IN THE SUPREME COURT OF THE MUSCOGEE (CREEK) NATION

RON GRAHAM,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	Appeal No.: SC-2020-01
	)	
MUSCOGEE (CREEK) NATION CITIZENSHIP BOARD,	)	
	)	
Respondent/Appellee.	)	

APPELLEE'S RESPONSE BRIEF

Muscogee (Creek) Nation
Office of the Attorney General
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June 12, 2020

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APPELLEE'S RESPONSE BRIEF

Respondent/Appellee, Muscogee (Creek) Nation Citizenship Board ("Citizenship Board" or "Appellee"), submits this brief in response to the opening brief filed by Petitioner/Appellant Ron Graham ("Mr. Graham" or "Appellant").

INTRODUCTION AND SUMMARY

Mr. Graham is an individual who asserts that he is a direct lineal ancestor of individuals listed on the final Dawes Rolls of 1906 as a Creek Nation Freedmen ("Freedmen"). Despite forty (40) years separating the filing of this appeal from passage of the 1979 Constitution of the Muscogee (Creek) Nation ("Nation"), Mr. Graham brings his appeal clearly suggesting that Article III, Section 2 of the 1979 Constitution is unlawful. Mr. Graham sues the Citizenship Board for actions taken pursuant to the Nation's federally approved 1979 Constitution. Article III, Section 2, provides in relevant part,

> [p]ersons eligible for citizenship in The Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137) ... .

Mr. Graham is unable to establish his eligibility by blood. Mr. Graham, however, alleges that the Creek Treaty of 1866 between the United States and the Nation mandates his enrollment as a citizen. Denying his enrollment, Mr. Graham alleges, violates the Creek Treaty of 1866 and recent federal case decisions [from other jurisdictions and involving other tribes].

Even though Mr. Graham's claims are untimely, and even assuming the truth of his allegations at this stage, his claims against the Citizenship Board were properly dismissed by the trial court on January 21, 2020, for the following reason, to-wit:

> The present appeal is a carbon-copy of a 2003 action that Mr. Graham began after filing an application for citizenship with the Citizenship Board 17 years ago, which this Honorable Court reviewed *de novo* and decided fully and finally in 2007. (emphasis added)

What follows is a concise outline of the history of Mr. Graham's first citizenship action, followed by the procedural history of the case leading up to the appeal currently before this Court.

APPELLEE'S STATEMENT OF FACTS

I. GRAHAM I

(District Court Case No.: CV 2003-53; Upon Appeal: SC 2006-03)

The GRAHAM I proceedings were highly contentious and endured for four (4) years (2003-2007). In GRAHAM I, Mr. Graham fully exhausted his administrative remedies by litigating his claim that he is eligible for citizenship "by blood" or, alternatively, entitled to citizenship as a descendant of the Creek Freedmen rolls. Mr. Graham's claims were fully briefed, argued, litigated in the district court[1] (ROA, Tab 1), appealed to this Honorable Court, and resulted in a final order.

On December 12, 2002, Mr. Graham, claiming to be a lineal ancestor "by blood" of an individual listed on the final Dawes Rolls of 1906, submitted his application for citizenship to the Citizenship Board. By letter dated January 10, 2003, Mr. Graham

[1] Record On Appeal Listing ("ROA") from CV 2003-53. Citations to the Record on Appeal in this brief will use the abbreviation "ROA" in conformity with 10th Cir. R. 28.1(A), followed by tab number or ROA date of filing. This Court may take judicial notice of filings in a related action. *United States v. Duong*, 848 F.3d 928 at 930 n.3 (10th Cir. 2017).

received a decision by the Citizenship Board denying his application.[2] (ROA, Tab 2). The Citizenship Board's stated reason for denying Graham's application for citizenship was, "the documentation that you have submitted is not sufficient evidence proving that you are a direct descendent (sic) of a person who is listed on the original Creek by blood roll or the 1906 Dawes Roll." The letter cited the relevant title and text of Article III, Section 2 of the 1979 Constitution. The Citizenship Board's letter also set forth Mr. Graham's appellate rights.

