IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

CITIZENSHIP BOARD OF THE MUSCOGEE (CREEK) NATION, Appellant, vs. RHONDA K. GRAYSON and JEFFERY D. KENNEDY, Respondents.	)	Case No.: SC-2023-10 (District Court Case No. CV-2020-34)

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Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 1

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In the Matter of the Extended Term of Off. of Dist. Ct. Judge Patrick Moore, No. SC 10-05 (Muscogee (Creek) 2011) 29

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McIntosh Carr v. Zrtikas Zarger v. Brunner & Gooden, 7 Mvs. L. Rep. 348 (Muscogee (Creek) 1886) 13, 24

Mclean v. United States, 226 U.S. 374 (1912) 20

MCN Nat'l Council v. MCN Election Board, No. SC 09-10 (Muscogee (Creek) 2010) 10, 28, 29

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Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (2019) 14, 23

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Roff v. Burney, 168 U.S. 21 (1897) 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 17

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Shrock v. Wyeth, Inc., 727 F.3d 1273 (10th Cir. 2013) 8

Smith v. United Parcel Serv., 578 F. App'x 755 (10th Cir. 2014) 13

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United States v. State of Wash., 157 F.3d 630 (9th Cir. 1998) 18

United States v. Wheeler, 435 U.S. 313 (1978) 17

Vann v. Kempthorne, 534 F.3d 741 (D.C. Cir. 2008) 17

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Angie Debo, *The Road to Disappearance* 253 (1941) 4

Annie Heloise Abel, *The American Indian Under Reconstruction* 211 n.443 (1925) 4, 23

Braden Harper, MVSKOKE MEDIA, *Governor Stitt continues to add stress to tribal government relationships* (Feb. 6, 2024), *available at* https://www.mvskokemedia.com/governor-stitt-continues-to-add-stress-to-tribal-government-relationships/ 5

Brief of Appellant ..... *passim*

Chris Cameron, NEW YORK TIMES, *Lawmakers threaten to withhold major funds from Native tribes over treatment of descendants of the enslaved* (July 27, 2001), *available at* https://www.nytimes.com/2021/07/27/us/freedmen-tribes-congress.html 5

Department of the Interior –Office of Indian Affairs: Report of D.N. Cooley, as President of the Southern Treaty Commission (October 30, 1865) 4, 23

Gary Zellar, *African Creeks – Estelvste and the Creek Nation* (2007) 3, 4, 24

Jean Chaudhuri & Joyotpaul Chaudhuri, *A Sacred Path: The Way of the Muscogee Creeks* (2001) 30

Jonathan Small, OKLAHOMA COUNCIL OF PUBLIC AFFAIRS, *McGirt Mess Continues to Grow* (May 23, 2022) *available at* https://ocpathink.org/post/analysis/mcgirt-mess-continues-to-grow. 6

Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914* 53 (1999) 5

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Record on Appeal ..... *passim*

Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002) 17

Secretary Haaland Approves New Constitution for Cherokee Nation, Guaranteeing Full Citizenship Rights for Cherokee Freedmen, UNITED STATES DEPARTMENT OF INTERIOR (May 12, 2021), available at http://tinyurl.com/2s3p9f54 25

Statement of Bryan Newland Before the United States Senate Committee on Indian Affairs, UNITED STATES DEPARTMENT OF INTERIOR (July 27, 2022), available at https://tinyurl.com/bkmahver 25

WEBSTER'S UNABRIDGED DICTIONARY (1886 Edition) 21

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Treaty Between the United States and the Muscogee (Creek) Nation, June 14, 1866, 14 Stat. 785 ..... *passim*

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INTRODUCTION

"Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). In the historic *McGirt* decision, the United States Supreme Court ended Oklahoma's violation of the 1866 Treaty between the United States and the Muscogee (Creek) Nation (the "Nation"), fortifying the Treaty's status as the supreme law of the land. Accordingly, the Supreme Court upheld the United States' commitments to the Nation in Articles 1, 3, and 9 of the Treaty of 1866 (the "Treaty") and restored the Nation's rightful jurisdiction.

In Article 2 of that same Treaty, the Nation solemnly committed to give Creeks of African descent and their descendants (the "Freedmen")[1] citizenship, "the rights and privileges of native citizens", and "equal protection" under the Nation's laws. Treaty Between the United States and the Muscogee (Creek) Nation, June 14, 1866, 14 Stat. 785, art. 2. Put simply, the Nation gave its word, and "[g]reat nations, like great men, should keep their word." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This Court now has the opportunity to show the world that the Nation will keep its word as a nation of laws by enforcing Article 2 of the Treaty and restoring the citizenship of Rhonda Grayson and Jefferey Kennedy (collectively, the "Respondents"), who were born citizens of the Nation before being illegally denaturalized in 1979.

In a stunning twist, Appellant Citizenship Board (the "Board") attempts to defend the indefensible by undermining the Nation's own sovereignty: it claims its denial of Respondents'

[1] In 1906, thousands of individuals who were or are descendants of (1) individuals who were enslaved by the Nation, (2) Creeks of "African Descent," (3) free "Africans" living as citizens of the Creek Nation, and/or (4) "mixed blood" citizens of the Nation were deemed by the Nation to be Creek Freedmen.

citizenship is rooted in a tacit abrogation of the Treaty by a statement from a functionary of the United States Government.[2] The Board posits that Congress can (and has) delegated to federal bureaucrats the ability to implicitly abrogate operative provisions of the Treaty, which the Board concedes is the supreme law of the Nation and the United States. If the Court remands on that logic, in future cases, the Nation will be estopped from demanding other parties must show Congress unequivocally intended to abrogate other treaty rights. It will open the Nation to renewed, more vigorous, challenges to the Treaty as a whole—thereby undermining *McGirt*, for which the Nation fought so hard.

Notably, most, if not all, of the Board's objections do not stem from the actions of the District Court, which the Board shamelessly disparages as engaging in "judicial activism." App. Br. at 15.[3] Rather, its objections stem from evidentiary issues caused by its own willful obstruction by refusing to provide evidence in a timely manner—behavior which was so egregious that the District Court sanctioned its trial counsel *E.g.*, R. 102 (District Court's Order granting Respondents' motion for sanctions). This Court should disregard the Board's paltry sovereign immunity claim, avoid a precedent-setting erosion of the Nation's rights under the Treaty, follow settled treaty interpretation and jurisprudence, and affirm the District Court's judgment that Respondents' petition to acquire citizenship in the Nation in 2019 was wrongfully denied.

STATEMENT OF THE ISSUES

(1) Can anything less than an unequivocal Act of Congress abrogate the Treaty Rights of the Nation or its citizens?

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[2] In lieu of even acknowledging the Nation's sovereign commitment to extend full rights to the Freedmen, the Board presents several red herrings in the form of purported evidentiary concerns and a statutorily-waived sovereign immunity defense. Notwithstanding the lack of support for the Board's evidentiary concerns, this Court could still apply *de novo* review, disregard all evidence at trial, and affirm the judgment below. *See infra* n.8 (discussing the administrative record in this case).

[3] Throughout this Brief, citations to "App. Br." indicate reference to Brief of Appellant. And citations to "R." indicate reference to the Record on Appeal.

SUMMARY OF THE HISTORICAL RECORD[4]

Creeks of African descent have a long and storied history within the Nation. R. 9 at 2 (citing Kristy Feldhousen-Giles, *To Prove Who You Are: Freedmen Identities in Oklahoma* 3 (2008)). These Creeks were brought into the Nation "as free people who intermarried or were adopted into tribal communities, as runaway [en]slave[d] from the American colonies and states, and as enslaved people who were bound to particular individuals . . . ." *Id.* There were citizens of African descent within the Nation well before the Treaty of 1866, *id.* at 3 (citing Gary Zellar, *African Creeks – Estelvste and the Creek Nation* 32-37 (2007)).[5] African Creeks' status deteriorated when many Creeks adopted the plantation economies and anti-Black attitudes of the southern slave-states. *See* R. 9 at 4 (citing Zellar at 43). The Civil War divided the Nation, with certain Creek leaders signing a treaty with the Confederacy. *Id.* A separate faction joined the Union army in Kansas with many African Creeks, both enslaved and free. R. 9 at 18 (citing R. 10, Ex. D, Dr. Gary Zellar Aff.).

