IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

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

APPELLANT'S PETITION FOR REHEARING

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The Muscogee Supreme Court's Opinion damaged the sovereignty of the Muscogee Nation. The Opinion rejected the will of the People when it cancelled the Nation's fundamental right to define citizenship. This Court rewrote the Constitution. The Court had no authority to do so. The People did not vote for this rewriting.

INTRODUCTION

The Nation's Constitution springs from its People – not from the Court. The Constitution binds the Nation together. Through it, and it alone, the People breathe life into the Nation's government. The Constitution defines its citizens. The Constitution describes the powers of the People and the limits of the government. The People did not give their Courts the power to rewrite the Constitution.

The Opinion creates potential challenges to all elections, laws, and judicial orders since 1979. Likewise, it cancels the People's requirement for a ¼ blood quantum for their National Council, Chiefs, Justices, and Judges.

Rehearing must be granted so this Court can cure its legal errors and restore the entire Constitution created by the People in 1979. The law requires that result and the People deserve it.

The Opinion requires rehearing and vacation for multiple reasons. Prior to enactment of the 1866 Treaty the Nation's citizens possessed the existential right to determine citizenship requirements. The Nation's citizens retained that right in making the 1866 Treaty unless expressly surrendered. The plaintiffs' claim perpetual citizenship cancelling the Nation's constitutional citizenship requirement. That claim can succeed only if the Nation in the 1866 Treaty expressly surrendered their existing right in the future to impose citizenship requirements that the plaintiffs do not meet.

The Opinion's invocation of *McGirt v. Oklahoma,* 591 U.S. _, 140 S. Ct. 2452, 207 L.Ed.2d 895 (2020), has no impact on the appellate issue here. There can be no confusion as to the fact that

McGirt **does not** require the invalidation of the Constitution's citizenship requirement. *McGirt* did not involve or address the section of the 1866 Treaty concerning Freedmen. *McGirt* did not define or limit the rights of native citizens. *McGirt* did not suggest, much less hold, that the rights of native citizens failed to include the right to change in the future the requirements for citizenship.

Rehearing and reversal of the District Court will neither violate *McGirt's* language nor have a negative impact on *McGirt's* application. Victory here for the Citizenship Board will not unwind *McGirt's* victory for the Nation. Rather, *McGirt* breathed fresh life into tribal sovereignty by strictly reading the 1866 Treaty in favor of the Nation. The Court here can and should follow the *McGirt* approach, strictly reading the Treaty in favor of the Nation to continue to protect that sovereignty advanced by *McGirt*.

The Opinion omits to identify and apply the extraordinarily high legal burden that must be met to cancel the Constitution's citizenship provision. When it comes to citizenship, the National Council has clearly recognized the Constitution as the supreme law of the land. The Citizenship Board does not have the burden of establishing validity of the Constitution. Rather, the **plaintiffs have the burden of establishing invalidity under the highest standard in the law**. It is long-held as a matter of general law that "**every possible presumption is in favor of the validity of a statute, and that continues until the contrary is shown to be invalid beyond a rational doubt**." *Union Pac. R.R. Co. v. U.S.*, 99 U.S. 700, 718 (1878). (Emphasis added). Accordingly, the party challenging the statute bears the burden of meeting the standard. A statute is constitutional and should be sustained against challenge when it is possible to do so. Without question, this "controlling rule applies equally to constitutional provisions as well as statutory enactments." *Local 514 Transport Workers Union of America v. Keating*, 2003 OK 110, ¶ 15, 83 P.3d 835, 839.

As shown in the balance of this Petition,[1] the Opinion fails to satisfy that heavy burden for cancellation of M(C)N Const. Art. III, Sec. 2. If the Opinion had recognized and then applied that undisputable United States Supreme Court decisional law, the Citizenship Board would have prevailed and the Nation's sovereignty would have been upheld.

The Opinion fails to apply the controlling fact, material to deciding that decisive question, that the express language of the 1866 Treaty contains no perpetual language expressly surrendering the Nation's preexisting right to determine citizenship. If the Opinion had acknowledged that fact as such and then properly applied the legal requirements for cancellation of **presumption of validity and of the challenger showing invalidity beyond a reasonable doubt**, the Citizenship Board's decisions should have been affirmed.

