IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

IN THE MATTER OF THE CONSTITUTIONALITY OF NCA 24-077	Case No.: SC-2024-05 (District Court Case No.: CV-2024-122)

RESPONDENT PRINCIPAL CHIEF DAVID W. HILL'S RESPONSE BRIEF IN OPPOSITION TO PETITIONERS' BRIEF IN SUPPORT OF DECLARATORY RELIEF HOLDING NCA 24-077 UNCONSTITUTIONAL AND NCA 24-077, TR 24-073 AND TR 24-074 VOID

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INTRODUCTION

Respondent Principal Chief David W. Hill ("Chief Hill"), in his official capacity as Principal Chief and head of the Executive Branch of the Muscogee (Creek) Nation (the "Nation") respectfully submits this brief in response and in opposition to *Petitioner's Brief in Support of Declaratory Relief Holding NCA 24-077 Unconstitutional and NCA 24-077, TR 24-073 and TR 24-074 Void* ("Petitioners' Brief").

As an initial matter, Chief Hill strongly disagrees that this case is a dispute among the Nation's three branches of government. This Court should not adopt Petitioners' framing of the issue as being "a direct assault on the separation of powers, the Constitution, and this Court's independence." Petitioners' Brief, pg. 5. The bottom line is this: The National Council exercised its constitutional authority by enacting NCA 24-077 (the "Special Justice Law") and to confirm two Special Justices who were nominated by Chief Hill under that law. Just because Petitioners do not agree with the seating of those two Justices does not negate the fact that Chief Hill and the National Council acted within their clear constitutional powers. And the exercise of these powers does not infringe or interfere with any constitutional authority of the Judicial Branch. Petitioners attempt to frame the issue as being one that infringes on the Judicial Branch, but that is not so.

This Court should find this action nonjusticiable under the political question doctrine since Petitioners ask this Court to unlawfully infringe on specific legislative and executive functions of the Nation; however, in the event the Court exercises jurisdiction to hear the merits, the Court should uphold the Special Justice Law as constitutional for the reasons provided in this brief.

A. THIS ACTION IS NONJUSTICIABLE AS A POLITICAL QUESTION[1].

This Court has previously recognized that only "justiciable" matters may be heard in the Nation's courts. *National Council v. Tiger*, No. SC 11-09, pg. 5 (Muscogee (Creek) 2011). "'Justiciability' refers to . . . judicially-imposed criteria includ[ing] ripeness, mootness, standing,

[1] Respondent originally objected to this action as a nonjusticiable political question in his *Motion to Intervene*; however, the Court has not yet ruled on this issue.

and **a general restriction against judicial intervention in purely political questions** or requests for advisory opinions." *Id.*, pg. 5, n.19. (emphasis added).

The weight of authority in federal court construes the political question doctrine as a threshold challenge to a court's jurisdiction. *Lin v. United States*, 561 F.3d 502, 504 (D.C. Cir. 2009) (affirming dismissal of complaint for lack of subject matter jurisdiction based on the political question doctrine). "The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary is as old as the fundamental principle of judicial review." *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005).

Federal courts consider a "political question" issue as one regarding policy choices and value determinations that are constitutionally committed to Congress or the Executive Branch and are not subject to judicial review. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986).

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the U.S. Supreme Court outlined six independent factors that must be considered to determine whether a political question exists:

(1) a textually demonstrable constitutional commitment of the issue to a coordinate political branch;
(2) a lack of judicially discoverable and manageable standards for resolving it;
(3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
(4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
(5) an unusual need for unquestioning adherence to a political decision already made; or
(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

A political question may be found if one or more of the above factors are present. *Schneider*, 412 F.3d at 194.

The Nation's Constitution may very well provide broad judicial review power in many areas, including governmental affairs; however, there are certain legislative matters that must not be subject to judicial review due to the respect for separation of powers between the three branches

of government. *Cf. Nixon v. United States*, 506 U.S. 224, 252-53 (1993) (Souter, J., concurring) ("[T]he political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government, and deriving in large part from prudential concerns about the respect we owe the political departments."). This prohibition against judicial review also applies to the question of whether a legislative body has followed procedures in enacting legislation. "[C]ourts generally consider that the legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative process is mandated by the constitution." *Hughes v. Speaker of the New Hampshire House of Representatives*, 876 A.2d 736, 744 (N.H. 2005) (quoting *State ex rel. La Follette v. Stitt*, 338 N.W.2d 684, 687 (1983)).