In 1865, as the Civil War ended, President Andrew Johnson designated a peace commission to travel to Fort Smith, Arkansas, to convene a council for the purpose of negotiating new treaties with the Nation, the other Five Tribes, and various Plains Tribes. R. 9 at 5 (citing Zellar at 78). The members of that commission declared that a treaty with the United States must contain certain stipulations to bring the 13th, 14th, and 15th Amendments into effect, including:

> The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

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[4] All of the history in this section was brought forth at the summary judgement stage, at trial, or both, and none of it was ever contested or contradicted by the Board.

[5] For example, the descendants of Cow Micco, a free Creek of African descent and Chief within the Creek Nation who along with other tribal leaders negotiated and signed the Treaty of 1866, are ineligible for citizenship within the MCN due to the racially discriminatory and unlawful blood quantum requirements. *See* R. 31 at 14.

R. 9 at 6 (quoting *Department of the Interior–Office of Indian Affairs: Report of D.N. Cooley, as President of the Southern Treaty Commission* 298 (October 30, 1865)); *see also* R. 91, Tr. 34:1-37:2 (expert testifying her scholarship shows the United States' intent in negotiating Article 2 of the Treaty was to extend the Reconstruction Amendments to the Nation). While many Creeks acquiesced, the Creeks aligned with the Confederacy ("Confederate Creeks") initially refused on the basis that the Freedmen should not benefit from "principles of equality as citizens" of the Nation. *Id.* at 17 (quoting Annie Heloise Abel, *The American Indian Under Reconstruction* 211 n.443 (1925)).

Despite initial opposition, and in a clear exercise of its sovereignty, the Nation negotiated and executed the 1866 Treaty with the United States. The Treaty provides in pertinent part:

> [T]he many persons of African descent . . . residing in said Creek country under their laws and usages, or who have been thus residing in said country . . . and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens (thereof,) shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons.

Treaty, art. 2 (emphasis added). From the 1867 Constitution until the passage of the present Constitution in 1979, Freedmen were accordingly integrated into the Nation.[6] In fact, the Arkansas Colored, Canadian Colored, and North Fork Colored towns all elected representatives to the House of Kings and the House of Warriors. R. 9 at 18 (citing Zellar at 97).

Intent on destroying the Nation, however, in 1893, Congress created the Commission to the Five Civilized Tribes (the "Dawes Commission") to negotiate an allotment agreement to "break

[6] By 1878, African Creek participation in the Nation's political affairs included not only representation on the National Council but also Tribal court judicial appointments as judges and attorneys, popular elected positions as Lighthorse law enforcement officers, and awardees of government service contracts. *See* R. 9 at 7 (citing Zellar at 99; Angie Debo, *The Road to Disappearance* 253 (1941)).

down the autonomy of the Five Tribes and erect a white man's state . . . ." R. 9 at 8 (quoting Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914* 53 (1999)). During this assault on the Nation's sovereignty, Congress passed the Curtis Act of June 28, 1898, 30 Stat. 495, *id.* (citing Carter at 36), which directed the Dawes Commission to forcibly complete citizenship rolls of the Creek Nation with the goal of disassembling the Nation's sovereign territory. The citizenship rolls created by the United States were: 1) the "Blood Roll," which allegedly comprised Creek citizens with Creek blood; and 2) the "Freedmen Roll," which was purportedly a roll of those citizens of the Nation who were formerly enslaved Africans.

In addition to determining Tribal citizenship, the Dawes Commission also artificially imposed an allottee's degree of Indian blood ("blood quantum"). Where an allottee had parents from different tribes, their blood quantum was calculated for their mother's side only. *Id.* at 9 (citing Carter at 49). The Dawes Commission employed the racist hypo-descent rule, by which any individual with "one drop" of "Black blood" was to be considered Black. Therefore, in cases of mixed African Creek and Indian "by blood" parents, the allottee was always enrolled on the Freedmen Roll. *Ibid.* The Dawes Commission enrolled Creeks of African descent on the Freedmen Roll, regardless of whether they or their ancestors were ever formerly enslaved or how much "Creek blood" they actually possessed. *Ibid.* The Nation is now using these vestiges of federal attempts to destroy the Nation to shirk its sovereign commitments to the Freedmen, thereby handing its many opponents in the United States and Oklahoma, as well as powerful private entities, new weapons with which to assault the Nation (*see infra* at 12-13).[7]

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[7] *See, e.g.*, Chris Cameron, NEW YORK TIMES, *Lawmakers threaten to withhold major funds from Native tribes over treatment of descendants of the enslaved* (July 27, 2001), *available at* https://www.nytimes.com/2021/07/27/us/freedmen-tribes-congress.html; Braden Harper, MVSKOKE MEDIA, *Governor Stitt continues to add stress to tribal government relationships* (Feb. 6, 2024), *available at* https://www.mvskokemedia.com/governor-stitt-continues-to-add-stress-to-tribal-government-relationships/; OKLAHOMA GOVERNOR J. KEVIN STITT, *Governor Stitt Delivers 2024 State of the State Address* (Feb. 5, 2024), *available at* https://oklahoma.gov/governor/newsroom/newsroom/2024/february2024/governor-stitt-delivers-2024-

On October 6, 1979, the present Constitution was ratified. Muscogee (Creek) Const., Certificate of Results of Election. The Constitution states, in pertinent part:

> Persons eligible for citizenship in the . . . 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 as provided [by the same act] . . . .

MCN Const. art. III, § 2 (emphases added). Upon ratification of this Constitution and to the present day, the Nation unlawfully robbed Creek Freedmen of their citizenship. It is this Constitutional language, and the laws implementing it, that are, as the Cherokee Supreme Court held when dealing with a similar treaty provision entitling their Freedmen to citizenship, void *ab initio*. *See In re Effect of Cherokee Nation v. Nash*, 16 Am. Tribal Law 268, 274 (Cherokee 2021). This litigation does not address any other provisions of the Nation's Constitution.

STATEMENT OF THE CASE

Respondents possess a present right to citizenship pursuant to Article 2 of the Treaty of 1866 as descendants of those enrolled by the Dawes Commission as Muscogee (Creek) Freedmen. The Treaty is binding on the Nation. Article III of the Creek Constitution and the Nation's current citizenship laws, as applied to descendants of the Dawes Freedmen Roll, violate Article 2 of the Treaty. The Citizenship Board's most recent denial of Respondents' right to citizenship deprives Respondents of their guaranteed rights under the Treaty. The District Court was accordingly correct to reverse the Board's decision and recognize those portions of Article III of the Creek Constitution which deny Freedmen citizenship as invalid. *See also In re Effect of Cherokee Nation v. Nash*, 16 Am. Tribal Law at 247; *Seminole Nation of Oklahoma v. Norton*, 2001 WL 36228153,

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state-of-the-state-address.html (lashing out against *McGirt* and lawsuits such as *Strobel* and *Hooper* supported by "tribal governments" as "standing in the way" of resolution of various legal issues); Jonathan Small, OKLAHOMA COUNCIL OF PUBLIC AFFAIRS, *McGirt Mess Continues to Grow* (May 23, 2022), *available at* https://ocpathink.org/post/analysis/mcgirt-mess-continues-to-grow.

at *17 (D.D.C. Sep. 27, 2001) (finding the Curtis Act, which Respondents note is more expansive and comprehensive than Oklahoma Indian Welfare Act, or "OIWA", did not abrogate the Seminole Nation's obligations to their Freedmen pursuant to their 1866 Treaty with the United States).