Rehearing is also required because the Opinion literally rewrites the 1979 Constitution's membership requirement to change its clear substance. By so doing, the Opinion violates the constitutional provision committing the adoption and amendment of the Constitution solely to the Nation's People.

Rehearing is further required for the separate and additional purpose of avoiding the constitutional crisis created by the Opinion's unnecessary language of "*void ab initio*" as to the constitutional citizenship provision. By using that phrase, the Opinion potentially calls into question all of the Nation's post-adoption elections and all acts of elected and appointed officers, and their appointments, including Justices.

Rehearing is additionally required for the separate and additional purpose of correcting the Opinion's unnecessary "*void ab initio*" invalidation of unidentified and unlitigated constitutional,

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[1] The Opinion not only omits the applicable legal standard for constitutional cancellation, a showing of invalidity of beyond a reasonable doubt, it identifies no standard at all.

statutory, and regulatory provisions based on "blood."[2] Such provisions would likely include the minimum ¼ blood quantum constitutional and statutory requirement for National Council Members, Chiefs, Deputy Chiefs, Justices of this Court, and the District Judge. Those provisions, which were not before the Citizenship Board and were not mentioned in the District Court order, are unnecessary for review of the applications and therefore cannot lawfully be cancelled in this appeal.

Rehearing is finally required to correct the Opinion's unauthorized command to the Citizenship Board to decide non-existent future cases in a specific way.[3] No constitutional or statutory authority is cited in the Opinion to legally justify such a mandate as to unfiled cases, which, of course, were neither decided by the Citizenship Board, addressed in the District Court order nor appealed to this Court. The command violates the doctrine of judicial restraint.

Without rehearing, the Opinion's unlawful cancellation of the Constitution's most important act of sovereignty and the resulting threat to the Nation's government remains unabated, unauthorized and therefore unlawful.

I: REHEARING IS REQUIRED BECAUSE THE OPINION IGNORED THE FACTS AND LAW THAT ESTABLISH THE EXISTENTIAL, RETAINED RIGHT OF THE NATION'S CITIZENS IN THE FUTURE TO IMPOSE REQUIREMENTS FOR CITIZENSHIP THAT PRECLUDE PEOPLE, INCLUDING FREEDMEN DESCENDANTS, FROM CITIZENSHIP IN THE NATION.

The overarching facts that determine the issue on appeal are undisputed, yet unapplied by the Opinion. The Appellant's issue is straightforward: did the Nation, in the express language of the 1866 Treaty, surrender the existential right of its citizens to impose future requirements for citizenship that prevent people, including certain Freedmen descendants, from being citizens?[4]

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[2] See Opinion pp. 20-21.

[3] See Opinion p. 23.

[4] The Citizenship Board has not advocated in this appeal that the 1866 Treaty has been abrogated

The Opinion does not expressly deny the pre-1866 Treaty right of the Nation's native citizens in the future to determine and limit tribal membership by adopting citizenship requirements. The Opinion does not expressly deny that due to the retained rights doctrine, in making the 1866 Treaty the Nation retained all rights, including the sovereign right of native citizens to so do unless expressly surrendered in the language of that Treaty.[5] The Opinion does not deny that if the Nation fails to so surrender by express language in the 1866 Treaty then the citizenship requirement in the Nation's Constitution, the People's use of that right cannot be is not subject to judicial cancellation by this Court.

The Opinion then overlooked several critical facts that, if applied, would have required the Opinion to uphold the Citizenship Board's rejection of the citizenship applications. First, and foremost, the Opinion notes, but omits rigorous application of the fact that the 1866 Treaty language contained no language clearly expressing the Nation's intent to deprive its citizens of the exercise of their pre-existing, otherwise retained existential right[6] in the future to impose a

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by either the United States or the Nation's constitutional requirements which the United States authorized and then pre-approved. In passing, the plaintiffs' ineffective assertion of abrogation does raise an important policy issue worth noting. According to the United States Supreme Court, "[t]he power [of Congress] exists to abrogate the provisions of an Indian treaty" and "it was never doubted that the power to abrogate existed in Congress." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Any claim that a nation lacks the equivalent power to abrogate a treaty provision through a constitution approved by the United States, while not necessary for the Citizenship Board to prevail here, is particularly unfair. Enforcement of such inequality by a tribal court would be especially demeaning of sovereignty.

