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)**

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.

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For the reasons set forth herein, Petitioners respectfully request this Court declare NCA 24-077 unconstitutional, and hold that NCA 24-077, TR 24-073, and TR 24-074 are void and unenforceable.

STATEMENT OF THE CASE

In calling an emergency session to pass the Special Justice Laws, the Muscogee (Creek) Nation's ("MCN") National Council and Principal Chief ("Chief Hill") violated the separation of powers that protects all the Nation's citizens and those subject to the MCN's jurisdiction. This Court is oath-bound to rebuff the National Council and Chief Hill's unconstitutional actions and recognized as much in taking the "rare" step of granting original jurisdiction to hear this Petition. Order (Sept. 5, 2024) at 1 (internal quotation marks and citation omitted).

The Nation's government "is comprised of three, equal branches of government," it "must follow the Constitution with its inherent separation of powers," and most importantly, "the Judiciary interprets the Constitution." *In re Judge Patrick Moore*, No. SC 10-05, at 12. At least, that was the case before June 10, 2024.

On that date, the National Council—without notice—held an emergency session in which it abruptly amended the judicial procedures codified in Title 27 of the Code. The novel amendments passed in this extraordinary session now allow the National Council to hand-pick "Special Justices" to sit on the Supreme Court whenever there are recusals. *See* NCA 24-077 (allowing two special justices to be placed on the Supreme Court of the Muscogee (Creek) Nation in the event one or more sitting justices recuse themselves from a case) and TR 24-073 and TR 24-074 (the confirmation of two Special Justices) (collectively referred to herein as "the Special Justice Law"). Pet'rs App. at Ex.1.

Respondents acted to guarantee their desired outcome in this critically important case. But Respondents' actions affect the entire Creek Nation, not just the Creek Freedmen Descendants. Separation of powers is a critical protector of *everyone* subject to MCN jurisdiction. And this Court has, time and again, checked the powers of the executive and legislative branches, as is its role. *See* Order (Sept. 5, 2024) (acknowledging that the matter "involves a dispute … wherein … the Judicial Branch has been effectively removed from its role …). The time has come for the Court to do so once again.

BACKGROUND

This Court is aware of the descendants of Creek Freedmen's (the "Freedmen") decade-long journey to become recognized citizens of the Muscogee (Creek) Nation. Former Chief Justice of this Court and now District Judge Mouser recognized the truth: Creek Freedmen are citizens of the Nation pursuant to this Nation's sovereign commitment to the United States and its Freedmen in the Treaty of 1866 that extended all rights of citizens of the Nation to its Freedmen and their descendants. Any Constitutional provision stating the opposite is null and void.

The Citizenship Board appealed Judge Mouser's decision. That appeal is fully briefed. Oral argument was stayed pending resolution of this Petition. In that matter, Vice-Chief Justice McNac and Justice Harjo-Ware recused themselves from the proceedings. With Petitioners set to defend Judge Mouser's opinion in this Court, the National Council acted to stack the deck against reaching the correct legal conclusion—that the Nation cannot, pursuant to its own or federal law, deny the Freedmen citizenship. These actions, the enactment of NCA 24-077, and the confirmation of two Special Justices, *see* TR 24-073 & TR 24-074, are nothing less than the political branches of the Nation handpicking *for this case* their representatives to sit on the Court.

On June 10, 2024, the National Council held an emergency session. This emergency session was shrouded in secrecy—no notice was given to the Nation's citizens and no record of the session is available. In this emergency session, the National Council passed NCA 24-077, which grants them the power to seat "Special Justices" in the event Justices of this Court recuse themselves from a case. Pet'rs App. at Ex. 1. And it confirmed two "Special Justices": James Jennings, TR 24-073, and Samuel Deere, TR 24-074. *Id.*

These actions are unsurprising given that the National Council's and Chief Hill's hostility to the Freedmen is well known. Indeed, Chief Hill has been quite open about his disdain for Freedmen citizenship,[1] as have several members of the 14-member National Council.[2]

What is more surprising is the attempt to adjudicate a case-in-controversy while this Court's deliberations are *currently underway*. One of the Special Justices appointed to hear this case is on the record pre-determining the outcome of *this very case*. In an interview with Mvskoke Media, when asked, "What is your opinion on the Creek Freedmen case", so-called Special Justice Jennings stated: "*My opinion on the Creek Freedmen case* is that if elected I will support and defend the Muscogee Creek Nation Constitution which states it's [citizenship] by

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[1] Chief Hill's involvement in the creation of the Special Justice Law cannot be ignored—he could have vetoed the Special Justice Law. But instead, he nominated the Special Justices that were appointed—apparently after attempting to obtain the appointment of such Special Justices via *ex parte* communications with the Chief Justice. He was, undoubtedly, involved every step of the way. His actions follow his public opposition to Freedmen citizenship, for example, his September 28, 2023 Facebook post wherein he stated "Yesterday, MCN District Court Judge Mouser issued a ruling in the case of Grayson v. Citizenship Board...We strongly disagree with Judge Mouser's conclusion in this case...." *See* Pet'rs App. at Ex. 3.

