. Constitution and the Indian Civil Rights Act, which applies the protections of the U.S. Bill of Rights including the First Amendment to Indian Country.

[4] Notably, we already addressed equal protection concerns raised by passage of Tribal Code Section 10.110(2) in *Bouschor* I. In *Bouschor* I, we rejected arguments alleging that Tribal Code Section 10.110(2) violates the equal protection clause of the Tribal Constitution.

[5] This Resolution is crucial to the matter presently before the Court because passage of Resolution No. 2005-202 brought the Tribal Code provision now at issue, Tribal Code Section 10.118(2), to the tribal members for vote. Accordingly, without Resolution No. 2005-202, Tribal Code Section 10.118(2) would not have been enacted.

to approve Tribal Resolution No. 2005-202. The Tribal Board is composed of thirteen members. Accordingly, a majority of all Board members eligible to vote would be seven Board members.

Petitioners argue that because the Tribal Constitution, Article IX requires an "affirmative vote of the majority of the board" Resolution No. 2005-202 was not passed by a "majority of the board" since only six Board members, and not seven, voted in favor of the Resolution. In buttressing their argument, Petitioners also point to Tribal Code Chapter 14, Section 14.105(5), which states that a "'[p]ositive Majority' shall mean a majority of the Board of Directors, regardless of whether they are present." Accordingly, because a "positive majority" under Tribal Code Section 14.105(5) of the Tribal Board is determined regardless of whether Tribal Board members are present, Petitioners argue that passage of Resolution No. 2005-202 was void for failure to obtain a majority vote of existing Tribal Board members, or seven affirmative votes.

Ultimately, Petitioners argument regarding Resolution No. 2005-202 fails. This claim is stale. As argued by Respondents, the period of time to challenge the validity of the referendum process under tribal law was the period of time between the passage of Resolution No. 2005-202 and the date of contesting the referendum vote under the Tribal Election Ordinance. Because Resolution No. 2005-202 was adopted on December 6, 2005, well over two years ago, the time has long since run for Petitioners or others to challenge the legitimacy of this Resolution based on the validity of the Tribal Board's approval of the original Resolution. This Court declines to address whether the votes of six Tribal Board members approving Resolution No. 2005-202 would have met the constitutional requirements of Article IX if Petitioners' claim had been filed in a timely fashion.

V. Bill of Attainder

Tribes are prohibited from passing any bill of attainder. 25 U.S.C. § 1302(9). A bill of attainder is "a legislative act which inflicts punishment without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946).[6] In other words, "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *Id.* In their briefs and at oral argument, Petitioners asserted that Tribal Code Section 10.110(2) is a bill of attainder because: passage of Resolution No. 2005-202 constituted a legislative action, that was directed at "easily ascertainable members of a group", defendants in Chippewa County Circuit Court Case No: 04-7606-CC, and was intended to inflict punishment by denying three individuals the ability to run for election.

[6] Federal caselaw is instructive on this point because the Tribal Constitution incorporates the protections of the U.S. Constitution, and *Lovett* interprets the U.S. Constitution. Moreover, the U.S. Congress has applied a federal prohibition on tribal bills of attainder through its adoption of 25 U.S.C. § 1302(9). The U.S. Congress has plenary authority over Tribes and may therefore enforce its explicit laws, such as 25 U.S.C. § 1302(9), on Tribes. *See United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

At oral argument, Respondents made four arguments regarding Petitioners' assertion that Tribal Code Section 10.110(2) constituted a bill of attainder.[7] First, Respondents argued that Petitioners lacked standing to bring the bill of attainder argument. As previously explained, Petitioners had broad standing under Election Code Section 10.118(2), which grants tribal members standing to challenge the Election Committee's determinations. Tribal Code Section 10.118(2) does not condition or limit the scope of members' appeals. *See Supra* Section II. Accordingly, Respondents' standing argument on this point fails.