Following the Citizenship Board's adverse decision, Mr. Graham acquired legal counsel [Damario Solomon-Simmons and Selim Fiagome] and appealed to the District Court. Mr. Graham filed his *Petition* on December 12, 2003 (ROA, 12/12/2003) and his *Amended Petition* on February 28, 2005 (ROA, 02/28/2005). Soon after retaining legal counsel and the filing of his *Amended Petition*, Mr. Graham began asserting the alternate theory of entitlement to citizenship based upon the Creek Treaty of 1866, Article II.

Mr. Graham, in Graham I, filed numerous dispositive motions challenging the legality of the Muscogee (Creek) Nation's 1979 Constitution and violation of his due process rights.[3] On July 11, 2005, Mr. Graham filed his *Motion for Summary Judgment re Treaty of 1866* and *Brief in Support* as the basis for his claim for citizenship: "Proposition I ... The Court has a duty to apply Article II of the 1866 Treaty and grant individuals enrolled as Freedmen by the Dawes Commission, and their descendents (sic),

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[2] Exhibit A to *The Muscogee (Creek) Nation's Motion to Dismiss*, CV-2019-138, filed November 15, 2019.

[3] On March 15, 2005 Mr. Graham moved for partial summary judgment as to interpretation of the "*by blood*" requirement of Article II, Section 1 and Article III, Sections 2 and 3; On May 18, 2005 moved for partial summary judgment regarding the Act of April 26, 1906, Final Rolls; On July 11, 2005 moved for summary judgment re: *Creek Treaty of 1866*; On July 11, 2005 moved for declaratory judgment that application of ordinances by the citizenship board are un-constitutional because it denies Mr. Graham his rights to due process and equal protection; and on August 15, 2005 filed his supplemental brief re: unconstitutionality of legislative enactment causing forfeiture of rights of citizenship.

the opportunity for citizenship with all rights and privileges of other citizens within the Muscogee (Creek) Nation." *Id*, at p.5. (ROA, 07/11/2005). Mr. Graham's 1866 Treaty claims were also included in Mr. Graham's *Trial Brief* (ROA, 08/26/2005) filed August 26, 2005 and within the trial court's *Pretrial Conference Order* filed August 29, 2005 (ROA, Tab 3).

The trial court initially found in favor of Mr. Graham, concluding that the Citizenship Board did not follow the Nation's laws in effect at the time Mr. Graham first presented his application for citizenship and, therefore, acted contrary to law and in an arbitrary and capricious manner (ROA, 03/17/2006). Accordingly, the trial court remanded the case back to the Citizenship Board and on April 10, 2006 Mr. Graham filed his application for writ of mandamus (ROA, 04/10/2006) seeking an order requiring the Citizenship Board to enroll him as a citizen.

On April 13, 2006, the Citizenship Board filed its notice of intent to appeal (ROA, 04/13/2006). Mr. Graham cross-appealed on April 24, 2006 (ROA, 04/24/2006).

Upon appeal, Mr. Graham fully presented his constitutional and treaty challenges to this Court in case number SC 2006-03. Mr. Graham, pled as follows:

> The legal issues agreed by the parties and ordered by the District Court to be bench-tried at the judicial appeal included whether the Board or the Citizenship Code, or both, had deprived Resp/Cross-App [Plaintiff] of one or more of the following legal rights: (1) equal protection under the Muscogee (Creek) Constitution or the Indian Civil Rights Act of 1968, or both; (2) due process under the Muscogee (Creek) Constitution or the Indian Civil Rights Act of 1968, or both; *(3) right to citizenship under the (unabrogated) Article II of the Creek Treaty of 1866 (14 Stat.785).* They also included whether the meaning of the phrase 'final rolls prepared pursuant to the Act of April 26, 1906' in the Muscogee (Creek) Constitution includes the 'Freedman (sic) Rolls,' and whether the meaning of the phrase 'Muscogee (Creek) Indian by blood' in the Muscogee (Creek) Constitution means "a person who has inherited genetic material

> from a Muscogee Creek Indian.' *Further, they included whether Resp/Cross-App's [Plaintiff] had been wrongfully denied citizenship by the Board. In addition, the factual issues to be tried included 'all facts underlying the [foregoing] legal issues,' which included Resp/Cross-App's [Plaintiff's] Muscogee (Creek) Indian heritage, and the history of the Muscogee (Creek) Nation, especially with regard to the citizenship rights of Muscogee (Creek) Indians who happen also to have ancestors of African descent.* (*emphasis added*)

Respondent/Cross Appellant's Brief (*Aplt's Br.,* at 2-4).