A. Proceedings Before the Citizenship Board

Respondents both applied for citizenship in 2019. *See* R. 75, 80.[8] Their applications invoked Article 2 of the Treaty and provided evidence that they are lineal descendants of an ancestor on the 1906 Dawes Freedmen rolls. The Board has not disputed Respondents' ancestral lineage and status as descendants of Creek Freedmen. *See, e.g.*, R. 75 at 41 (acknowledging Kennedy's ancestral lineage to be "true and correct"). Despite this undisputed lineage, both Respondents were given a boilerplate denial of citizenship because "no Original Enrollee, on the 1906 Dawes Creek *By Blood* Roll, was found for your Citizenship Application . . . the Citizenship Board's decision is to deny your Citizenship application for enrollment." R. 75 at 39; R. 80 at 18 (emphasis added). Both then appealed the denial through a hearing before the full Board in which they presented as evidence the Treaty and re-asserted their right to citizenship in the Nation.

[8] R. 75 and R. 80 are the administrative record: Respondents only obtained the administrative record after discovery requests. *See* R. 89, Tr. 55:1-56:10 (Nathan Wilson testifying that these exhibits are the administrative record and were provided only after discovery requests).
Despite its statutory obligation to maintain an administrative record, MCNA 7, § 2-108(B)(1), the Board initially denied creating one. Thus, it strains credulity that the Board currently appeals the District Court's ruling in part because the District Court strayed from the administrative record. In fact, in its brief opposing Respondents' request that this Court take original jurisdiction, the Board argued that the attempted appeal was "a disingenuous attempt to circumvent . . . the exercise of discovery" and insisted that it "must be afforded the opportunity to engage in the exercise of discovery, including responses to requests for production of documents, sworn interrogatory responses, answers to requests for admissions and the opportunity to depose Appellants, their witnesses and experts." Mot. to Dismiss Appeal, *Grayson v. Citizenship Bd. of the Muscogee (Creek) Nat.*, No. CF 2020-34 (Mar. 26, 2021) at 6 (emphasis added). Additionally, this Court declined to assert original jurisdiction, in part because it "would greatly benefit from the assembling of a complete record before the District Court." *Id.*, Order Denying Pet'r's Notice of Appeal, *Grayson v. Citizenship Bd. of the Muscogee (Creek) Nat.*, No. CF 2020-34 (Mar. 29, 2021) at 4. Accordingly, and because the Board was successful in demanding original jurisdiction not be taken because a factual record—which necessarily sits outside of the administrative record—be compiled, it should be estopped from attacking the opinion below for doing just as the Board insisted: compiling and then relying upon evidence outside the administrative record.

Despite this, the Citizenship Board affirmed the denial in letters containing nearly identical language to Respondents' initial denials. *See* R. 75 at 50; R. 80 at 15.

B. Respondents' Petition in the District Court

The administrative record is crystal clear: Respondents were denied citizenship in violation Article 2 of the 1866 Treaty. Having exhausted their administrative remedies, Respondents petitioned the District Court, as is their right "pursuant to [MCNA] Title 7 § 4-110 (B)." R. 1 ¶ 18. The petition sought relief under "the Treaty of 1866 between the United States and the Creek Nation . . . ." R. 1 ¶ 19; see also R. 1 ¶ 78.[9] Respondents maintained throughout the proceedings below that their citizenship rights were supported by the administrative record. *See id.* at 40:16-24. However, in the proceedings below, and contrary to their MCNA-mandated obligation to maintain an administrative record (MCNA 7, § 2-108(B)(1)), the Citizenship Board claimed it "[did not] have a record . . . ." R. 31, 9:11-12; *id.* at 34:25-35:4; *see also supra* n.8.

C. The Trial

The Board's own obfuscation of the record forced a trial on one issue: the rationale for denying Respondents' citizenship application.[10] *See also supra* n.8 (discussing Respondents circuitous acquisition of the administrative record). In that trial, Respondents presented evidence from a legal expert meticulously outlining the Supreme Court test necessary to decide if a Treaty

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[9] The Board's invitation to this Court to reverse the District Court on precisely the grounds requested in the Petition's headers should be declined. Courts do not limit themselves to the headers in a complaint to determine if a claim is present, but rather read holistically to determine whether a defendant has been given "fair notice of what the … claim is and the grounds upon which it rests." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted); *see also Clinton v. Sec. Benefit Life Ins. Co.*, 63 F.4th 1264, 1275 (10th Cir. 2023) ("Our task is to consider the complaint's allegations taken as a whole") (emphasis added) (quotation marks and citation omitted). Moreover, the Board did not assert this as a ground for dismissal either in their motion to dismiss or at trial. Accordingly, this last-ditch effort to avoid the Nation's obligation to the Freedmen is waived. *Compare* App. Br. at 2-3, *with Shrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) ("Arguments that were not raised below are waived").

[10] The District Court made clear why it denied summary judgement: "Inasmuch as this case is rooted in the Citizenship Board's rationale for the denial of Plaintiffs' applications for enrollment, and the rationale applied by the Citizenship Board is not a fact agreed upon by the parties, this Court need go no further in discussing whether summary judgment is appropriate." R. 42 at 7.

between the United States and an Indian Nation remains in force. Certainly, during the trial, the District Court heard testimony from the Board's employees as to their rationale in denying Respondents' citizenship application. But that rationale is irrelevant as a matter of law, because all that matters is (as is conclusively shown below) the Nation made a sovereign commitment and agreed that the "supreme law of the land" required extending citizenship and all rights to Creek Freedmen and their descendants (Treaty, art. 2), *supra* (citing R. 75 at 41). The fact that the Board still denied citizenship "based on applicable law . . . .", R. 75 at 39; R. 80 at 18, means the "applicable law" in question is contrary to the Treaty and the Nation's laws—a question of law.

D. The District Court's Opinion

The District Court held that the Board's decision was both contrary to the law and did not address the substantial evidence (including addressing the Treaty, which was appended to Respondents' applications).

The District Court did not reach "contradictory conclusions," as the Board argues. App. Br. at 9 (representing the District Court somehow condoned the Citizenship Board's decisions because it found they "were not arbitrary and capricious"). This is a complete misreading of the District Court's opinion—the opinion defined "arbitrary and capricious" as "a willful and unreasonable action taken without consideration or in disregard of acts or law or without a determining principle." R. 111 at 7 (emphases added). As this Court, and any regular user of the English language, is aware, "'or' is disjunctive, indicating an alternative." *United States v. Smith,* 35 F.3d 344, 346 (8th Cir. 1994); *see also In re McDaniel*, 973 F.3d 1083, 1095 (10th Cir. 2020) (finding that "or" is "disjunctive" (citing *Loughrin v. United States*, 573 U.S. 351, 357 (2014))). While the District Court found that the Citizenship Board's actions were not arbitrary and capricious, because they received "flawed" guidance from the Nation's Attorney General, R. 111

at 10, the Opinion nonetheless found that the decision was contrary to law. *Id.* at 12-14. This comports with the standard of review in the statute, which requires agency action be set aside if it is "arbitrary and capricious, unsupported by substantial evidence or contrary to the law." *Id.* at 7 (emphasis added) (quoting MCNA 7, § 4-110(B)); *see also Loughrin*, 573 U.S. at 357.[11]

STANDARD OF REVIEW

The Citizenship Board is correct that the standard of review for the purely legal and Constitutional question of whether Article 2 of the Treaty has been abrogated by Congress, discussed more thoroughly *infra* at 27-29, is *de novo* (App. Br. at 26). But this Court's review of questions of Constitutional law should never be "deferential." *Id.* "As this Court reviews all lower court rulings on issues of law *de novo*, all dispositive constitutional law issues are ultimately decided by this Court." *MCN Nat'l Council v. MCN Election Board*, No. SC 09-10, at 11 (Muscogee (Creek) 2010), *corrected on other grounds* on Dec. 6, 2010; *see also infra* at 28-29 (discussing *MCN Nat'l Council*). For this reason, and because this dispute is purely legal, this issue does not implicate the factual record developed at trial—only the administrative record and the laws of this Nation.