Second, Respondents argued that Tribal Code Section 10.110(2) was not intended to inflict punishment. Respondents argued that this Court should look to the implicit purpose behind the Tribal Board's decision to submit the matter to tribal referendum. During oral argument, however, counsel for Respondents was unable to articulate any statements from the Tribal Board identifying a permissible intention behind adoption of Tribal Code Section 10.110(2). Conversely, counsel for Petitioners identified numerous statements made suggesting that the purpose of Tribal Code Section 10.110(2) was to punish defendants in Chippewa County Circuit Court Case No: 04-7606-CC for allegedly stealing money from the Tribe. This Court declines to attempt to ascertain the implicit purpose of the Tribal Board, when explicit statements presented to the Court strongly suggest that the purpose of Tribal Code Section 10.110(2) was to punish three individuals.

Third, Respondents argued that Tribal Code Section 10.110(2) does not constitute a bill of attainder because it is temporary in nature. Tribal Code Section 10.110(2) will cease to act as a barrier to certification for election of defendants in Chippewa County Circuit Court Case No: 04-7606-CC once the Chippewa County Circuit case is either settled or decided, and, therefore, Respondents argue that it is not a permanent punishment. This Court, however, agrees with Petitioners that this argument is without merit. First, Respondents fail to cite any legal sources supporting the assertion that an act does not constitute a bill of attainder if it is temporary in nature. Second, Petitioners make a sound policy argument in that should the Court adopt Respondents' argument on this point, this would effectively constitute a loop hole to the bill of attainder prohibition found in the U.S. Constitution and 25 U.S.C. §1302(9), where none currently exists. For example, under Respondents' argument, the Tribal Board could avoid the prohibition on bills of attainder by limiting acts to 150 years. Because no one lives for 150 years, such an act would be temporary in form, but permanent in reality.

Finally, Respondents argued that the Court must reject Petitioners' bill of attainder argument because this argument was not developed below in front of the Election Committee. Petitioners concede that the bill of attainder argument was not developed below. However, Petitioners argue that raising this issue is entirely consistent with the Tribal Code, which allows this Court to consider issues that were not raised below if "a

[7] Notably, Respondents declined to address Petitioners first two arguments, that Resolution 2005-202 was a legislative act and that Tribal Code 10.110(2) affects an "easily ascertainable" group of people, and we therefore accept these arguments as true.

miscarriage of justice would result." Tribal Code Section 82.125(1). The Court agrees that failure to consider the bill of attainder argument at this time would constitute a miscarriage of justice. First, as argued by counsel for Petitioner at oral argument, the deadline for certifying candidates for the upcoming tribal election is March 28, 2008. Accordingly, given this deadline is less than a week away, it would be impossible to remand this issue to the Election Committee for a determination of the bill of attainder issue before the deadline for certification expires. Moreover, there is a question as to whether the Election Committee would even have jurisdiction to make a determination on the bill of attainder issue, as the Election Committee does not have the jurisdiction to determine the constitutionality of actions of the Tribal Board. For example, although the Election Committee expressed its concern that Tribal Code Section 10.110(2) was not constitutional, it did not feel it had the authority to overturn the Section. Accordingly, given the time constraints involved in the present matter and the Election Committee's apparent inability to consider the constitutionality of actions of the Tribal Board, this Court must make a determination on the bill of attainder issue in order to avoid "a miscarriage of justice" under Tribal Code Section 82.125(1).

Under Tribal Code Section 82.125(1), this Court has the authority to consider Petitioners' bill of attainder argument. Accordingly, given that Respondents concede the first two prongs of the bill of attainder test: (1) Resolution No. 2005-202 constituted a legislative action and (2) Tribal Code Section 10.110(2) applies to an "easily ascertainable members of a group", defendants in Chippewa County Circuit Court Case No: 04-7606-CC, the only issue left for this Court to decide is whether Tribal Code Section 10.110(2) constitutes punishment without trial. Ultimately, because Petitioners cite numerous statements suggesting the Section was intended to punish and Respondents are unable to cite to any explicit statements to the contrary, this Court must conclude that the purpose of Tribal Code Section 10.110(2) was to punish defendants in Chippewa County Circuit Court Case No: 04-7606-CC for allegedly stealing money from the Tribe. Accordingly, Tribal Code Section 10.110(2) constitutes a bill of attainder, and, because 25 U.S.C. section 1302(9) and the U.S. Constitution that is incorporated into the Tribal Constitution prohibits the Tribe from enacting bills of attainder, Tribal Code Section 10.110(2) is illegal and must be stricken from the Tribal Code.