[5] Tribes possess the right to change citizenship requirements to exclude citizens from future citizenship. The Salish and Kootenai Tribe did exactly that by increasing its blood quantum. In 1960 the Confederated Salish and Kootenai Tribes exercised their sovereignty by tightening their membership requirements and "established that only those born with one-quarter or more blood quantum could be tribal members." R.L. Trosper 1976 Native American Boundary Maintenance: The Flathead Reservation, Montana 1860-1970, Ethnicity (1976) Vol. 3, 256-274, cited in Russell Thornton, Population Research and Policy Review, Vol. 16, pp. 33-42 (1997).

[6] The United States Supreme Court expressly determined that a tribe's right to determine its membership is existential. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978) ("[a]

citizenship requirement that would preclude citizenship of certain individuals, including some Freedmen descendants. Proper application by the Opinion under the "beyond a reasonable doubt standard," should have ended the case with a decision in the Citizenship Board's favor.[7]

As part of its omission, the Opinion overlooked and failed to apply additional facts raised at oral argument. The United States in specific treaties with Tribes, including the Muscogee (Creek) Nation before 1830 until after 1866, used particular language which demonstrates that the United States knew how to use various words of perpetuity.[8] The centuries old common law practice, codified in Oklahoma's warranty deed statute, 16 O.S. § 40 and identified at oral argument, uses the express word "forever" when perpetual effect is intended. Those facts demonstrate that the 1866 Treaty did not, beyond a reasonable doubt, intend perpetuity and therefore should end the case in the Citizenship Board's favor.[9]

By then utilizing the canons of construction, the Opinion confirms that critical omitted fact of the native citizens' continuous right to adopt restrictive citizenship requirements. By identifying

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tribe's right to define its own membership for tribal purposes has long been recognized **as central to it existence** as an independent political community.") (Emphasis added.)

[7] The retained right of native citizens to limit citizenship in the future is reinforced by the citizens' act of voting on adoption of the Constitution. If it is beyond a reasonable doubt that right did not exist, why then did the Treaty counterparty, the United States, require the Freedmen right to vote on that adoption and why did that counterparty pre-approve the Constitution which required such right to vote? 3,590 voters, exercising the rights of native citizens, voted. See M(C)N Const. Art. X, Sec. 2, (annotation).

[8] *See*, 1818 Treaty with the Muscogee (Creek) Nation, using "forever"; 1828 Treaty with Western Cherokee Nation, using "forever" and "in all future time"; 1855 Treaty with the Chickasaw Nation and Choctaw Nation, using "forever" and "absolutely"; 1863 Treaty with Kickapoo Nation, using "perpetual"; and 1870 Treaty with the Klamath Tribes and Modoc Nation, using "perpetual and forever."

[9] "Indian Treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943).

and wrongly applying some of the canons of construction which the Opinion determined applicable, the Opinion at p. 17, actually impeaches its own result:

> In general, the canons are: (1) A treaty must be liberally interpreted in favor of the Indians or tribes in question[,] (2) A treaty must be construed as the Indians understood it[,] (3) Doubtful or ambiguous expressions in the treaty must be resolved in favor of the given Indian tribe[, and] (4) Treaty provisions that are not clear on their face may be interpreted from the surrounding circumstances and history.

Canons of construction only apply when an ambiguity exists. *See, Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, the first canon is also the last: 'judicial inquiry is complete.'") Here, an ambiguity only exists when the treaty uses words that can be read in favor of the Nation. By applying the canons (and implicitly finding an ambiguity,) the Opinion concedes that the Nation's rights expressed in its own Constitution are embodied by the Treaty. By so doing, the Opinion prevents the finding that there must be no reasonable doubt as to perpetual surrender of the right to restrict membership in the future required to cancel the Constitution's requirements.

Under the Opinion's first and third canons the Nations position must legally prevail, as the canons quoted use of "**must be** liberally interpreted in favor of the Indians or tribes" and "**must be** resolved in favor of the given Indian tribe" clearly confirm. (Emphasis added.) Accordingly, the Court cannot meet the legal standard required for constitutional cancellation and the case should end.