ARGUMENT

The Board incorrectly complains that the District Court did not afford it the appropriate level of deference, App. Br. at 9, 12, 14, 26, 27, and instead engaged in "judicial activism," *id.* at 15. Yet the Board is not due a heightened level of deference when it misapplies the law. And it did indeed misapply the law by violating Article 2 of the Treaty. It is not a sign of judicial activism,

[11] Not content to merely misread the lower court proceedings, the Board goes as far as to malign them. In describing the District Court opinion, the Board characterizes it as "judicial activism . . . ." App. Br. at 15. Worse still, the Board attacks the testimony of University of Oklahoma College of Law's Ada Lois Sipuel Fisher Chair in Civil Rights, Race and Justice Professor Carla Pratt before the District Court on the basis that she is "an adopted child of Choctaw Freedmen . . . ." *Id.* at 7. There is no reason to denigrate the birth of a witness, particularly where this Court only overturns factual determinations of a District Court for clear error. The Board appears desperate enough to avoid this Court's review of the merits of the law to resort to *ad hominem* attacks on witnesses and the Nation's judiciary.

but judicial resolve, to uphold the laws that protect the Nation from federal and state encroachment. Conversely, the Nation is not entitled to sovereign immunity because it was expressly waived.

I. The Citizenship Board's Denial of Citizenship to Respondents was Arbitrary and Capricious, Without Substantial Evidence, and Contrary to the Law.

It is axiomatic that the Treaty of 1866, including Article 2, is in full force and is binding. The Board is bound to conform to the Treaty because "treaties entered into with the United States of America and Indian Nations should be held inviolate and followed by . . . the United States of America and the Muscogee (Creek) Nation." *Seminole Nation Dev. Auth. v. Morris*, 2000 WL 33976514, at *8, 7 Okla. Trib. 67 (Muscogee (Creek) D. Ct. 2000). In 2020, the Nation won a landmark victory in which it advocated for the supremacy of the Treaty before the United States Supreme Court. *See McGirt*, 140 S. Ct. at 2460-51; *see generally* Amicus Br. of the Muscogee (Creek) Nation in Support of Pet'r, *McGirt v. Oklahoma*, No. 18-9526 ("*McGirt* Amicus Brief"). *McGirt* adheres to the principle, uniformly followed by courts, that all sovereign entities are bound by treaties as they are the "supreme law of the land." *See also Seminole Nation Dev. Auth. v. Morris*, 2000 WL 33976514, at *8. Article 2 of the Treaty expressly guarantees citizenship in the Nation to descendants of those on the Freedmen Rolls, including Respondents. Accordingly, any decision that denies Respondents citizenship in the Nation because they do not descend from ancestors on the so-called Creek by Blood Roll is contrary to the law, as doing so denies them the citizenship to which they are entitled, "the rights and privileges of native citizens," and "equal protection" under the Nation's laws. Treaty, art. 2.

The Citizenship Board does not, and cannot, argue that the Treaty is not part of the Nation's law. Indeed, "[t]he judicial power of the . . . Nation shall be vested in [this] Court limited to the . . . Nation's jurisdiction . . . .", MCN Const. art. VII, § 1, which is defined as "based upon those Treaties entered into by the . . . Nation and the United States of America . . . ." M(C)N Const. art.

1, § 2 (emphasis added). Moreover, the Nation's courts "shall have general civil jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the . . . Nation . . . regardless of the Indian or non-Indian status of the parties." MCNA 27, § 1-102(B) (emphasis added). And "[i]n all cases, the . . . Nation's Courts shall apply the Constitution and duly enacted laws of the . . . Nation, the common law of the Muscogee people as established by customs and usage, and the Treaties and Agreements between the . . . Nation and the United States." *Id.* § 1-103(A).

Moreover, if this Court adopts the Board's argument that Article 2 can be abrogated by anything less than unequivocal statutory language by the United States Congress, then the Nation will be barred by the doctrine of judicial estoppel from ever requiring its many adversaries to meet the high burden of establishing Congressional clarity when abrogating treaty rights in the future. Judicial estoppel "forbids a party 'from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.'" *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1217 (6th Cir. 1990); *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (The "three factors" of estoppel in the Tenth Circuit—the venue where the Nation faces the most immediate risk of challenge, are that: (1) the party's position is "clearly inconsistent" with a past position, (2) the party "succeeded" "so that judicial acceptance of [the] inconsistent position . . . would create the perception that either the first or the second court was misled[;]" and (3) the party "would gain an unfair advantage in the litigation").

This "equitable doctrine" applies in this circumstance as it "preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment," *Teledyne Indus., Inc.*, 911 F.2d at 1218; an apt description of fighting for recognition of the Treaty in one breath in *McGirt*, and self-abrogating portions of the Treaty contrary to those same

arguments in another. *See Smith v. United Parcel Serv.*, 578 F. App'x 755, 759 (10th Cir. 2014) ("The purpose of judicial estoppel 'is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions.'"); *see also Hooper v. City of Tulsa*, 71 F.4th 1270, 1285 (10th Cir. 2023) (the Nation supporting Hooper as amicus and relying on *McGirt*, which of course relied on the enforceability of the Treaty); *Strobel v. Oklahoma Tax Comm'n*, No. TC-120806 (Okla. Sup. Ct. Oct. 28, 2022) (same); *Muscogee (Creek) Nation v. City of Tulsa,* No. 23-cv-00490-SH (N.D. Okla. Nov. 15, 2023) (the Nation relying on *McGirt* as a party to the action). In fact, the Court may find that the Board's argument is presently estopped, as it directly contradicts the Nation's successful intervention in *McGirt* and *Hooper*. If successful here, the Nation will certainly be faced with relitigating *McGirt* in the future without the successful defenses it initially raised.

Rather than test the unequivocal language, applicability, or supremacy of the Treaty, the Board resorts to a myopic legal theory that risks the very foundations of tribal sovereignty both for the Nation and all other Tribal Nations throughout the country. Specifically, the Board argues Article 2 was implicitly abrogated upon the Department of the Interior's (the "DOI") acceptance of the Nation's present constitution through OIWA. App. Br. at 19-22. In support of this theory, the Board erroneously points to boilerplate language in the Treaty recognizing that Congress may alter the terms of the treaty. It is black letter law that Congress cannot abrogate treaty rights without an unequivocal statement to that effect. OIWA does not expressly abrogate Article 2; in fact, it does not even mention the Treaty.

The Board also ignores binding precedent from this Court interpreting Article 2 of the Treaty, which recognizes Creek Freedmen as citizens, *see McIntosh Carr v. Zrtikas Zarger v. Brunner & Gooden*, 7 Mvs. L. Rep. 348 (Muscogee (Creek) 1886), and instead—unbelievably—

relies on a non-binding (and unpersuasive) 1941 opinion from the Solicitor General of the DOI as authority that the Treaty has been implicitly abrogated.

Accepting the Citizenship Board's arguments would create a catastrophic inroad on the Nation's sovereignty by exponentially expanding any adverse party's ability to violate the Nation's sovereign interests. Regardless, the DOI's ratification of the Nation's Constitution explicitly carves out ratifying any violations of federal law—which denying the Freedmen citizenship in the Nation surely constitutes. As the Treaty remains wholly in force, the Nation violated and continues to violate the Treaty, and therefore the law, when it denies Freedmen citizenship despite its commitment in the Treaty.

A. Article 2 of the Treaty of 1866 Remains in Force.

"Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 739 (1986). Yet it is "clear that Congress has . . . broken more than a few of its promises to the Tribe." *McGirt*, 140 S. Ct. at 2462. Certainly, it remains the unfortunate reality that Congress can unilaterally abrogate treaty provisions or treaty rights. *See Dion*, 476 U.S. at 739. Due to the fundamental nature of Indian rights, however, such abrogation must be unequivocal. *Id.* at 738 ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."); *see also Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 535 (8th Cir. 2020) (relying upon *Dion*'s clear statement rule to hold that the OSHA does not apply to a fishery organized under Indian law). The Nation itself has argued that acts, such as the Oklahoma Statehood Act, cannot abrogate treaty rights unless they "otherwise demonstrate[] Congress' clear intent to abrogate a treaty . . ." *McGirt* Amicus Br. at 25 (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (2019)).

While an "[e]xplicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights," *Dion*, 476 U.S. at 739, at a minimum, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty," *id.* at 739-40; *see also Leavenworth, Lawrence, & Galveston R.R. Co. v. United States*, 92 U.S. 733, 741-42 (1875); *EEOC. v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 250-51 (8th Cir. 1993).