Petitioners' challenge to the enactment of the Special Justice Law is partially based on certain procedures contained within the law itself. However, those provisions are only procedural, not jurisdictional, and are certainly not constitutionally mandated. A challenge to these procedures are not subject to judicial review. See *Hughes*, 876 A.2d at 744 ("The legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure.").

Three of the *Baker* factors are present in this action. In applying these factors, this Court should dismiss this action as nonjusticiable.

1. A Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Branch

The power to enact legislation and to execute enacted law is constitutionally bestowed, respectfully, to the Legislative Branch and the Executive Branch, not the Judicial Branch. Also, the power to seat Justices on the Supreme Court is constitutionally bestowed to those two Branches, not the Judicial Branch. And nothing in the Constitution provides the Judicial Branch with any authority to limit, restrict, or regulate the exercise by the Executive and Legislative Branches of these powers. This is a clear example of the Constitution providing a "textually

demonstrable constitutional commitment" of the issues in the case to the Executive and Legislative Branches and with no judicial review of those powers given to the Judicial Branch. This is a textbook case of a political question, meaning this case is nonjusticiable.

2. Lack of Judicially Discoverable and Manageable Standards

A political question exists here because no judicially manageable standards are available against which to review the process by which the Principal Chief nominates, and the National Council confirms, judicial officers. Further, no judicially manageable standards exist for this Court to determine if the National Council violated its own procedures.

Petitioners point to no standard within the Constitution by which this Court could adjudicate these questions, making this case nonjusticiable.

3. Intrusion Into the National Council's Internal Proceedings

Petitioners ask this Court to declare the Special Justice Law as unconstitutional because the National Council allegedly violated its own procedures in confirming the Special Justices. Petitioners' Brief, pg. 11. However, this is one of the factors under *Baker* that make this a nonjusticiable political question not subject to judicial review. Reaching the merits of this case would require this Court to intrude upon the internal processes of the National Council and would thus be a lack of respect for the Council as a coordinate branch of government. This is especially true when there is no specific constitutional delegation of authority of the Judicial Branch to intrude upon the Council's internal processes.

Applying these three factors under *Baker*, this Court should decline jurisdiction pursuant to the political question doctrine.

B. NCA 24 – 077 IS A CONSTITUTIONAL ACT.

MCN Code Title 27 § 3-101 (codified from NCA 82-30) stated that a "judgment or decision of the Supreme Court requires the approval of a minimum of four justices." However, previous opinions of this Court found that only a majority of the seated, unrecused justices was

constitutionally required for a Supreme Court decision. The National Council enacted the Special Justice Law to remedy the judicial interpretation of § 3-101.

In *Muscogee (Creek) Nation National Council, et al. v. Muscogee (Creek) Election Board, et al.*, SC-09-10 (Muscogee (Creek) S. Ct. 2010), only five justices were seated to decide the case. The plurality of remaining justices found that they had the constitutional authority to decide a case of great magnitude involving the legitimacy of the constitutional amendment process by a 3-2 vote:

> It is noted that at the time of this Court's review of and substantive vote on the issues underlying this Opinion, there were only five Supreme Court Justices seated. Muscogee (Creek) Nation Code of Laws, Title 27, § 3-101 (codified from NCA 82-30) states that a "judgment or decision of the Supreme Court requires the approval of a minimum of four justices." In rendering this Opinion, this Court holds Title 27, § 3-101 (NCA 82-30) has no force or effect when less than six justices are seated. As such, in this case, three justices constitute a majority and this Opinion and Order is accordingly issued as the majority opinion of this Court.*
>
> **This does not mean, however, that in an instance when a plurality opinion is ever issued that this Court has not met its constitutional requirement of majority.*

Muscogee (Creek) Nation National Council, et al. v. Muscogee (Creek) Election Board, et al., SC-09-10 at p.4-5 (Muscogee (Creek) S. Ct. 2010).