It is important to address the dissent's concerns that the Court's procedure related to the bill of attainder argument was unfair. The dissent never reaches the merits of the bill of attainder argument because they believe that the Court impermissibly interjected itself into the process and "fed" an argument to the parties that would not have otherwise been made. Specifically, on March 20, 2008, the Court issued an order to the parties to prepare to argue the bill of attainder issue at oral argument on March 24, 2008. Notably, after all Judges currently sitting on this Court were encouraged to submit feedback on whether the then-proposed March 20, 2008 order should be submitted to the parties' counsel,[8] none of the Judges deciding this matter raised any concerns with the other Judges regarding the appropriateness of the proposed order.

[8] Judge Gable did not receive this correspondence.

The March 20, 2008 order does not constitute unfairness to the parties for several reasons. First, neither party to the present matter raised the issue of fairness in either their briefs or oral argument. Given their opportunity to both brief and argue this issue, it seems the parties had opportunity to develop this argument and neither felt the Court's request unfair.

Second, neither party was disadvantaged as a result of the March 20, 2008 order, as both parties had the same period of time to develop their arguments. The parties' ability to adequately develop their arguments was exemplified by the fact that both parties included the bill of attainder argument in their supplemental briefs, which was not required by the March 20, 2008 order (only requesting oral argument on this point).

Third, a request that certain issues be addressed by parties at oral argument is common practice among courts. For example, the United States Courts of Appeals for the Fourth, Fifth and Ninth Circuits have all issued similar requests to parties appearing within their jurisdictions. Courts issue these orders to make oral arguments fairer for the parties affected. Rather than "springing" new arguments on parties at oral argument without advance notice, orders, such as the March 20, 2008 order issued by the Court, give parties warning of the issues courts are considering.

Accordingly, not only was the Court's March 20, 2008 order requesting oral argument of the bill of attainder issue fair, it provided the parties ample notice and opportunity to brief and develop a question crucial to the determination of this issue. It would have been unfair to the parties to "spring" such an important argument on them at oral argument without advance warning.

CONCLUSION

Under Tribal Code Section 10.118(2), Petitioners have standing in this matter. Tribal Code Section 10.110(2) constitutes an illegal bill of attainder under 25 U.S.C. section 1302(9) and therefore must be struck from the Tribal Code.

Accordingly, given the Election Committee "by a majority vote of those members present and constituting a quorum, has determined that Bernard Bouschor would be eligible to run for elected office but for the requirements of § 10.110(2), which exclude him as a candidate",[9] this Court finds that Bernard A. Bouschor meets the eligibility requirements for certification as a Unit One candidate in the upcoming election. Therefore, this Court grants Petitioners their requested relief and it is ORDERED that:

1) The Election Committee certify Bernard A. Bouschor as a candidate for Unit One in the upcoming tribal election.

2) Tribal Code Section 10.110(2) be struck from the Tribal Code.

Hon. Elizabeth A. Kronk, Chief Judge — March 25, 2008

Hon. Jeannine Gable, Appellate Judge — March 25, 2008

Hon. Donelda Harper, Appellate Judge — March 25, 2008

Hon. Cheryl Nolan, Appellate Judge — March 25, 2008

[9] Sault Ste. Marie Tribe of Chippewa Indian Election Committee, *In re Eligibility of Bernard Bouschor: Findings of Fact and Conclusions of Law*, 2 (February 2008).

Judge Winnick **dissenting** as to Part V and the conclusion of the majority opinion.