[2] *Meet the Candidate, 2021 Election*, MVSKOKE MEDIA at 17:42 (Aug. 23, 2021), *available at* https://www.youtube.com/watch?v=BYadS46tkpk (Second Speaker Thomasene Yahola-Osborn, when asked where she stands on the Freedmen issue, stated: "You know, at this time, I do not support it [admitting Freedmen into the Nation.]"); *Meet the Candidate*, MVSKOKE MEDIA at 18:25 (August 17, 2023), *available at* https://www.youtube.com/watch?v=OLl5i_NbAI8&list=PLzAYLb8-60fO_KecpaLEaBUkeCxEvRpFp&index=7 (Council Member Dode Barnett, when asked what her views were on Freedmen Citizenship, stated: "My viewpoint is that I support the Constitution and the Constitution says that citizenship is by Creek blood. A lot of freedmen are Creek by blood... Obviously, we can't explore those right now, because there is a lawsuit. But our Constitution says citizenship is Creek by blood."); 2023 *MCN Nation Council Okmulgee District Debate*, MVSKOKE MEDIA at 12:08 (October 20, 2023), *available at* https://www.youtube.com/watch?v=T3CgxcuntB4 (Representative Robyn Whitecloud, when asked what her views are concerning Judge Mouser's decision, stated that "I, too, would uphold the Constitution. Any individual that wants to become an enrolled Creek citizen has to go by our regulations and our rules which is you have to prove your lineage by blood. So that's what I would uphold.").

blood." *Meet the Candidate 2023 – James Jennings*, Mvskoke Media, at 11:30-12:00 (Aug. 23, 2023), *available at* https://www.youtube.com/watch?v=WxE7EgmZYlo (emphasis added).

The above shows exactly the threat this law poses. It is a case study in why the separation of powers is paramount to the just and orderly functioning of a society. The Court must take the opportunity to protect its citizens—and everyone now subject to the laws, courts, and jurisdiction of the MCN post-*McGirt*—from the political branches' unconstitutional arrogation of judicial power.

ARGUMENT

The Special Justice Law is a direct assault on the separation of powers, the Constitution, and this Court's independence. For these reasons, the Court must declare the Special Justice Law unconstitutional, void, and unenforceable.

I. The Special Justice Law Violates the Constitution and Assails the Structure of the Nation's Government.

A. The Special Justice Law Conflicts with the Plain Text of the Constitution.

"The judicial power of the Muscogee (Creek) Nation shall be vested in one Supreme Court . . . ." M(C)N Const., Art. VII § 1. And "[t]he Supreme Court shall be composed of seven (7) members . . . whose term shall be for six (6) years beginning July 1." *Id.* at § 2. The framers of the current MCN Constitution required Justices receive a minimum of a six-year term: Justices would not, like these Special Justices, be selected for how they would rule on individual cases but for their general knowledge and wisdom, they would be insulated from outside pressure and would have time to grow into the role.

Section 2 of Article VII of the Constitution then outlines the requirements for the composition of the Supreme Court:

> The requirement for a six member Court is equal to the requirement for Court members to serve six-year terms. . . . Any statutory mechanism creating a bypass to these requirements would be constitutionally suspect.

Ellis v. Checotah Muscogee Creek Indian Cmty., SC-10-01 at 16 (Muscogee (Creek) 2013) (Deere, J., concurring). The National Council eschewed this constitutional requirement in crafting NCA 24-077 as under the Special Justice Law, "Special justices shall only serve until the conclusion of the case for which they have been appointed." *Id.* at Title 27, § 3-103(3).

Accordingly, these "Special Justices" are not Justices as defined in the Constitution and therefore their slightest involvement in this or any matter will render the proceedings "*coram non judice*" or "before a person not a judge . . . ." *Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990) (Scalia, J., concurring). Any proceeding before such a person is "not a *judicial* proceeding because lawful judicial authority was not present and could therefore not yield a *judgment*." *Id.*

Indeed, other jurisdictions' judiciaries held unconstitutional similar legislatively enacted stop-gap measures which violated their constitution's plain text. *E.g.*, *Saunders v. State*, 371 So. 3d 604, 618 (Miss. 2023). For instance, Mississippi's constitution required judges to be elected by the people and to be seated for four years. *Id.* Mississippi's legislature crafted a special judge provision which allowed their Supreme Court's "Chief Justice to appoint four additional (and unelected) circuit judges to the existing Seventh Circuit Court District . . . for a term ending" three and a half years after appointment. *Id.* "[R]eading the plain language of the statute[,]" the Mississippi Supreme Court found that "the new . . . judges are just unelected circuit judges, appointed . . . to serve three-and-a-half years instead of four." *Id.* at 618. The Court struck the legislation as unconstitutional. *Id.*