In an unprecedented move, the two dissenting justices and a justice who was not seated and did not participate in the case filed a Response to the Opinion of the three justices challenging the validity of their Opinion:

> Title 27 §3-101 and Supreme Court Rule 22(C) requires four (4) or more justices to be in agreement for a valid and binding decision of the Muscogee Supreme Court. Justice Chaudhuri contends that in order to apply this long-standing Muscogee law, that six (6) justices must be seated at the time of the decision. Indeed, six (6) justices were seated at the time, but nonetheless Justice Chaudhuri weaved a new theory in footnote 4, that only a simple majority is required to issue a Supreme Court decision. In doing so, he contradicts his own unsupported position and ignores Muscogee law and the Supreme Court Rules. The previous Supreme Court decisions have been made either by unanimous consent or the Court has recognized and abided by the requirement of Title 27 § 3-101.
>
> Moreover, Justice Chaudhuri's reference to Supreme Court Appellate Rule 3-108 is misleading. Rule 3-108, Rules of Appellate Procedure provides:

> The Supreme Court shall establish procedures for all cases and other matters before the Supreme Court. Such rules shall be transmitted, before their effective date, to the National Council, the District Court, and members of the Muscogee (Creek) Nation Bar. Copies of the rules shall be made available to the Supreme Court at any time except that rules in effect at the time of filing of a matter in the original hearing body shall govern that matter until final resolution by the Supreme Court.

Thereafter, the rules were developed and approved by the National Council in NCA 82-30, as amended by NCA 01-88, effective June 1, 2001. There is no possible reading of Rule 3-108 that authorizes Supreme Court rulings by simple majority vote. Three votes adopting the December 3rd filing is simply insufficient. The December 3rd filing was never lawfully decided and is void.

Muscogee (Creek) Nation National Council, et al. v. Muscogee (Creek) Election Board, et al., SC-09-10 (Muscogee (Creek) S. Ct. 2010) (*Corrected Response To The December 3rd Filing By Justice Jonodev Chaudhuri, Justice Amos McNac, And Justice Houston Shirley).*

The three justices in the majority responded, again reiterating that MCN Code Title 27 §3-101 did not apply when fewer than a full court was seated:

> The Majority Opinion was issued recognizing the critical need for clarity in this Nation regarding the validity of the legal process by which Amendments were approved in the November 7, 2009 Special Election. Therefore, for clarity purposes, we must address the respective weight interested parties should place on the Majority Opinion and the dissent. In order to do so, we restate that at the time the substantive vote was taken in this case, the vote was 3-2. This substantive vote was the final and controlling vote on the justices' positions regarding the central issues in the case. The inapplicability of NCA 82-30 to a five-justice court, the inherent authority of the Supreme Court to maintain judicial independence free from undue legislative interference in internal operations and policy, and this Court's inherent authority to rule by majority in issuing its decisions, were among the substantive issues debated. These issues constituted logical underpinnings to the majority's position and were essential factors incorporated in this Court's substantive vote.
>
> When the vote was taken, the Court discussed that Justices Harjo-Ware and Mouser, as participating justices in the final vote in this case, were entitled to disagree with the majority, and file a written dissent. Justice Supernaw, however, never participated in this case. The case had been debated and decided prior to her joining the bench. The dissenting justices' attempt to insert a third vote in their favor is an attempt to imply a 3-3 tie — a result that does not reflect this Court's vote. **No such tie exists, or ever existed, regarding this Court's substantive vote in this case.** Accordingly, this Court's **Majority Opinion carries with it the full force and effect of any Supreme Court opinion**.

> For the reasons stated above, the minority's "Response" dated December 6, 2010 shall be treated as the minority's dissenting opinion.

Muscogee (Creek) Nation National Council, et al. v. Muscogee (Creek) Election Board, et al., SC-09-10 (Muscogee (Creek) S. Ct. 2010) (*Clarifying Addendum To December 3, 2010 Majority Opinion*) (emphasis in original).

In the case *In The Matter of Extended Term of Office of District Court Judge Patrick Moore*, SC-10-05 (Muscogee (Creek) S. Ct. 2011), this Court again issued an important constitutional decision with only three justices participating and three justices recused. The authority of the Court to decide a case with only three participating justices was not challenged.

In another case of national importance, *Ellis v. Checotah Muscogee Creek Indian Community, et al.*, SC-10-01 (Muscogee (Creek) S. Ct. 2011), this Court affirmed the trial court by a plurality of three justices finding that "[a] majority ruling by this Court is necessary to overturn, remand, or modify the lower court ruling. This Court's ruling is to affirm the District Court's order." *Ellis*, *supra* at p.7. The appellees in that case moved to vacate the Supreme Court's Order arguing that it was decided by only three justices, not four as required by Title 27, § 3-101, which provided at the time that "[a] judgment or decision of the Supreme Court requires the approval of a minimum of four justices." This Court found that the meaning of § 3-101 was ambiguous:

> It is clear that Title 27, § 3-103 creates a quorum requirement because it specifies that four qualified justices must be available to participate before the Court can properly hear any action or appeal (the quorum rule). It is also clear that Title 27, § 3-101 requires four justices to agree at the conclusion of proceedings (the four-in-agreement rule). When both sections are read together, however, and in light of the historical reality that most Supreme Court cases are decided by only four or five justices, it is contextually ambiguous whether § 3-101's four-in-agreement rule was intended to apply when less than six justices are available to participate in rendering a decision.