Application of the second cited canon likewise causes the legal requirement for cancellation to fail and requires the Nation to prevail. Is it likely that when the Muscogee (Creek) Commissioners executed the 1866 Treaty, they understood and agreed that their Indian tribe could one day consist of native Indian citizens and tens of thousands of non-Indian Freedmen descendants and that the Freedmen descendants, unlike native citizens, when the Treaty was

adopted, would have a future right to perpetual citizenship? Not surprisingly, the Opinion offers no evidence of such an understanding.

Omitting all of the foregoing, the Opinion's holding turns to referencing history and surrounding circumstances under the fourth cannon. The Opinion does so by selectively referencing "historical writings, legislative actions, and Court opinions in the years immediately following the ratification of the Treaty of 1866" for the proposition that the historic Creek Nation believed the Freedmen and their descendants to have been given the rights of native citizens by virtue of the Treaty. Opinion at p. 18. No one disputes that the Treaty conferred to the Freedmen and their descendants the rights of "native citizens" and that the Freedmen and their descendants enjoyed those rights in the years immediately following the Treaty of 1866 up to and until the adoption of the Nation's 1979 Constitution. The question presented in this case is not whether the Freedmen and their descendants enjoyed the rights of native citizens as a result of the Treaty, but whether the Nation surrendered it the native citizens' right to impose restrictions on membership in the future by granting perpetual citizenship. The historic writings, legislative acts, and Court opinions upon which the Opinion rests its holding do not address, much less resolve the question before this Court. The Opinion identifies nothing in the history or surrounding circumstances under the fourth canon of construction establishing beyond a reasonable doubt that the Nation had destroyed its right to impose restriction in the future and that the Nation understood it had conferred via the Treaty perpetual citizenship to the Freedmen and their descendants.

If those outcome determinative omitted facts had been expressly included and legally applied correctly, then the Opinion then would have failed to meet the high legal standard for constitutional invalidation and instead resulted in the continued recognition of the Nation's unsurrendered sovereignty and reversal of the District Court's order.

The Opinion further omits a principal canon of construction requiring two documents (here the Constitution and the 1866 Treaty) to be each given effect if possible.[10] The Citizenship Board's position satisfies that canon. The Opinion does not. If that canon had been applied, rather than omitted, the constitutional requirement could not have been judicially cancelled.

The Opinion further omits the proper application of the canon giving effect to the usage by the parties. The Nation's constitutional usage is obvious. So is the identical post-promulgation usage by the 1866 Treaty counterparty, the United States. Three times over eighty years, by action of the Roosevelt, Carter, and Biden Administrations (i.e. the United States,) the Treaty counterparty recognized the Nation's right to adopt such language as utilized in the 1979 Constitution.[11]

Rehearing is required to correct the Opinion's omissions and violation of the applicable law requiring the challenge of a constitutional provision to show that the provision is invalid beyond a reasonable doubt. Likewise, rehearing is required to correct the Opinion's misapplication of the canons of construction, which further confirms the failure to show constitutional invalidity beyond a reasonable doubt. That correction should result in reversal of the District Court order.

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[10] *U.S. v. Stewart*, 311 U.S. 60, 64 (1940), explaining the "*pari materia*" canon of construction.

[11] The Opinion attempts to refute the reasoning of the 1941 Solicitor's Opinion. That attempt misses the point. The issue is not whether the Solicitor's legal analysis is erroneous. Rather, the issue is whether the Treaty parties agreed on the result of the language. The Treaty parties both agreed that the Nation still had the right to determine the citizenship by using the constitutional requirement at issue, as the United States' approval of the Nation's 1979 Constitution, the Solicitor's opinion and its reaffirmation of the Opinion by the Assistant Secretary of the Department of the Interior, all confirm. Against that federal counterparty action, the Opinion offered no contrary statements from the federal counterparty.

II: THE OPINION VIOLATES THE CONSTITUTION BY PHYSICALLY AMENDING THE CONSTITUTION.