Tellingly, the Board's brief mentions none of this.[12] Further, the statutory language from OIWA that the Board contends abrogates Article 2 does not contain an unequivocal or plain statement abrogating the Treaty. Nor does it, or does its legislative history, contain even a scintilla of evidence, let alone "any clear evidence that Congress actually considered the conflict between its intended action on the one hand [stripping citizenship from Freedmen, as the Board claims] and Indian treaty rights on the other [here, a guarantee of citizenship to Freedmen and their descendants], and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 740; *see also see Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 132 (D.D.C. 2017) (finding no evidence in the legislative history of the Five Tribes Act that Congress intended to abrogate Freedmen citizenship requirements in the 1866 Treaty between the U.S. and the Cherokee), *judgment entered sub nom. In re Effect of Cherokee Nation v. Nash*, 16 Am. Tribal Law 268.

The relevant portion of OIWA states:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under

[12] In fact, in a shocking turn of phrase that flips the last remaining protections it has against federal encroachment on the Nation's sovereignty on its head, the Board states that "[t]he 1866 Treaty does not invalidate the membership requirements contained in the Nation's Constitution and approved by the United States." App. Br. at 24. The actual question that must be answered, but that the Board has avoided throughout these proceedings, is whether the Nation's Constitution could ever "invalidate" (i.e., abrogate) a treaty (it cannot) and if any supposed United States approval meets the level of specificity the Supreme Court requires.

> such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting . . . .

25 U.S.C. § 5203. There are no indicators in this section or any statutory text in OIWA (or its legislative history) that Congress even considered a conflict between that Act and Article 2, or any aspect of the Treaty. *See Dion*, 476 U.S. at 740. In fact, OIWA "and its legislative history do not mention Indian treaties or treaty rights at all, let alone the Treaty of [1866]." *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1160 (9th Cir. 2020). Nor does OIWA have, on its face, any evidence of Congressional intent to abrogate Article 2 (or any other aspect of any treaty). This is in marked contrast to *Dion*, as an example, in which "Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles [was] certainly strongly suggested on the face of the Eagle Protection Act" because "[t]he provision allowing taking of eagles under permit for the religious purposes of Indian tribes [was] difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians." 476 U.S. at 740. There is no similar tension between OIWA and Freedmen citizenship guaranteed in Article 2.

Even if there was some indication in OIWA suggesting Congress intended to greenlight the disenfranchisement of Freedmen (there is not), the DOI's acceptance of the present constitution does not suffice to abrogate the Freedmen's rights. The DOI's ratification of the constitution explicitly cabins its approval to actions that do not violate federal law. M(C)N Const., Approval (DOI approving of the 1979 Constitution "provided that nothing in this approval shall be construed as authorizing any action under the Constitution that would be contrary to federal law."). Depriving Freedmen of citizenship violates Article 2 of the Treaty, which constitutes the supreme law of the land unless abrogated. As such, the ratification of the M(C)N constitution did not—and could not have—ratified stripping the Freedmen of citizenship within the Nation.

Without abrogation of the Treaty, the Nation has no sovereign right to deprive Freemen of citizenship. This is not because the Nation does not have a sensitive sovereign interest in choosing its membership. It does. *See* App. Br. at 23 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978) and *Roff v. Burney*, 168 U.S. 218, 222 (1897)). Rather, it is because the Nation exercised a different sovereign prerogative in joining the Treaty—the ability, as a sovereign, to make treaties with another sovereign. It is well established that the one constraining factor upon the Nation's ability to self-select membership is federal law (here, a treaty)—something *Roff v. Burney*, to which the Board itself cites, makes eminently clear:

> The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the constitution or laws of the United States, and we know of no provision of such constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred.

168 U.S. at 222 (emphasis added).[13] Even the most deferential constructions of tribal authority, which posit the federal supremacy clause should not apply to First Nations, still maintain that treaties are a sovereign act and must be adhered to. *See, e.g.*, Robert N. Clinton,[14] *There Is No*

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[13] *See also Vann v. Kempthorne*, 534 F.3d 741, 755–56 (D.C. Cir. 2008) (noting the "Cherokee Nation has no interest in protecting a sovereignty concern that has been taken away by the United States," that "the Thirteenth Amendment and the 1866 Treaty . . . left it powerless to discriminate against the Freedmen on the basis of their status as former slaves, and that "[t]he tribe lacks *any* sovereign interest in such behavior." (citation omitted)); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute . . . ."); *Seminole Nation Dev. Auth.*, 2000 WL 33976514 at *8 (concluding "treaties entered into with the United States of America and Indian Nations should be held inviolate and followed by not only the United States of America and the Muscogee (Creek) Nation, but other Indian Nations . . . ."); *Haaland v. Brackeen*, 599 U.S. 255, 318 (2023) (Gorsuch, J., concurring) ("[T]he only restriction on the power' of Tribes 'in respect to [their] internal affairs' arises when their actions 'conflict with the Constitution or laws of the United States.'"); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) ("Indian tribes have long been recognized as sovereign entities, 'possessing attributes of sovereignty over both their members and their territory . . . .' This sovereignty is not absolute. Tribal sovereignty is subject to limitation by specific treaty provisions, by statute at the will of Congress, by portions of the Constitution found explicitly binding on these tribes, or by implication due to the tribes' dependent status." (citations omitted)).

[14] At the time of authorship, Professor Clinton was the "Barry Goldwater Chair of American Institutions, Arizona State University. B.A., 1968, University of Michigan; J.D., 1971, University of Chicago. The author also serve[d] as the Chief Justice of the Winnebago Supreme Court and as an Associate Justice of the Cheyenne River Sioux Tribal Court of Appeals and the Colorado River Indian Tribal Court of Appeals." *Id.* at n.a1.

Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 115 (2002) ("[T]here is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty." (emphasis added)).

As current Principal Chief David Hill explained to current Oklahoma Governor Kevin Stitt just a few weeks before the District Court published the opinion that is presently being appealed, "the Muscogee (Creek) Nation has entered into numerous treaties with the United States, and, as you know, Article VI of the U.S. Constitution clearly upholds these treaties as the supreme law of the land, and every judge and every state shall be bound thereby."[15]

Additionally, holding steadfast to the Treaty is vital for the continued sovereignty of the Nation. Treaties protect against encroachment on tribal sovereignty. *E.g. McGirt* Amicus Brief, *see also United States v. State of Wash.*, 157 F.3d 630, 647 (9th Cir. 1998) ("Thus, whatever the status of the state law at the time of the Treaties or today, the Treaties represent the supreme law of the land and give to the Tribes the right to take shellfish from private tidelands."). As the Nation's own Code recognizes, the Treaty is essential to the continued survival of the Nation. *See* MCNA 27, § 1-101 (identifying that "[t]he authority of the . . . Nation to adopt this title is based upon . . . [t]he inherent sovereignty of the Muscogee (Creek) Nation and the Treaties and Agreements between the Muscogee (Creek) Nation and the United States, including but not limited to the Treaty of 1790 and the Treaty of 1866." (emphasis added)); *see also McGirt*, 140 S. Ct. at 2476 ("[T]he most authoritative evidence of the Creek's relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place.").

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[15] *See* Principal Chief David Hill, FACEBOOK (Aug. 30, 2023), available at https://www.facebook.com/photo?fbid=861032425783818&set=pcb.861036559116738 (Posting a letter from David Hill to Kevin Stitt).

Even arguing that a portion of the Treaty of 1866 is void risks impinging on the Nation's sovereignty. As the District Court noted:

> The Nation cannot choose to select and rely on portions of the Treaty to which it points as evidence of the tribe's intact reservation, and also negate clear language entitling descendants of a segment of the Dawes Final Roll – the Creek Freedmen – from eligibility for citizenship . . . . Either the Treaty in its entirety is binding or none of it is.