Mr. Graham acknowledged in his appellate brief that this Court must review *de novo* issues of law. (*Aplt's Br.,* at 4).

On November 02, 2007, this Court issued the following succinct, but comprehensive *ORDER*:[4]

> The Supreme Court reviewed the record *de novo* and finds no evidence that the Citizenship Board acted arbitrarily and capriciously. The Citizenship Board's final decision will be upheld. The District Court's Order remanding the case back to the Citizenship Board is hereby reversed. The District Court is hereby ordered to dismiss the case. (*emphasis added*)

This Court's November 02, 2007 *Order* (ROA, Tab 4) clearly states that this Court reviewed the complete record *de novo* (analyzing the same issues now raised in GRAHAM II).

The issue of Mr. Graham's claim to entitlement to citizenship, based upon the Creek Treaty of 1866 as raised in GRAHAM I, is identical to the one now presented upon appeal in the present case.

Mr. Graham, following this Court's November 02, 2007 final *Order* in GRAHAM I, neither sought reconsideration nor clarification from this Court of its order, nor did he take

[4] Exhibit C to *The Muscogee (Creek) Nation's Motion to Dismiss*, CV-2019-138, filed November 15, 2019.

the issue to federal court. It is now after the passing of twelve (12) years that Mr. Graham challenges the depth, breadth and precedential value of this Court's November 02, 2007 final *Order* in GRAHAM I. Mr. Graham sat upon his rights from 2007 until 2019.

II. GRAHAM II – The Case at Bar

(District Court Case No.: CV 2019-138; Upon Appeal: SC 2020-01)

On May 30, 2019, Mr. Graham presented another Citizenship Application to the Citizenship Office (hereafter, "GRAHAM II") again claiming citizenship based on the Creek Treaty of 1866, Article II. The Citizenship Board met on August 2, 2019 to review the information provided by Mr. Graham and on August 23, 2019, Mr. Graham received a letter from the Citizenship Board denying his Citizenship Application. (ROA, Tab 5). Mr. Graham, in a letter addressed to the Citizenship office dated September 3, 2019, sought administrative appellate review by the Citizenship Board. Mr. Graham waived his right to appear before the Citizenship Board for hearing. Consequently, on September 26, 2019, based upon Article III, Section 2 of the 1979 Constitution, the Citizenship Board issued its letter of denial to Mr. Graham. The letter also advised Mr. Graham of his appellate rights to the district Court.

Mr. Graham filed his *Petition* in the district court on October 18, 2019 and his *Amended Petition* on October 21, 2019, appealing the decision of the Citizenship Board which denied his application for citizenship under the Creek Treaty of 1866, Article II. On November 15, 2019, the Citizenship Board, by and through the Office of the Attorney General, filed its *Motion to Dismiss*. On January 08, 2020, the Honorable Judge Gregory H. Bigler, Chief Judge of the District Court, heard the Citizenship Board's motion to dismiss.

A. The January 8, 2020 District Court Hearing on Appellee's Motion to Dismiss.

Upon the record[5] (ROA, Tab 6), counsel for the Citizenship Board advised the trial court that there were no factual issues to be presented and that all matters before the court were questions of law. (ROA, Tab 6, Tr. 7:5 - 7:8 (Haskins)). Standing largely upon the averments in its motion to dismiss, the Citizenship Board urged that Mr. Graham's present claims against the Citizenship Board had been fully adjudicated in a 2003 action by Mr. Graham, involving the identical issues and parties. (ROA, Tab 6, Tr. 6:16 – 7:5 (Haskins)). The Citizenship Board requested that the trial court take judicial notice of filings in GRAHAM I.[6] (ROA, Tab 6, Tr. 6:19 - 6:21 (Haskins)). The Citizenship Board urged that Mr. Graham's claims in GRAHAM I, including entitlement to citizenship in reliance upon the Creek Treaty of 1866, were fully briefed, litigated, preserved for appeal, and resulted in a final order from this Court dated November 02, 2007. (ROA, Tab 6, Tr. 7:18 - 8:2 (Haskins)).