Of note, the special judges in *Saunders* were to be appointed by Mississippi's Chief Justice. In contrast to the Special Justice Law, appointment by the Chief Justice at least arguably lessens the separation of powers concerns because the judiciary was still in charge of the appointments of the lower-court judges. That is not the case here, where the *political branches* hand-pick a *Supreme Court Justice's* replacement. The Special Justice Law presents graver separation of powers concerns (discussed *infra*) than in *Saunders*. This Court should, accordingly, look to *Saunders* as highly persuasive and extend to the Nation's citizens the same defense of their Constitution.

B. The Special Justice Law is a Breach of the Separation of Powers.

The National Council and Chief Hill not only abrogate constitutional law but also centuries-old Creek tradition. As this Court recognized:

> In fact, long before 1787, when the Federalists and Anti–Federalists in the Constitutional Convention of the newly formed United States of America debated the issue of having separate branches of government, the Muscogee people had already established, centuries before, an effective, functioning government with "checks and balances." Decisions of the Muscogee people regarding national issues, such as treating with other nations, or war, or peace, could not be made just by one mekko.

Alexander v. Gouge, 8 Okla. Trib. 1, at *3 (Muscogee (Creek) 2003); *see also* 27 MCNA § 1-103(A) ("In all cases, the Muscogee (Creek) Nation Courts shall apply the Constitution and duly enacted laws of the Muscogee (Creek) Nation, *the common law of the Muscogee people as established by customs and usage*, and the Treaties and Agreements between the Muscogee (Creek) Nation and the United States." (emphasis added)).

The Nation's prescient custom of separation of powers manifests itself in the Constitution by its establishment of three equal branches of government: the National Council who legislates, the Principal Chief who executes the laws, and the judiciary who interprets the laws. *See* M(C)N

Const. Arts. V (establishing the Executive Branch), VI (establishing the legislative branch), VII (establishing the Supreme Court); *In the Matter of the Extended Term of Off. Of Dist. Ct. Judge Patrick Moore*, No. SC 10-05, at 12 (Muscogee (Creek) 2011) (The Nation's government "is comprised of three, equal branches of government," it "must follow the Constitution with its inherent separation of powers," and "the Judiciary interprets the Constitution."). Indeed, there is no doubt the separation of powers still has a role to play in this Nation's government: "The 1867 Constitution formally incorporated the separation of powers doctrine, dividing tribal government into three branches of government. This separation of powers continues under the present Constitution." *Alexander*, 8 Okla. Trib. at *3.

This Court has historically protected the balance of power and the Judiciary's ability to act independently. "This Court has previously held that where NCA 82-30 required the Supreme Court to grant a jury trial when requested by a party, this law infringed upon the inherent powers of the Court to enforce its orders, and maintain orderly administration of justice, and was, therefore, unconstitutional." *MCN Nat'l Council v. MCN Election Board*, No. SC 09-10, at *5 n.4 (Muscogee (Creek) 2010), *corrected on other grounds* (citing *Ellis v. Muscogee Creek Nation National Council*, SC 06-07 (Muscogee (Creek) 2007)). When the National Council determined that tribal judges must be one-quarter Creek by blood, and adhering to that determination would cause vacancies on the Court, this Court ordered that "each Justice of the Supreme Court of the . . . Nation shall and do retain their position and authority and shall continue to serve as Justice until their successor is duly qualified" because "[t]he power and authority of this Court will not be decreased, nor will this Court be diminished by any other branch of the tribal government by its failure to perform its duties and obligations under the Constitution." *In re Supreme Court of Muscogee (Creek) Nation*, 1 Okla. Trib. 89, 91

(Muscogee (Creek) 1986). And when the National Council required that at least four Justices be in concurrence in all cases, even if the court had less than six seated justices, the Court found that "[s]uch a legislative requirement would unduly interfere with this Court's internal decision-making process and would be unconstitutional." *M(C)N Election Board*, SC 09-10, *5 n.4.