Ellis, *supra*, Opinion and Order Denying Motion To Vacate filed May 22, 2013 at p. 8.

The Court looked at the prior enactments in Title 27 and determined that only a simple majority of justices was required to render an opinion of the Court:

> Ultimately, the legislative history presents two possible interpretations by which to resolve the contextual ambiguity created by § 3-101 and § 3-103. First, § 3-101 's

> four-in- agreement rule may be interpreted to be independent from § 3-103's quorum rule and applicable without regard to the number of qualified, participating justices. Alternatively, § 3-101 may be read to require only a simple majority to render a decision because the four-in-agreement rule, when read in conjunction with § 3-103's quorum rule, includes an inherent presumption of six qualified, participating justices. We find that due process considerations and the canon of constitutional avoidance require us to conclude the latter interpretation and resulting construction are proper.

Ellis, *supra*, Opinion and Order Denying Motion To Vacate filed May 22, 2013 at p. 10.

In 2013, the Constitution was amended to provide that the Supreme Court would be composed of seven justices appointed by the Principal Chief and confirmed by the National Council. MCN Constitution Article VII, Section 2. A review of this Court's opinions since 2013 shows that no case has been decided by a judgment of fewer than four Supreme Court justices. On May 10 of this year, the Nation was left within a quandary when a second justice recused from the case of *Citizenship Board of the Muscogee (Creek) Nation v. Rhonda K. Grayson and Jeffery D. Kennedy*, SC-2023-10, leaving only five justices leaving a potential for a 3 - 2 vote. As set forth above, the law which previously required a four-justice vote had been determined to mean something other than its plain meaning -- that is that four justices were required to agree to issue an opinion.

The Executive and Legislative Branches sought clarity from this Court by requesting a meeting with the Chief Justice to appoint special justices to ensure a full panel of justices decided the case per the then existing Special Judge statute, MCN Title 27, Appendix 1, Rule 15A. However, the Chief Justice declined any such discussion, even though authorized by statute, on the basis that the Nation was a party to the case. In order to legislatively correct the meaning of Title 27 MCN Code § 3-103, the National Council passed and the Principal Chief signed into law NCA 24- 077. That law is intended to ensure that seven justices hear every case. Special justices are appointed and qualified in the exact same manner as regular Supreme Court Justices only to one specific case when a justice has recused. In so doing, the Legislative and Executive Branches clarified that four justices were required to agree to issue a majority opinion, rather than a majority of a quorum of justices, and agreed with the dissenting view of Justice Harjo – Ware who opined:

> As of July 20, 2011, this Court was comprised of three validly seated justices. In the instant case, a simple majority of those three agreed that the District Court's conclusions of law in the underlying case were erroneous and insufficient to sustain the permanent injunction against Appellants. But for Title 27, § 3-103's requirement for a quorum of four justices, Appellants obtained a simple majority. In the absence of a statutory mechanism by which the Supreme Court will consistently enjoy six validly seated members, i.e. appointment of special justices, Title 27, § 3-103 also creates a prejudicial requirement equal to that created by § 3-101. An appellant has no opportunity to obtain reversal of a District Court decision if the Supreme Court is unable to achieve a quorum to begin hearing and deliberation. This, too, is untenable. Without the ability to seek appointment of special justices when the Court is unable to meet the four-justice quorum requirement, § 3-103 must also fall to avoid an unconstitutional infringement on the rights of Appellants. Accordingly, as to the majority's unstated, yet necessarily obvious, validation of the four-justice quorum requirement under Title 27 § 3-103, I respectfully dissent. I must therefore dissent to the majority's overall judgment which is based upon that premise.
>
> In conclusion, I believe that while the authority to appoint special justices was available, §§ 3-101 and 3-103 were valid. That authority should have been utilized rather than ignored. **The Supreme Court should have always been comprised of six justices. Decisions should have been deliberated by four-justice quorums with decisions rendered by four-justices-in-agreement. In my opinion, decisions issued without both appointing special justices when such appointment authority was available and complying with the requirements of §§ 3-101 and 3-103 were and still are invalid.** However, in the absence of the authority to appointment of special justices, there are times the Supreme Court will not be comprised of the constitutionally required six justices. In these instances, I believe the due process rights of our citizens and other appellants are jeopardized. Statutory provisions which create a higher burden on them to overturn district court decisions such as the four-in-agreement and four-justice quorum rules must fall in favor of their due process rights.