The Citizenship Board also argued that Mr. Graham was not raising new facts or authority beyond that which was litigated and appealed in Graham I, and that there is no authority at law or equity that would permit continual appellate review of an issue previously resolved by the Nation's highest court. (ROA, Tab 6, Tr. 6:21 - 7:5 (Haskins)). The Citizenship Board argued that Mr. Graham's claims are subject to the doctrine of claim preclusion (res judicata). (ROA, Tab 6, Tr. 8:6 - 8:10 (Haskins)). Finally, the Citizenship Board argued that this Court's November 02, 2007 final *Order* clearly affirms

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[5] The ROA from the January 8, 2020 hearing transcript (Tab 6) will be cited by page and line in the format suggested by the *The Blue Book: A Uniform System of Citation*.

[6] Courts may take judicial notice of prior orders of the Court. *Duong*, 848 at 930 n.3 (taking judicial notice of filings in related district court action).

that this Court exercised *de novo* review of Mr. Graham's claims. (ROA, Tab 6, Tr. 8:13 - 8:22 (Haskins)).

The trial court afforded Mr. Graham great latitude in making his presentation to the court. Mr. Graham argued the denial of his right to citizenship based upon the Creek Treaty of 1866, claiming that the district court and this Court had previously failed to rule upon his treaty arguments in his 2003 case. (ROA, Tab 6, Tr. 9:3 - 14:10 (Graham)). Mr. Graham raised no new facts or law.

On January 21, 2020, the trial court issued its *Order* sustaining the Citizenship Board's motion to dismiss Mr. Graham's amended petition. (ROA, Tab 7). The trial court found that Mr. Graham's claim to citizenship based upon the Creek Treaty of 1866 was previously fully litigated and was the subject of an opinion issued by the highest Court of the Nation in SC-2006-03 (GRAHAM I). The trial court concluded, "[t]his Court is bound by the Muscogee (Creek) Nation Supreme Court's decisions once that Court has spoken on the issues in question."

ISSUES

1. Did the Trial Court properly find that Appellant's claimed entitlement to citizenship "by blood", or, in the alternative, pursuant to the Creek Treaty of 1866, Article II, was fully adjudicated in GRAHAM I?
2. Should this Court reconsider its November 02, 2007 *Order* in GRAHAM I?

STANDARD OF REVIEW

In appeals from a bench trial, appellate courts review a trial court's factual findings for clear error, and its legal conclusions *de novo*. *See Holdeman v. Devine*, 572 F.3d 1190, 1192 (10th Cir. 2009). "It is not the roll of an appellate court to retry the facts,

because '[t]he court below has the exclusive function of appraising credibility, determining the weight to be given testimony, drawing inferences from facts established, and resolving conflicts in the evidence.'" (quoting *State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 411-12 (10th Cir. 1984)). Thus, "clear error" does not exist if the trial court's determinations are supported in any respect by the record. *Id.*

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT'S *ORDER* SUSTAINING APPELLEE'S MOTION TO DISMISS IS PROPER AND SHOULD BE AFFIRMED.

A. The Trial Court Correctly Sustained Appellee's Motion to Dismiss.

Appellant was very competently represented by legal counsel in Graham I and had the full and fair opportunity to litigate his claims. This Court's decision in GRAHAM I is the law as it applies to Appellant's Treaty claim. Under the doctrine of *stare decisis*, trial courts are required to follow the precedential decisions of appellate courts on questions of law. *See B.T. ex rel. G.T. v Santa Fe Public Schools*, 506 F.Supp.2d 718, 2007 WL 1306847 (2007). The policy of *stare decisis* is vital to the proper exercise of judicial function because "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010). Appellant, at the January 08, 2020 hearing, offered neither facts nor authority beyond that what which had been pled, briefed, argued, litigated and appealed in GRAHAM I. The trial court correctly granted Appellee's motion to dismiss.