The **dissent** does not dispute that Tribes are prohibited from passing any bill of attainder. 25 U.S.C. § 1302(9). A bill of attainder is "a legislative act which inflicts punishment without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946). In other words, "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *Id.*

The **dissent** does not dispute that under Tribal Code Section 82.125(1), this Court has the authority to consider Petitioners' bill of attainder argument. Accordingly, given that Respondents concede the first two prongs of the bill of attainder test: (1) Resolution No. 2005-202 constituted a legislative action and (2) Tribal Code Section 10.110(2) applies to an "easily ascertainable members of a group", defendants in Chippewa County Circuit Court Case No: 04-7606-CC, the only issue left for this Court to decide is whether Tribal Code Section 10.110(2) constitutes punishment. The **dissent** would give this issue (or any other justiciable issue) due consideration to the extent a litigant on his/her own volition raised the same.

The **dissent** sees a sense of fundamental unfairness and procedural unsoundness as to how this issue comes before the Court that makes any of the aforementioned findings in this opinion that speak to the bill of attainder to be dicta because there is no legal mechanism within the case at bar that would permit the court to review the issue upon its merits.

The **dissent** takes a conservative and fundamental stance that it is the Court's role and function to be the arbiter of the dispute that comes before it, not the dispute it wishes to hear or that might have come before it if the lawyers were thinking about it. To the extent a jurist has no regard as to who should prevail in a dispute is to the extent a jurist should not be instrumental in framing the question. The litigants in this matter came before this bench with zealous and competent counsel. At no time was the question of a bill of attainder submitted to this bench prior to the Court's March 20, 2008 order by the Petitioner and as such there was no corresponding duty upon the Respondent to anticipate it. The facts of this case did not demand that the issue be raised.

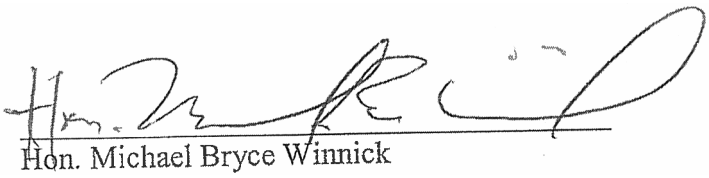
The adjudication of this instant case would not have precluded the issue from being raised in a subsequent proceeding. The dissent recognizes the liberal standing rules that speak to this issue. This in and of itself creates potential for a remarkable number of litigants that would otherwise have access to this bench to raise this argument if any attorney of their choosing sought to bring this argument before the bench. *Assuming arguendo*, that this Court did not feed this aspect of the case to the Petitioner, there would have been no detriment. This litigation would not have caused the bill of attainder issue to become res judicata.

The **dissent** is mindful of this Court's actions constituting or being viewed as constituting a political action as opposed to an adjudication of the questions that were properly brought before it. While any jurist or any lawyer can perform their best when they are faced with the question they got to ask, the Court is there for the litigants, not vice-versa and such little emphasis should be placed upon what the cause of action the Court wished would have been brought before it. It may be viewed as more than coincidental that on the very cause of action that this Court requested to come before it, the Petitioners prevailed while simultaneously failing on the other causes of action that the Court did not specifically request come before it.

Admittedly, neither party to the present matter raised the issue of fairness in either their briefs or oral argument. The Petitioner has no reason to. The Court telegraphed (metaphorically) to him that there was an additional way to posture his arguments and in the worst case scenario, he would lose by failing to sustain his burden as to three causes of action instead of two. There is little, if any downside. The Respondent sees writing on the wall and has to make a judgment call as to risk alienating the Court by calling its fairness into question.

Accordingly, this Court ruled correctly as to the issue(s) of standing, the passage of Resolution 2005-202, and the alleged violations of the First Amendment. This Court errs when addressing the Bill of Attainder on its merits based upon it not being raised in any lower forum or within the underlying Petition. By all accounts it would have been unfair to the parties to "spring" such an important argument on the litigants at oral argument without advance warning. More academically, it is not the role or function of a Court to "spring" arguments upon litigants. They are supposed to bring their arguments to us.

I join the majority as to Parts I-IV, but dissent as to the majority's opinion at Part V and in its conclusion.



Hon. Michael Bryce Winnick

3/25/08

March 25, 2008