The Nation's Constitution is the supreme law of the land. Accordingly, in M(C)NCA Title 7 § 1-102(A) provides:

> The Nation Council finds that:
>
> A. **Constitution supreme**. The 1979 Constitution of the Muscogee (Creek) Nation ("Constitution") shall be supreme in all matters of law relating to, arising under or in conflict with this Title, and

The Nation's courts' existence and authority solely arise from the Constitution adopted in 1979 by the People. Those courts are bound and limited by the Constitution. It is beyond dispute that this Court cannot lawfully violate the Constitution.

The Constitution recognizes one, and only one, body to enact the Constitution in the first instance:

> Under the guidance of the Almighty God, our Creator, **We the People** of the Muscogee (Creek) Nation, do promote Unity, to establish Justice, and secure to ourselves and our children the blessings of Freedom, to preserve our basic Rights and Heritage, to strengthen and preserve self and local Government, in continued relations with the United States of America, **do ordain and establish this Constitution for the Muscogee (Creek) Nation**.

Preamble of the Muscogee (Creek) Nation Constitution. (Emphasis added.)[12]

The Muscogee Nation Supreme Court was created by the Muscogee Nation Constitution. As such it is subject to those limitations contained in the Constitution. "Each of this Nation's three branches of government hold great power, but each must also act with a great sense of responsibility and recognition of its rightful authority and **its concomitant limitations**." *Oliver v. Muscogee (Creek) National Council*, SC-06-04 (Muscogee (Creek) 2006) (emphasis added).

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[12] Even then, federal statute required federal approval of the OIWA Constitution enacted by the People. 25 U.S.C. § 5203.

The Constitution does not authorize justices or judges to amend the Constitution. Rather, the People used express language to underscore separation of powers and thereby limit the powers of the judicial branch of the Nation's constitutional government. Specifically, the People have authorized only themselves and their elected representatives, the National Council, together to amend the Constitution:

> (a) This Constitution shall be amended by:
>
> > (1) Passage of an amendment ordinance before the Muscogee (Creek) National Council, which shall require affirmative vote of 2/3rds of the full membership of the National Council for approval.
> >
> > (2) A two-thirds (2/3) affirmative vote of the eligible voters who vote in special election called for said purpose by the Principal Chief pursuant to the rules and regulations that the Muscogee (Creek) National Council shall prescribe.

M(C)N Const. Art. IX. That language is consistent with the United States Supreme Court's statement that courts do not have the power of "amendment under the guise of interpretation." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937).

The Opinion violates those constitutional limitations in expressly amending the Constitution by physically striking out a portion of the People's language in what the Opinion labels a "correction." As the Opinion at p. 22 sets out:

> By striking "by blood" from Article III, Section 2, the Nation is left with the following citizenship provision:
>
> > Persons 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); (except that an enrolled member of another Indian tribe, nation, band, or pueblo shall not be eligible for citizenship in the Muscogee (Creek) Nation.)

> **With this correction**, citizenship is available to any "Muscogee (Creek) Indians 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 whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137)[.]"

(Emphasis added.) Neither the People nor the National Council have acted to adopt such a "correction," nor did the Department of the Interior approve it.[13]

This Court's constitutional violation is magnified by the substance of this Court's amendment. The judicial rewriting of Const. Art. III, § 2, substantially changes the sovereign exercise by the People of their existential right to define national membership. The result is a constitutional text radically different from words actually intended and enacted by the only body with constitutional authority to so act—the People.

That magnification of the Opinion's constitutional violation is further heighted by the omitted fact that no Creek citizen, other than the five signatories of the Opinion, have actually voted for the new constitutional language. Even more striking is the fact, omitted from the Opinion, that there is no evidence anywhere that the People would have enacted a constitution containing this Court's significant "correction," since the People voted on the Constitution as a whole, rather than separately on distinct Articles.

Rehearing is required to remedy this Court's unconstitutional physical amendment of the Constitution and to thereby restore the constitutional power of amendment to the only bodies which possess it—the People and their elected National Council.

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[13] The Opinion cites no Muscogee (Creek) or federal authority for judicial amendment of the Constitution.