This Court's *de novo* review of the complete record and order in GRAHAM I is a final judgment upon the merits for purposes of claim preclusion. No authority exists at

law or equity that would permit a litigant to continually seek appellate review of an issue previously resolved upon appeal by the Nation's highest Court.

Appellant cannot be permitted to continually reapply for citizenship, thereby restarting any applicable statute of limitation period, and then appeal either stale or previously adjudicated claims. Appellant, and all others so similarly situated, should be estopped from bringing untimely claims or the Nation will be faced with piecemeal litigation *in perpetuity*. Appellant cannot relitigate issues already decided by this Honorable Court involving the identical parties and issues.

Appellant asserts in his *Amended Notice of Appeal* the existence of new evidence and the application of additional authorities. However, Appellant did not seek to reopen the record before the district court in order to introduce any additional evidence nor present additional authorities for consideration. Issues raised for the first time upon appeal and outside of the record developed in the trial court should not be considered. *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716 (10th Cir. 1993). The trial Court's January 21, 2020 *Order* of dismissal should be sustained.

B. Appellant's Assertion That The Courts In GRAHAM I Did Not Rule Upon His Treaty Claim is Belied by the Record.

Appellant asserts in his *Amended Notice of Appeal,* p.1, ¶3, that this Court "[D]id not specify the basis for the dismissal and so it could have been Appellant's genealogy and not the 1866 Treaty . . . [a]nd in the event this Court decides that SC-2006-03 was based on the 1866 Treaty . . . that the August 30, 2018 Opinion in *Cherokee Nation v. Nash*, D.DC. No 13-01313(TFH) is cause for this Court to reexamine SC-2006-03."

Appellant alleges in his opening brief that neither the trial court nor this Court in GRAHAM I clearly differentiate the basis of its findings, *e.g.* that Appellant was denied

citizenship based upon his claim to citizenship "by blood" or upon Appellant's alternative theory of citizenship by treaty right. The record, however, is replete and unambiguously demonstrates that all of Appellant's claims, including "by blood", constitutional and treaty challenges were fully considered in GRAHAM I, and denied.

The brevity of this Court's November 02, 2007 *Order* does not suggest the Court did not exercise its obligation to conduct a thorough review of all of Mr. Graham's legal challenges that were preserved for appeal. *See Northington v. Marin*, 102 F.3d 1564, 1570 (10th Cir. 1996); *citing In re Griego*, 64 F.3d 580, 583-84 (10th Cir. 1995); *Bratcher v. Bray-Doyle Independent School District*, 8 F.3d 722, 724 (10th Cir. 1993)(internal quotations omitted)(a court's obligation to conduct a *de novo* review over all issues is presumed). A brief order expressly stating the court conducted *de novo* review is sufficient. *Griego*, 64 F.3d at 583-84; *Bratcher*, 8 F.3d at 724.

This Court's November 02, 2007 *Order* concluding that the Citizenship Board did not act arbitrarily or capriciously does not preclude *res judicata* effect of judgment entered in that action. The Tenth Circuit Court of Appeals recently reaffirmed the principles of issue preclusion (*Res Judicata*). *Goodwin v. Hatch*, 2019 WL 3297504 (10th Cir. July 23, 2019). "The doctrine of *res judicata*, ..., will prevent a party from litigating a legal claim that was *or could have been* the subject of a previously issued final judgment." *citing Lenox MacLaren Surgical Corp. v. Medtronic*, Inc. 847 F.3d 1221, 1239 (10th Cir. 2017) (internal quotation marks omitted)(*emphasis added*).