R. 111 at 14. (emphasis added)). In recognition of this fact, the Cherokee Nation reinforced their commitment to their Freedmen in the wake of the United States Supreme Court's *McGirt* decision (despite their treaty requiring Freedmen citizenship with less clear language than that of Article 2):

> As our people rejoice the ruling in *McGirt,* and expect a similar determination in pending litigation before the Oklahoma Court of Civil Appeals, may we be reminded that the Creek Nation's rights to self-governance and the recognition of its reservation was dependent upon its 1866 Treaty. Likewise, Cherokee Nation's pathway to similar recognition requires upholding the 1866 Treaty, not abrogating it. Our ancestors suffered unspeakable atrocities in their fight to preserve culture, language, traditions, values, and right to self-governance. Any calls by the government or the people demanding a new amendment to the Constitution, a Constitutional Convention, or the passage of other laws, for the sole purpose of denying the right of citizenship to Freedmen descendants, must only be seen as politically and or socially motivated acts. Such words shall never be law.

In re Effect of Cherokee Nation v. Nash, 16 Am. Tribal Law at 275. The Nation's arguments threaten the vitality of the Treaty, but also allow for future encroachments on the Nation's sovereignty and pose a grave risk to the Nation. Treaty abrogation must remain unequivocal.

B. The Board's Denial of Citizenship Violated Federal and MCN Principles of Treaty Interpretation, Application, and Precedent.

The Treaty unambiguously mandates that Freedmen have citizenship rights. Canons of treaty interpretation further support granting Freedmen citizenship. Treaty interpretation must follow the original meaning of the terms at signing and may not "favor contemporaneous or later practices instead of the laws Congress passed." *McGirt*, 140 S. Ct. at 2468; *see also Washington St. Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019). Moreover, when

interpreting treaty language, "the language [must] be understood today . . . as that same language was understood by the tribal representatives in 1800s when the treaty was negotiated." *Seminole Nation Dev. Auth.*, 2000 WL 33976514, at *2; *see also Muscogee (Creek) Nation v. American Tobacco Co.*, 2 Mvs. L. Rep. 376, 381 (1998). Critically, if something is stated in plain language—as it is in Article 2—this Court will not place a different meaning on the words. *Tiger v. Muscogee (Creek) Nation Election Bd.*, SC 07-04 (Muscogee (Creek) 2008).

The Board does not suggest that Article 2 never conferred upon Freedmen and their descendants citizenship in the Nation. Nor could they, as that language is clear:

> [T]he many persons of African descent . . . residing in said Creek country under their laws and usages, or who have been thus residing in said country . . . and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens (thereof,) shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds . . . and the laws of the said nation shall be equally binding upon and give equal protection to all such persons.

Treaty, art. 2 (emphasis added); *see also All*, WEBSTER'S UNABRIDGED DICTIONARY (1860 Edition) ("1. Every one, or the whole number of particulars. 2. The whole quantity, extent, duration, amount, quality, or degree . . . . This word signifies, then, the whole or entire thing . . . ."); *Mclean v. United States*, 226 U.S. 374, 383 (1912) ("'All' excludes the idea of limitation."). That Freedmen were entitled to citizenship under provisions such as Article 2 was clear at the time of, and immediately after, the Treaty's ratification. *Infra* at 24-25. As such, Article 2 unambiguously extends citizenship to the descendants of Creek Freedmen.

Refusing to acknowledge these well-established principles of Treaty interpretation, the Board proposes two ex post facto caveats to the clear meaning of Article 2. First, the Board contends that "the Treaty did not preclude that Freedmen descendants' future applications for citizenship could be subject to terms agreed to by the Treaty parties that might ultimately prevent

the descendants from becoming citizens." App. Br. at 24. But that is squarely foreclosed by the Board's failed argument of treaty abrogation. *See generally id.* (declining to mention the word "abrogated" aside from one reference to the alleged inadmissibility of evidence brought by plaintiff at trial, *id.* at 7); *see also supra* at 14-18.

Second, the Board argues that the "Treaty language does not guarantee that all Freedmen descendants forever will automatically be citizens of the Nation," positing that the Treaty only "gives Freedmen descendants the right to become citizens, which right includes the right of all citizens to vote on constitutional limitations to citizenship that might exclude the Freedmen descendants' future descendants, as noted in *Harjo*, *supra*." App. Br. at 24.[16] This baseless assertion is contradicted by the plain text of the Treaty. The Treaty guarantees that Freedmen, "and their descendants . . . may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof,] shall have and enjoy all the rights and privileges of native citizens, . . . and the laws of the said nation shall be equally binding upon and give equal protection to all such persons." Treaty, art. 2 (emphasis added).

This clause grants perpetual citizenship to Creek Freedmen as a class. So long as "native citizens" enjoy citizenship in the Nation, then "descendants" of Freedmen "shall have and enjoy" that right. *Id.* The Citizenship Board does not even attempt to explain how "descendants" could somehow be so time-limited. Construing the Treaty as the Board suggests (without ever actually

[16] The Board mistakenly relies upon *Harjo*, 420 F. Supp. 1110, for the proposition that "[t]he Treaty [of 1866] gives Freedmen descendants the right to become citizens, which right includes the right of all citizens to vote on constitutional limitations to citizenship that might exclude the Freedmen descendants' future descendants . . . ." App. Br. at 24. As the Board concedes, this was merely "the Court recogniz[ing] the United States' position . . . . [,]" *id.* at 22, or at least the position of the DOI (and not the whole of the federal government as that position is manifested through laws or treaties passed through bicameralism and presentment). Indeed, the *Harjo* court was clear that, in that case, "[t]he issue [wa]s not who is entitled to membership in the tribe or to vote in tribal elections . . . ." 420 F. Supp. at 1117 (emphasis added). Accordingly, even if the *Harjo* Court was opining on the Treaty, it was dicta. And dicta of a foreign district court is certainly not binding on this Court. Just as the court in *Harjo*, this Court may find "the Interior Department's later interpretations . . . utterly untenable . . . ." *Id.* at 1129.

coming to terms with the words of the Treaty) is to "utterly ignore the meaning of the word 'descendant' as defined by the best authors[:] 'one who descends, as offspring, however remotely' . . . [;] 'Any one proceeding from an ancestor; offspring' . . . 'issue of the body of the person named, of every degree[;]' . . . 'those who have issued from an individual, including his children, grandchildren, and their children, to the remotest generation.'" *Tichenor v. Brewer's Ex'r*, 33 S.W. 86, 87 (Ky. 1895) (citing Webster, Stormouth, Rapalje and Lawrence, and Bouvier close in time to Treaty's enactment).

The plain meaning of descendants also comports with how "that same language was understood by the tribal representatives in 1800s." *Seminole Nation Dev. Auth.*, 2000 WL 33976514, at *2. The historical record shows that Confederate Creeks who enslaved Creeks of African descent were violently anti-Black, allied with the South, and opposed Freedmen citizenship. *Supra* at 3 (discussing that delegation's opposition to Freedmen citizenship during the Treaty's negotiation). If the Treaty language was understood to mean that the Nation could stop recognizing Freedmen citizenship at any point, then the Confederate Creeks' strong opposition to Article 2 makes no sense. In fact, there is voluminous evidence that the Nation's representatives at the time of signing the Treaty and shortly thereafter understood the Treaty in the same way its plain language requires: Creek Freedmen are, and forever shall be, citizens of the Nation. *See infra* at 23-25 (discussing the practical construction of the Treaty). The Board's alternative explanation entirely fails to address the actual words of the Treaty.

Third, the Board seizes upon a routine provision in the Treaty to attempt to inject ambiguity into the Treaty's plain meaning. App. Br. at 17, 24. But the provision to which the Board points is merely a restatement of the unfortunate but well-established principle that Congress can unilaterally restructure a treaty, provided it does so unequivocally. *See supra* at 14-15. This basic

principle does not alter the plain meaning of Article 2. Nor does it create any ambiguity as to Article 2's clear statement that Freedmen are entitled to citizenship in the Nation.