III: THE OPINION'S UNNECESSARY DETERMINATION THAT THE CONSTITUTION'S MEMBERSHIP REQUIREMENT WAS "*VOID AB INITIO*" RENDERS THE NATION'S GOVERNMENTAL OPERATIONS SINCE ADOPTION OF THE 1979 CONSTITUTION LEGALLY INFIRM.

The question of whether the 1979 constitutional membership requirement was in the Opinion words "*void ab initio*" was not presented to or decided by the Citizenship Board or the District Court. As the District Court's order affirmed by the Opinion demonstrates, the determination of the constitutional provision as "*void ab initio*" is not necessary to afford the plaintiffs' relief.[14] Although such action would have been legally erroneous, this Court could have simply affirmed the District Court's conclusion that the 1866 Treaty precluded the Citizenship Board's enforcement of the constitutional provision to deny plaintiffs' applications. Such an approach, although legally flawed, would have furthered the fundamental principle of judicial restraint, which prevents the courts and judicial officers from becoming political legislators.

Instead, the Opinion made the unnecessary finding that the People's constitutional provision is "*void ab initio*." Under the Opinion's conclusion of "*void ab initio*," this Court implicitly calls into question the results of every election after the adoption of the 1979 Constitution, since the Freedmen did not vote. As a result, the Opinion renders all acts of the National Council and Chiefs potentially open to question.[15]

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[14] The United States Supreme Court recognizes the well-established general rule that in the ordinary course, appellate courts do not decide questions neither raised nor resolved below. *See*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008). The use of dictum to determine significant rights is inappropriate. "Judges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication." *Horne v. Coughlin*, 191 F.3d 244, 247 (2nd Cir. 1999) (quoted with approval in *Pearson v. Callahan*, 555 U.S. 223, 239-40 (2009)). The doctrine of judicial restraint requires courts to decide the issue before them on the narrowest grounds whenever possible. As now Chief Justice Roberts then stated, "a cardinal principle of the judicial process" is "if it is not necessary to decide more, it is necessary not to decide more." *PDK Lab'ys Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Robers, J. concurring), quoted with approval by Justice Stevens in *Citizens United v. FEC*, 558 U.S. 310, 396 (2010) (Stevens, J. concurrence).

[15] That result conflicts with the requirement that constitutional provisions are presumed valid until

Of particular significance, the potential challenges caused by the Opinion's language extend to executive branch appointments confirmed by the legislature, including justices and judges. That challenge could involve all orders of the Nation's courts after adoption of the 1979 Constitution, including the Opinion here. That use of "*void ab initio*" in reference to the Constitution's citizenship requirement is unnecessary to resolve the appeal. For that separate reason, additional to the reasons in Propositions I and II, the Opinion language requires rehearing.

IV: THE OPINION'S INVALIDATION OF ALL CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS USING "BLOOD" REFERENCE DETERMINES ISSUES NOT BEFORE THE CITIZENSHIP BOARD, THE DISTRICT COURT, OR THE COURT IN THIS APPEAL.

The Opinion extends its unnecessary "*void ab initio*" language beyond the constitutional citizenship requirements to unnamed constitutional statutory and regulatory provisions that utilize a "by blood" reference not at issue in the District Court and unaddressed by it order under review.[16] Courts are required to hear actual cases and controversies and not hypothetical ones. *Oliver v. Muscogee (Creek) National Council*, SC-06-04 (Muscogee (Creek) 2006).

Although not expressly identified in the Opinion, the broad "*void ab initio*" mandate appears to encompass certain constitutional and statutory provisions requiring a full citizen's minimum ¼ blood quantum for office holding. Const. Art. III, Sec. 4, requires that the Chief and Deputy Chief hold full citizenship. Const. Art. VI, Sec. 2(c), requires all members of the National Council to hold full citizenship. Likewise, M(C)NCA Title 26 § 3-205, requires the District Judge

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a challenger shows invalidity beyond a reasonable doubt.

[16] The Opinion holds that the Treaty of 1866 makes the non-native Freedmen descendants Indians, thereby redefining the generally understood definition of an Indian which is based on descent (including blood quantum.) Rather, the actual language provides that the Freedmen "shall have and enjoy all the **rights** and privileges of native citizens." Treaty of 1866, Art. II, (emphasis added.) It does not change the fact that they are not descendants from Creek Indians and therefore are not Indians.

and the Supreme Court Justices be full citizens.