Appellant's rights were fully litigated and decided in GRAHAM I. Supporting the application of *res judicata* in GRAHAM II, both actions arise out of denial of Appellant's applications for citizenship with the Nation, all of Appellant's alleged injury flows from

denial of that application under the 1979 Constitution, and Appellant asserted no new and independent claims in GRAHAM II. The Supreme Court's ruling in GRAHAM I is the law of this case.

i. Claim Preclusion (*Res Judicata*)

It is only upon appeal that Appellant suggests the existence of new facts and raises non-binding case law from other jurisdictions, which were not presented to the trial court. While judicial deference should be given to *pro se* parties, that deference and latitude should not be extended to permit the creation of new issues on appeal by newly retained legal counsel that were not raised before the trial court. Appellant generally alleges in his *Amended Notice of Appeal*, filed January 29, 2020, at ¶4, that "Appellant has additional evidence that was not known in the earlier case"; however, Appellant does not identify those additional facts nor allege that Appellant was denied the opportunity to present those facts in GRAHAM I.

Issue preclusion has three elements: "(1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Id*. This Court's November 02, 2007 *de novo* affirmation of the Citizenship Board's action was a final judgment upon the merits for purposes of preclusion. The parties in GRAHAM I and GRAHAM II are the same and there exists identity of causes of action in both suits.

The Tenth Circuit has adopted the transactional test contained in the Restatement (Second) of Judgments § 24. *See Hatch v. Boulder Town Council*, 471 F.3d 1142, 1149 (10th Cir. 2006). Under the transactional test, "a claim arising out of the same transaction, or series of connected transactions as a previous suit, which concluded in a valid and

final judgment, will be precluded." *Id.* Both GRAHAM I and GRAHAM II arose out of the same transaction or series of transactions – namely, the denial of Appellant's application for citizenship. Newly discovered facts, "[u]nder the transactional test, a new action [based upon new facts] will be permitted only where it raised new and independent claims, not part of the previous transaction, based on the new facts." *Hatch*, 471 F. 3d at 1150. Appellant's claims in GRAHAM II are not new or independent.

There is an exception to application of claim preclusion where the party resisting it did not have a full and fair opportunity to litigate the claim in the prior action. *See Lenox MacLaren Surgical Corp.*, 847 F.3d at 1239. Here, however, in GRAHAM I, Appellant was represented by competent counsel in an action that spanned four (4) contentious years, and covered numerous legal issues, including application of the Creek Treaty of 1866.

Appellant had the opportunity to fully and fairly litigate all of his claims in GRAHAM I. He did so and his rights and claims were fully determined by the highest court of the Nation. Both the trial court and this Court ruled upon Appellant's "by blood" and Treaty claims in GRAHAM I. Appellant had the opportunity to fully and fairly litigate his rights. He did so and his rights and claims were fully determined. Therefore, Appellant's claims are subject to the doctrine of *res judicata* and were properly dismissed.

II. THIS COURT'S NOVEMBER 02, 2007 *ORDER* IN SC 2006-03 (GRAHAM I) WAS CORRECT.

A. The 1979 Constitution Was Enacted Consistent With Federal Law.

The 1979 Constitution was passed in compliance with the Oklahoma Indian Welfare Act of 1936. The Nation could logically have concluded that the Oklahoma Indian Welfare Act superseded all prior treaty rights. It was plain to the Nation that

Congress exercised its plenary powers when it passed the Oklahoma Indian Welfare Act of 1936 and then permitted passage of the 1979 Constitution. Congress has plenary power to abrogate a treaty unilaterally, an any time, even without consent of the affected tribe. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)(this case is commonly cited by the federal government when it abrogates Indian treaty rights).

The Nation also asserts the legitimacy of its 1979 Constitution because its passage was completed under the watchful eye of Federal Judge Bryant in *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd*, *Harjo v. Andrus,* 581 F.2d 949 (D.C.C.1978).

Furthermore, the 1979 Constitution was ratified by the citizens of the Muscogee (Creek) Nation and was approved by the Department of Interior.

The Nation has now relied upon the U.S. government's apparent approval of the 1979 Constitution and upon the Freedmen's lack of diligence for forty (40) years. Since passage, the 1979 Constitution has become woven into the legal fabric of the Nation and has remained unchanged for four (4) decades. The trial court correctly sustained Appellee's motion to dismiss.