Ellis, *supra*, Opinion and Order Denying Motion To Vacate filed May 22, 2013 (Harjo-Ware, J. concurring in-part and dissenting in-part at p. 21-22) (emphasis added).

Petitioners argue that the Special Justice Law is unconstitutional; however, in casting a net for red herrings, Petitioners' arguments yielded quite a haul:

1. Petitioners complain about the appointment process for special justices, yet the process and qualifications are identical to the constitutionally mandated appointment process for Supreme Court Justices. MCN Constitution Article VII. The process clearly complies with the Constitution.

2. Petitioners seem to argue that the Chief and National Council did not have the authority to enact a statute regarding the appointment of special justices. Petitioners' argument ignores the fact that a previous special judge/justice statute already existed in MCN Code Title 27, Appendix 1, Rule 15A. The National Council clearly has the authority to legislate regarding the Supreme Court. *See* MCN Code Title 26, Sections 1-101, 3-201 et. seq., 4-101 et. seq., 5-101 et. seq., 5-201 & 5-301 et. seq., and Tile 27, Sections 1-101, 1-106, 3-101 et. seq., 7-101, Appendix 1 and 2. This is consistent with this Court's previous decisions finding that the National Council has authority to legislate in the realm of other branches of government within constitutional boundaries. *See Cox v. Kamp*, 5 Okla. Trib. 530 (Muscogee (Creek) S. Ct. 1991) (National Council has authority to legislate as to inferior offices of the Executive Branch and to require approval of Executive nominations).

3. Petitioners argue that only the Supreme Court can exercise the judicial authority of the Nation. While it is true that the Supreme Court exercises the judicial authority of the Nation, that judicial authority is not unbridled.

> [The Constitution] allows for a true separation of powers between the branches of government and permits a system of checks and balances. The "checks" of this system refers to the abilities, rights, and responsibilities of each branch of government to monitor the activities of the other two branches. "Balances" refers to the ability of each branch of government in the Creek Nation to use its authority to limit the powers of the other two branches, whether in general scope or in a particular case, so that one branch does not attain power greater than that of either of the other two branches.

Oliver v. National Council, SC-2006-04, 9 Okla. Trib. 475 (2006). The Special Justice Law is a constitutional act of the other two branches of government acting within the framework of checks and balances to ensure the legitimacy of the decisions of the Supreme Court by effectively requiring a majority of four justices in every case. This Court recognized the authority of the National Council and Principal Chief to legislate in this manner in *Ellis*, *supra*, where the Court found the decision and quorum rules of 27 MCN Code §§ 3-101 & 3-103 to be ambiguous and in need of interpretation, **but not unconstitutional in any way**. Thus, NCA 24-077 is constitutional in purpose and execution. The Legislative and Executive Branches acted constitutionally and the process enacted is the only constitutional process to appoint a special justice.

C. THE SUPREME COURT HAS IMPROPERLY RECAST THIS CASE AS A SEPARATION OF POWERS ISSUE.

In its Order Assuming Original Jurisdiction, Docketing Case and Setting Briefing Schedule, this Court improperly recast this case, as a dispute between the three branches of government:

> This matter also involves a dispute among the Nation's three (3) branches of government, wherein (1) the Judicial Branch has been effectively removed from its role in making temporary appointments to the Supreme Court under M(C)NCA Title 27, App. 1, Rule 15A (a law which previously required "'joint" approval by the Principal Chief, Speaker of the National Council, and Chief Justice of the Supreme Court for any temporary appointment to Supreme Court), and (2) M(C)NCA Title 27, App. 2, Rule 22 (C), which requires "the approval of a minimum of four (4) justices" for the filing any judgment or decision by the Supreme Court.