If such "blood" requirements are now legally "*void ab initio*," then like the result of the Opinion's "*void ab initio*" finding of the constitutional citizenship requirement, all such official occupants, past and present, and their actions are subject to potential challenge.[17] Rehearing is further separately required, in addition to the reasons in Propositions I, II and III, to remedy that potential impact on the Nation's operations caused by the Opinion's violation of the doctrine of judicial restraint by the unnecessary determination of issues not before this Court.

V: THE OPINION'S COMMAND FOR ADMINISTRATIVE ACTION IN NON-EXISTENT CASES, AND AS TO WHICH RELIEF IS NOT PRESENTLY SOUGHT IN THIS COURT, IS BEYOND THIS COURT'S JURISDICTION.

The National Council and Chief, by statute, have waived the sovereign immunity of the Citizenship Board only as to judicial administrative review of the Citizenship Board's actual decisions. Nowhere have the People by constitution or through their elected representatives by statute conferred jurisdictional power on this Court to decide yet to be filed actions and to command a constitutionally created non-judicial agency to take a particular result on those potential applications.[18]

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[17] The constitutional and statutory blood quantum requirements for office holding affect all citizens of the Nation the same. All citizens of less than a ¼ blood quantum are ineligible for the impacted offices.

[18] M(C)NCA Title 7 § 4-110(B), which is the only waiver of the Citizenship Board's sovereign immunity from suit as to its decisions on citizenship applications, authorizes only judicial review by the District Court of the Citizenship Board's completed action on an existing application and then appellate review of that District Court decision on the completed Citizenship Board's action on an existing application. Nowhere does § 4-110(B) authorize the district of Supreme Court to adjudicate and command action by the Citizenship Board in a non-existent case:

> **Judicial appeals**. The Courts of the Muscogee (Creek) Nation are hereby granted exclusive jurisdiction over all disputes relating to, arising under or in conflict with this Title. After the applicant has exhausted the administrative remedies of the Citizenship Board, and a final determination not to enroll the applicant has been made, the applicant shall have the right to file an appeal of said decision in the

Nevertheless, without citation to Muscogee (Creek) or federal authority, the Opinion decides non-existent, yet to be filed applications and, although not an issue in this appeal, commands the Citizenship Board to take certain actions in those potential future cases.[19] In this case, the Citizenship Board decided only the two applications before it and nothing else. Its orders said nothing about future applications. Likewise, the District Court reviewed and decided only those two applications. Nothing more was determined by the District Court. Like the Citizenship Board, the District Court's order said nothing about future applications.[20]

Although unclear, the command may have been intended to procedurally preclude subsequent judicial appellate review of the issues decided in the Opinion. Of course, this Court could later include a majority of members with legal views different than those in the Opinion. Nevertheless, the command of future action is not a judicial act of determining an actual present

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> Muscogee (Creek) Nation District Court. The applicant shall serve notice of the appeal to the Chairman of the Citizenship Board or his authorized representative at the Citizenship Board Offices. In hearing the appeal, the Muscogee Nation District Court shall give proper deference to the administrative expertise of the Citizenship Board. The Muscogee Nation District Court shall not set aside, modify, or remand any determination by the Board unless it finds that the determination is arbitrary and capricious, unsupported by substantial evidence or contrary to law. Standard procedures of the Muscogee (Creek) Nation District Court, including the right to appeal to the Supreme Court, shall govern all proceedings.

[19] The Opinion concludes by commanding:

> The matter is **REMANDED** to the Appellant, Citizenship Board, who is directed to apply the Treaty of 1866 and issue citizenship to the Respondents, and any other future applicant who is able to establish a lineal descendant on the Creek By Blood Dawes Roll, or the Creek Freedmen Dawes Roll.