B. *Cherokee Nation v. Nash, et al.*, Is Not Binding Upon this Court and is Factually and Legally Distinguishable.

As an alternate argument, Appellant asks this Court to reconsider its 2007 order by broadly referencing federal district court decisions involving the Cherokee and Seminole Nations where those nations either lost or abandoned their fight to exclude the Freedmen from citizenship. Those cases are from other jurisdictions, are factually and legally distinguishable.

The Cherokee Nation case is not binding precedent upon the Nation and was not presented to the trial court for consideration. *Cherokee Nation v. Nash*[7] is merely persuasive precedent that this Court may follow or reject and, when properly presented, is entitled to respect and careful consideration, although it is from a neighboring jurisdiction. *Black's Law Dictionary*, Abridged Seventh Edition, p. 957. This Court is not bound to find the same way.

Finally, the Cherokee Nation case is factually and legally distinguishable. The Cherokee Nation had previously permitted citizenship enrollment of the Freedmen and then, in 1979, held a Constitutional convention and voted to remove the citizen Freedmen. This Nation has never permitted enrolled citizenship of the Freedmen. The Cherokee Nation case is persuasive at best.

C. Should This Honorable Court Decide to Review Application of the Creek Treaty of 1866 to Article III §2 of the 1979 Constitution, the Matter Must be Remanded to the District Court to Develop a Full Record for Appeal Upon All Issues.

Mr. Graham also raises whether the 1979 Constitution, Article III §2, must be consistent with the Creek Treaty of 1866. Appellee respectfully suggests that should this Honorable Court decide to again review application of the Creek Treaty of 1866 to the 1979 Constitution, this case must be remanded to the district court for further proceedings.

The trial court in GRAHAM II failed to reach the following issues raised by the Citizenship Board's *Motion to Dismiss*: i) whether the trial court lacked subject matter jurisdiction over Mr. Graham's claims; ii) whether Mr. Graham's claims are barred by the applicable statute of limitations; iii) whether the courts of the Muscogee (Creek) Nation

[7] *Cherokee Nation v. Nash et al.*, 267 F.Supp.3d 86 (U.S.D.C., D.C. 2017); 2017WL3833870.

must uphold the 1979 Constitution; iv) whether Mr. Graham enjoys a private right of action to enforce the Creek Treaty of 1866; v) whether the Muscogee (Creek) Nation's sovereign immunity has either been waived or abrogated by Congress; and vi) whether Mr. Graham has failed to state a claim upon which relief can be granted.

Additionally, the trial court should also consider whether the Treaty of 1866 reaffirms the Muscogee (Creek) Nation's right to self-government and to the exercise of independent tribal sovereignty within its reservation boundaries. The trial court should also consider the technical meaning of the Treaty of 1866 in the sense in which they would naturally be understood by the Muscogee (Creek) Nation in 1866.

In summary, before this Court can reach the constitutionality of Article III §2 of the 1979 Constitution, the matter must be remanded to the trial court to make a complete record and reach all issues raised in the Nation's motion to dismiss.

CONCLUSION

The 1979 Constitution of the Muscogee (Creek) Nation defines who can become a citizen of the Nation. This Court, in GRAHAM I, heard and denied all of Appellant's claims for citizenship, including that relying upon the Creek Treaty of 1866.

WHEREFORE, the Citizenship Board respectfully prays that this Honorable Court affirm the trial court's *Order* of January 21, 2020 sustaining the Citizenship Board's motion to dismiss Appellant's *Amended Petition,* and decline to revisit its November 02, 2007 *ORDER*, including application of the Creek Treaty of 1866.

Respectfully submitted on June 12, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2020, I caused to be placed into the U.S. Mail, with postage fully pre-paid and affixed thereto, a true and correct file-stamped copy of the above **APPELLEE'S RESPONSE BRIEF**, to the following:

John E. Parris
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s/ Kyle B. Haskins
Kyle B. Haskins