The "history of the treaty, the negotiations, and the practical construction adopted by the parties"—again, material only appropriate for this Court's consideration if the Treaty were in fact ambiguous—supports Respondents' right to citizenship. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Mille Lacs Band of Chippewa Indians*, 526 U.S. at 197 (negotiation history as shedding light on treaty interpretation). During the Treaty negotiations, the United States made clear that Freedmen citizenship was initially a prerequisite to the recognition of the reservation.[17] The Confederate Creeks strongly opposed Freedmen citizenship,[18] while the Loyal Creeks fought for it:

> [T]he United States commission urged the loyal delegation to yield temporarily on the point [full citizenship for people of African descent within the Creek Nation]. They [the loyal delegation] refused: they held out firmly for their freedmen, urging that when the brave old Opothleyoholo, resisting all the blandishments of the rebel emissaries, and of his Indian friends, stood out for the government, and led a large number of his people out of the country, fighting as they went, abandoning their hoes, they promised their slaves that if they would remain also faithful to the government they should be free as themselves. Under those circumstances the delegates declined to yield, but insisted that the sacred pledge should be fulfilled, declaring that they would sooner go home and fight and suffer again with their faithful friends than abandon the point."

Daniel F. Littlefield, Jr., *African and Creeks: From the Colonial Period to the Civil War* 145 (1979) (emphases added). Ultimately, all parties to the agreement reaffirmed the Freedmen's citizenship.

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[17] *See* R. 9 at 16-17 (the U.S. delegation during treaty negotiations with the Southern and Loyal Creek delegations, requiring "incorporation [of Freedmen] into the tribes on an equal footing with the original members . . . .") (citing Ex. A, *Department of the Interior—Office of Indian Affairs: Report of D.N. Cooley, as President of the Southern Treaty Commission* 298 (Oct. 30, 1865)).

[18] The Southern Creek delegation to the Treaty negotiation opposed extending citizenship to the Freedmen because, "we agree to the emancipation of the negroes in our nation but cannot agree to incorporate them upon principles of equality as citizens thereof . . . ." R. 9 at 17 (quoting Annie Heloise Abel, *The American Indian Under Reconstruction* 211 n.443 (1925)); *see also supra* at 3 (discussing the same).

In fact, the practical construction of the Treaty leans in only one direction: Freedmen citizenship. Immediately after the Treaty's passage, the Nation's 1867 Constitution extended citizenship to the Freedmen, and Freedmen were represented in the Nation's government in the Houses of Kings and Warriors. R. 9 at 18 (citing Zellar at 97); *see also*, *generally*, M(C)N 1867 Const. (not including blood quantum requirements for citizenship eligibility). Moreover, in 1871, when the Nation's courts held exclusive criminal jurisdiction in Indian Country, then Principal Chief Checote argued against federal prosecution of Creek Freedmen because "[t]he Colored people are regarded by the Creeks as their citizens having been made so by treaty stipulations . . . . [and the Nation] claim[s] full jurisdiction over them subject to be tried in our courts by our laws, which they have helped to make." *Id.* (quoting *Zellar* at 103). The United States ultimately agreed. *Ibid.* Finally, in 1877, Principal Chief Ward Coachman, in a statement to a joint legislative session of the Honorable Houses of Kings and Warriors, made clear that Article 2's grant of rights upon Freedmen was so "plain that no one c[ould] mistake or misunderstand it." *Id.* at 7 (citing Ex. E at 3, Message of Principal Chief Ward Coachman, (Oct. 1, 1877)). The Board cannot, and has never, challenged this history.

Moreover, Respondents' construction of the Treaty comports with the 138-year precedent of this very Court. In the only instance where this Court interpreted Article 2, it held:

> In the opinion of the Court that from the above treaty it is clearly shown that there are three classes of the African descent who are allowed to enjoy the rights of a Creek citizen. First, those lawfully residing in the nation at the time of the ratification of said treaty. Second, those who may have resided and may return to this country within one year from the certification of the treaty and their descendants. Third and such other of the same race, as may be permitted by the laws of this Nation to remain within the limits of the jurisdiction of the Nation.

McIntosh Carr v. Zrtikas Zarger v. Brunner & Gooden, 7 Mvs. L. Rep. 348 (Muscogee (Creek) 1886) (emphasis added).

McIntosh Carr, unlike the opinion of the DOI's Solicitor General upon which the Board premises its abrogation theory, is actually "applicable law" in this Nation: it constitutes "the common law of the Muscogee people . . . ." MCNA 27, § 1-103(A). And, unlike the Solicitor's opinion issued seventy-five years after the signing of the Treaty, *McIntosh Carr* provides this Court insight into the contemporaneous meaning of Article 2, because it expounds upon the meaning of Article 2 a mere twenty years after the Treaty's signing.

Yet the Board maintains that the United States. has a different interpretation of the Treaty due to the issuance of that opinion by the DOI Solicitor General,[19] which, according to the Board, "demonstrated its intent that the [N]ation's OIWA-authorized Constitution is consistent with the 1866 Treaty." App. Br. at 25. The Board conveniently glosses over the fact that Solicitor General opinions are not only insufficient to abrogate treaty rights, but are also routinely disregarded by federal courts as unpersuasive. *E.g.*, *Harjo*, 420 F. Supp. At 1129-30 (finding the DOI's "later interpretations" of Congressional actions "utterly untenable"); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1197, 1199 (C.D. Cal. 1998) ("[T]he Court does not find the

[19] As discussed above, *supra* 14-15, treaty rights do not ebb and flow at the whim of federal bureaucrats and can only be extinguished through unequivocal acts of Congress. Even if these rights are as effervescent as the Board suggests, the Solicitor's Opinion that it stakes its theory upon is not the federal government's last word on this matter. In fact, and contrary to the Board's allegation that the U.S. Government assented to denying Freedmen citizenship, the federal government recognizes the Nation's obligations to the Freedmen and maintains the Nation should meet these obligations in accordance with its commitments and the law. *Statement of Bryan Newland Before the United States Senate Committee on Indian Affairs*, UNITED STATES DEPARTMENT OF INTERIOR (July 27, 2022), available at https://tinyurl.com/bkmahver (encouraging the Five Tribes "to meet their moral and legal obligations to the Freedmen."); *Secretary Haaland Approves New Constitution for Cherokee Nation, Guaranteeing Full Citizenship Rights for Cherokee Freedmen*, UNITED STATES DEPARTMENT OF INTERIOR (May 12, 2021), available at http://tinyurl.com/2s3p9f54 ("encourag[ing] other Tribes to take similar steps to meet their moral and legal obligations to the Freedmen" after approving the Cherokee constitution which extended citizenship rights to their Freedmen). A federal magistrate court recognized as much as well when it found that Creek Freedmen's rights under Article 2 "are rights on par with those protected by the Constitution. Therefore, the undersigned Magistrate Judge agrees that Plaintiff has a right of action under Article II of the Treaty of 1866, and by virtue, the Thirteenth Amendment." *Graham v. Haaland*, No. 6:23-cv-00168, Docket No. 84 at 15 (E.D. Oklahoma Jan 8, 2024) (report and recommendation).

defendants' argument[,]" which included reliance upon "a 1978 Opinion of the Solicitor of the [DOI,]" "to be persuasive . . . .").

In addition to eviscerating the critical requirement that treaty abrogation be unequivocal, *see supra* at 14-15, this argument also ignores that treaty interpretation turns on the meaning of the treaty—to the signatories—at the time of signing. *McGirt*, 140 S. Ct. at 2468 (treaty interpretation may not "favor contemporaneous or later practices instead of the laws Congress passed." (first emphasis added)); *Seminole Nation Dev. Auth.*, 2000 WL 33976514, at *2 (treaty interpretation favors "language [as it] was understood by the tribal representatives in 1800s.") (emphasis added).

OIWA, enacted in 1936, cannot speak to the intent of the signatories of a treaty that predated its passage by seventy years. Nor does the legal opinion of a functionary with no policy-making authority provide any insight into the intent of the entire federal government. The rights of the Nation's citizens cannot possibly hinge upon the legal musings of a foreign federal bureaucrat. Nor should the Nation, or this Court, endorse such a perverse outcome.