[20] The Citizenship Board's orders did not determine that the plaintiffs were descendants of Freedmen under the 1866 Treaty and the 1906 Freedmen Roll. That decision is for the Citizenship Board alone to make in the first instance pursuant to its constitutional authority. Accordingly, the Opinion's requirement of admission is beyond the appellate authority of this Court.

case. It is legally inappropriate.[21] The Opinion is in reality a political act controlling future matters, rather than reviewing existing orders by a constitutionally created, executive branch agency. Accordingly, the Opinion requires rehearing to correct that unconstitutional, unauthorized political command as to non-existent cases or controversies.[22]

CONCLUSION

In its review of the District Court order addressing the Citizenship Board's denial of two applications for citizenship, the Opinion creates a constitutional crisis. The Opinion cancels the supreme act of the People's sovereignty, the constitutional exercise of their existential right to determine citizenship in the future.[23] The Opinion does so based on the Treaty's supposed

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[21] *See, Oliver, supra.*

[22] While the Opinion in another place at p. 22, references an opinion of the Cherokee Nation Supreme Court, *In re: Effect of Cherokee Nation v. Nash and Vann v. Zinke, District Court for the District of Columbia*, Case No. 13-01313 (TFH) and Petition for Writ of Mandamus Requiring the Cherokee Nation Registrar to Begin Processing Citizenship Applications (February 22, 2021), that opinion in another Nation does not, and cannot, confer extra-constitutional authority on a court of this sovereign Nation. Additionally, a close review of the Cherokee Nation opinion confirms that it was not issued in an actual contested controversy. That court's recognition of the Freedmen descendants as citizens had been required, as a political act without apparent objection by the Cherokee legislative branch. The legislature required recognition of the unappealed prior decision of a single federal district judge in Washington D.C. as binding on that Nation.

That federal trial judge addressed none of the legal issues raised here. The Cherokee Nation's Constitution at issue was not adopted pursuant to the OIWA and therefore, unlike here, had not been approved by the United States, the counterparty to the Cherokee Treaty of 1866. Further, the Cherokee case did not decide whether "right of native citizens" included the right in the future to impose citizenship restrictions by a constitution, whose adoptive vote included Freedmen. The Cherokee case did not address the highest known legal standard required for constitutional invalidation or its application to the constitutional language here. The Opinion did not address the rules of construction and the necessary finding of constitutional validity required by their usage. The Cherokee case did not address judicial physical altering of the Constitution. The Cherokee case did not address the legality of deciding appeal issues not before and decided by the district court. Accordingly, that opinion of another Nation not binding on this Nation should not control here.

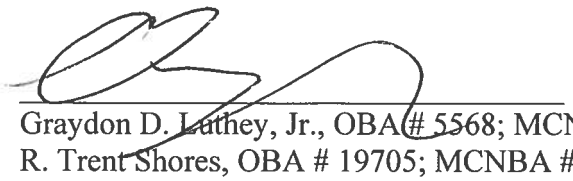
[23] The Opinion rarely mentions sovereignty and then largely in passing.

surrender of that right. Yet the Opinion identifies no express words of surrender, as confirmed by the absence of language of perpetual citizenship for the Freedmen descendants and without language showing the intent of the Nation to give up that future right. Most significantly, the Opinion cancels a constitutional provision without the necessary legal showing that beyond a reasonable doubt that the provision is invalid.

The Opinion's created crisis continues with its unauthorized radical, actual physical amendment of the Constitution, a clear usurpation of the People's exclusive political power. The Opinion continues its creation of the constitutional crisis by its unnecessary "void ab initio" language, calling into possible question post-Constitution governmental senior office holders and their actions. The Opinion unnecessarily further invalidates constitutional and statutory language not at issue before the Citizenship Board or the District Court. Finally, the crisis culminates in its mandate as to cases unknown and unfiled. Rehearing is required to recognize and apply that highest known legal standard applicable to challengers seeking to invalidate a constitutional provision, remedy the Opinion's result of the failure to follow such a standard and by so doing, then avert a constitutional crisis.

The time for action to protect the Constitution is now. The Citizenship Board has demonstrated this Court's violation of the People's constitutional right to define citizenship. The law states the burden that must be met to take away that constitutional right. The Court did not identify, much less meet that burden. Now, this Court has the opportunity to (a) grant rehearing, (b) vacate the Opinion, (c) reverse the District Court, and (d) uphold the Citizenship Board's application of the Constitution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2025, a true and correct copy of the foregoing instrument was served via U.S. Mail, postage prepaid, and/or Electronic Mail to the following:

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