This Court cannot complain that "the Judicial Branch has been effectively removed from its role in making temporary appointments to the Supreme Court" when that role was granted by the National Council and Principal Chief through legislation. What was granted by legislation can be removed by legislation. *Cox v. Kamp*, 5 Okla. Trib. 530 (1991) ("[T]he National Council always has the right to repeal or amend those statutes it creates.") Only the National Council and Principal Chief have constitutional appointment powers. MCN Constitution Art. V, Sec. 2; Art. VI, Sec. 7 and Art. VII, Sec. 2. The Supreme Court has no constitutional power of appointment.

The Court has even suggested that **it was a party to the case** in its Order on August 12, 2024 Motion to Intervene:

> This action concerns a separation of powers issue between the Nation's three (3) branches of government. By granting the Executive Branch's *Motion to Intervene*, all three (3) branches of government are now adequately represented in this action. The Executive Branch, through its attorney general, should not be authorized to express a view on behalf of the Muscogee (Creek) Nation when the issues implicated concern internal disputes between the Nation's three (3) branches of government. Essentially, the Muscogee (Creek) Nation's "interest" in the case is well covered by arguments made by each of the three (3) branches of government, and thus Rule 7 (A)(I)(c) cannot be met.

This case is a declaratory judgment action challenging the constitutionality of a Muscogee (Creek) Nation law brought by private litigants who allege they are affected by the law. It is improper for the Supreme Court to inject itself into the shoes of the Petitioners in this case. Such an action violates the canon of constitutional avoidance.

Justice Brandeis articulated this principle – that courts should avoid determining constitutional issues "unless absolutely necessary to a decision of the case" and "will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which a case may be disposed of" -- in his concurring opinion in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936). *Ashwander*, 297 U.S. at 347–48 (quoting *Burton v. United States*, 196 U.S. 283 (1905)). Justice Brandeis described the avoidance doctrine as consisting of a "series" of seven rules:

1. "The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding ...";
2. "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it."
3. "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."
4. The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed.
5. The Court will not pass upon the constitutionality of a statute unless the plaintiff was injured by operation of the statute.
6. "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."
7. Even if "serious doubt[s]" concerning the validity of an act of Congress are raised, the court will first ascertain "whether a construction of the statute is fairly possible by which the question may be avoided".

Ashwander, 297 U.S. at 345–49. Justice Brandeis concludes his discussion of the avoidance doctrine with this warning: "One branch of the government cannot encroach upon the domain of another, without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Ashwander*, 297 U.S. at 355 (quoting *Sinking-Fund Cases v. U.S. Central Pacific Railroad Co.* U.S. 700, 718 (1871).

This Court has specifically adopted the canon of constitutional avoidance:

> In deference to the National Council's legislative authority, modern Mvskoke jurisprudence has implicitly incorporated the canon of constitutional avoidance.

> The avoidance canon provides that "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to [legislative] intent[.]"

Ellis, supra at p. 12 citing *Oliver v. National Council,* 4 Mvs. L. R. at 289 ("[t]his Court does not believe that the above record of repeated litigation reflects an intentional attempt by the National Council to usurp the [constitutionally conferred] authority of either of the other two branches of government of this Nation."); *In the Matter of the Constitutionality of NCA 98-02,* 4 Mvs. L. R. 175, 182 (August 19, 1999) (declining to assume original jurisdiction over a National Council member's claim seeking declaratory relief based on lack of standing and noting in dicta that "[w]hile the exercise of [judicial review] is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of ... courts performing that role." (internal citations omitted)); *Ellis v. National Council,* 4 Mvs. L. R. 305, 311 (July 12, 2007) (Harjo-Ware, J., concurring in-part and dissenting in-part) (declaring a statutory requirement for the M(C)N Supreme Court to provide a jury trial on demand by either party in original jurisdiction cases "void on inapplicability grounds utilize[ing] a least restrictive statutory construction..." thereby avoiding the constitutional question reached by the majority.).

The canon of constitutional avoidance requires this Court to avoid separation of powers issues when they are unnecessary, rather than to inject itself as a party into litigation to raise such issues. *See Ellis, supra*; *see generally* Z. Payvand Ahdout, Separation of Powers Avoidance, The Yale Law Journal, Vol. 132 at 2360 (2023).

CONCLUSION

For the above reasons, this Court should find this action a nonjusticiable political question and dismiss it entirely; alternatively, this Court should deny Petitioners' application for declaratory judgment, find NCA 24-077 constitutional, and reject all objections to TR 24-073 and TR 24-074.

Dated: October 7, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 7th day of October, 2024 a true and correct copy of the foregoing was hand-delivered or sent via email or US Mail, postage prepaid thereon, to the following:

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