Article III of the Constitution is clearly in conflict with the Treaty because the Treaty explicitly requires the Nation to extend citizenship to Freedmen. Accordingly, the cannon of statutory interpretation, which requires a court read statutes to avoid a conflict between them and which the Board relies on, is inapplicable in this case. As pointed out herein, canons of treaty interpretation control, not canons of statutory interpretation.[20]

The Board's invocation of the Indian Canon of Construction, requiring that ambiguity in a treaty be interpreted to the Nation's benefit, is equally inapposite. App. Br. at 24-25 (citing *Herrera*

[20] The Board's argument even fails on that canon's own terms. The Board's interpretations, cannot "be read to give effect, if possible, to both enactments." App. Br. at 25. In the Board's reading of the law, one enactment entirely erases the other.

v. Wyoming, 139 S. Ct. 1686, 1689 (2019) and *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 269 (1992)). There is no ambiguity in the Treaty; Congress cannot retroactively project ambiguity in the Treaty through OIWA (*see supra at* 26). Implicit abrogation does not benefit the Nation and is a dangerous precedent. *See supra* at 12-13.

II. The Nation Has Waived Its Sovereign Immunity On At Least Two Applicable Occasions, And The Question Presented In This Case Is One Of Law, Which This Court Reviews *De Novo*.

This appeal presents a single issue: Can anything less than an unequivocal act of Congress abrogate the treaty rights of the Nation or its citizens? Desperate to avoid the plain language of the Treaty, the Board fabricates four ancillary "questions presented" relating to sovereign immunity. This case does not present sovereign immunity concerns.

The Nation has unequivocally and expressly waived sovereign immunity on at least two occasions,[21] both of which apply in this case. First, and broadly:

> The sovereign immunity of the . . . Nation is hereby waived in all actions limited to injunctive, declaratory or equitable relief; . . . The waiver of sovereign immunity in actions for injunctive, declaratory or equitable relief shall not be construed as granting a waiver for the purpose of obtaining any equitable relief requiring payment from, delivery of, or otherwise affecting funds in the Treasury of the Muscogee (Creek) Nation. . . ."

MCNA 27 §1-102(D). Here, Respondents ask only for prospective declaratory and equitable relief, which does not draw upon the Treasury retroactively. This comports with similar sovereign immunity frameworks. *See Edelman v. Jordan*, 415 U.S. 651, 677 (1974) ("[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective

[21] The premise of the Board's sovereign immunity claim requires this Court to find the denial of Respondents' citizenship arbitrary and capricious. The Board faults the District Court for going "beyond the administrative record," App. Br. at 9, to ascertain "the rationale for denial," *id.* at 5 (quoting R. 42 at 6). But remanding on the basis that the District Court was wrong to conduct a trial to ascertain the rationale for denial is an admission that the rationale is unclear or contradictory. "To survive an arbitrary-and-capricious review, an agency must offer 'understandable' findings and rationales, not 'unclear or contradictory' ones." *W. Virginia v. U.S. Envtl. Prot. Agency*, No. 3:23-CV-032, 2023 WL 2914389, at *13 (D.N.D. Apr. 12, 2023) (quoting *Associated Gas Distribs. v. FERC*, 893 F.2d 349, 361 (D.C. Cir. 1989)), *appeal dismissed*, No. 23-2411, 2023 WL 8643059 (8th Cir. Oct. 10, 2023).

injunctive relief and may not include a retroactive award which requires the payment of funds from the state treasury . . . ." (citation omitted)); *see also Milliken v. Bradley*, 433 U.S. 267, 288-91 (1977) (holding that injunctive relief that would prospectively draw upon a state's Treasury does not violate a state's sovereign immunity). The trial below clearly falls within this waiver.

Second, and more narrowly, the Nation waived sovereign immunity for appeals of the Board's decisions. MCNA 7, § 4-110(B). The Board does not deny that Respondents exhausted their administrative remedies, nor do they deny that suit under such grounds is appropriate. Rather, they contend that any evidence brought in from outside the administrative record violated their sovereign immunity because it exceeded the Court's scope of review. App. Br. at 13-15. Setting aside the fact that the relief sought by Respondents clearly fits within the first broad waiver of immunity discussed, *supra*, this Court can decide this matter without considering material outside the administrative record. The question at issue here is purely one of law; the administrative record (R. 75, 80) and the operative law (the Treaty and this Nation's laws and constitution) are properly before this Court. The trial below resulted solely because of the Board's obfuscation and deliberate misrepresentation of the record. *See supra* n.8; *id.* at 8.

Regardless, "this Court is the final arbiter of cases and controversies concerning constitutional provisions." *MCN Nat'l Council*, No. SC 09-10, at 6; 11 ("As this Court reviews all lower court rulings on issues of law *de novo*, all dispositive constitutional law issues are ultimately decided by this Court."). None of the evidence adduced at trial is necessary for this Court to decide whether Congress abrogated Article 2 of the Treaty.

Finally, the Board vaguely references some quotient of deference it is due according to the MCNA 7, § 4-110(B). Tellingly, however, the Board never attempts to describe or quantify the scope of this deference, simply describing the standard of review applicable as "deferential,

judicial review." App. Br. at 27. Certainly, this Court should "give proper deference to the administrative expertise of" the Citizenship Board on factual issues. MCNA 7, § 4-110(B) (emphasis added). But no facts are in dispute here regarding the Respondents' ancestral lineage tracing descent to the Freedmen (and therefore Dawes Final) Rolls. *See also* R. 75 at 41. Moreover, the Board's vague assertions of deference cannot encroach on this Court's power as "the final arbiter of cases and controversies concerning constitutional provisions." *MCN Nat'l Council*, No. SC 09-10, at 6; *see also* MCNA 7, § 2-108 (listing the Board's "[d]uties and responsibilities" which do not include interpreting the law and constitution of the Nation).

Ultimately, the Board asks the Court to risk the sovereignty of the Nation in its effort to exclude the Freedmen. It invites this Court to join in this masochistic pursuit by ceding its proper place in the Nation's separation of powers. *See In the Matter of the Extended Term of Off. of Dist. Ct. Judge Patrick Moore*, No. SC 10-05, at 12 (Muscogee (Creek) 2011) (noting the Nation "is comprised of three, equal branches of government," that the "Nation must follow the Constitution with its inherent separation of powers," and that "the Judiciary interprets the Constitution"). For the Nation's sake, this Court is duty-bound to decline both invitations, retain its authority as the Nation's law-interpreting body by applying *de novo* review to all questions of law, and affirm the District Court's ruling ending decades of failure to adhere to the Nation's sovereign commitments.

CONCLUSION

It bears repeating Justice Gorsuch's statement in *McGirt* that "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt*, 140 S. Ct. at 2482. The Nation's unlawful violation of Article 2

has, for 44 years, robbed Respondents and thousands of other similarly situated Creek Freedmen of their birthright, heritage, and humanity.

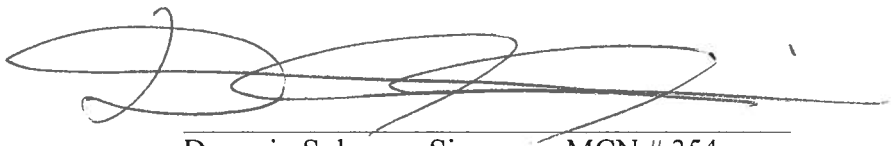
The Nation did not traditionally equate citizenship with race, physical appearance, or Blood quantum; it was the federal government that forced this "Eugenic Theory" upon the Muscogee (Creek) Nation.[22] Thus, deciding in Respondents' favor would both vindicate the rule of law and be a monumental expression of traditional Creek values and customs.

"You do what you think is right and let the law catch up," was how the great civil rights lawyer and United State Supreme Court Justice Thurgood Marshall described his judicial philosophy. In this case, the law is settled, and Respondents ask this Court to catch up and do the right thing.

For the reasons stated, the lower court's decision must be affirmed.

[22] *See* Jean Chaudhuri & Joyotpaul Chaudhuri, *A Sacred Path: The Way of the Muscogee Creeks* 56, 59 (2001).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 2024 a true and correct copy of the foregoing instrument was served via email and U.S. Mail to the following:

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