Here, the threat to the Court's internal deliberation process—and its very independence as a branch of government—is much greater, and "any attempt to control the Supreme Court under the guise of legislation [can]not be tolerated." *Id.* The National Council and Chief Hill cannot hand-pick replacement Justices whose views align with their desired outcomes for a specific case. These "Special Justices" will take the place of a Supreme Court Justice and do all the duties of a Justice. NCA 24-77 (at 27 MCNA § 3-103(B)). There is no indication in the Special Justice Law that Special Justices are to be construed as anything but a replacement for a recused Justice as "Special Justices shall be appointed to ensure that seven (7) *justices* hear the case." *Id.* (emphasis added). Accordingly, the "Special Justice" will participate in oral argument and participate in internal court deliberations regarding the case to which they are appointed. They may even end up drafting the Court's opinion. And, most concerningly, they will determine the outcome of all cases decided by narrow majorities. The Special Justice Law is nothing less than the National Council—handpicking on a case-by-case basis—representatives of its desired outcome onto every case with a recusal. "Such a legislative requirement would unduly interfere with this Court's internal decision-making process and [is] unconstitutional." *M(C)N Election Board*, SC 09-10 at *5 n.4.

The impact of Special Justices will be felt widely, as recusals are commonplace in the MCN judiciary. *See supra* (noting that 78% of the Supreme Court's cases were decided with

less than a full panel). Special Justices imperil the rights of all the Nation's citizens and all citizens of Northeast Oklahoma subject to MCN jurisdiction.

For instance, what if a recusal occurs in a case resolving a contractual dispute where one side is a wealthy business-owner? National Council members may suddenly be recipients of campaign donations from the wealthier party in the hopes that the litigant can buy a seat on the Court to hear his or her case. Or what if a recusal occurs in an unpopular person's appeal of their criminal conviction in the expanded jurisdiction post-*McGirt*? His or her appeal will be adjudicated by politically appointed Special Justices appointed only for his or her case. NC 24-77 opens the door for unconstitutional judicial review of a large percentage of cases impacting over one million people in Oklahoma that this Court oversees.

Because NCA 24-77 allows for Special Justices to act as replacements for recused Justices, such Special Justices will be able to determine the outcome of all cases decided by narrow majorities, thereby opening the door for the National Council to hand-pick its desired outcomes in all contentious cases in which there is a recusal – including ones where, such as here, the Nation is a party. A decision rendered by such unconstitutionally appointed Special Justices undermines the Supreme Court's legitimacy. These actions, if allowed, would surely face scrutiny by federal courts.

This Court must exercise its rightful place in the Nation's constitutional order and protect its independence. Not just for the sake of the Freedmen, but for the sake of all the Nation's citizens who rely upon this body to mete out justice.

II. The Nation Explicitly Waived Sovereign Immunity for Just the Type of Relief Petitioners Seek.

The Nation unequivocally and expressly waived sovereign immunity in cases limited to injunctive, declaratory, or equitable relief:

> 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); *see Vann v. Kempthorne*, 534 F.3d 741, 746-47 (D.D.C. 2008) ("[A]brogation of tribal sovereign immunity requires an explicit and unequivocal statement to that effect."). This action does not affect "funds in the Treasury". MCNA 27 §1-102(D). Petitioners seek only that this Court declare that the Special Justice Law unconstitutional and void.

Further, this Court is the final arbiter of Constitutional questions. *MCN Election Board*, No. SC 09-10, at *11. To hold otherwise would waste the Nation's limited judicial resources, as this issue would inevitably end up back before the Court.

III. The National Council's Actions Violate Its Own Procedures.

The National Council did not comply with its own procedures in confirming the Special Justices. The Special Justice Law requires the Clerk of the Supreme Court to notify the Principal Chief of a recusal; *then*, for the Principal Chief to nominate a Special Justice; and only *then*, for the National Council to confirm the Special Justice by a majority vote. By definition, this procedure could not have been adhered to because the National Council confirmed the nomination of the special justices *before* it amended Title 27 to create the procedure which allowed for the seating of Special Justices. *See* Pet'rs App. at Ex. 2 (*AGENDA: Emergency Session*, MUSCOGEE (CREEK) NATIONAL COUNCIL (June 10, 2024), *available* at https://www.mcnnc.com/images/pdf2024/061024EMERGENCYSESSION.pdf (outlining the "ORDER OF BUSINESS" and placing amending Title 27 *after* the confirmation of the special justices)).

Even if the National Council did not appoint the Special Justices before it created the procedure enabling their creation, there is no possibility that any of the Special Justice Law's notice requirements were followed: notice from the Court to the Principal Chief and then notice of the Principal Chief's nomination to the National Council. The procedure to appoint a special justice was created *in the same session* that the appointments were made.

Furthermore, the National Council violated its own procedures when enacting the Special Justice Law. The National Council's own rules of procedure provide:

> At the discretion of the Speaker, he/she may, for emergency purposes, poll the National Council Members in reference to meeting. Upon receiving confirmation of majority approval, the Speaker has the authority to assemble the Council to deal with the emergency situation only. No other matters may be officially addressed and/or voted upon.

Muscogee (Creek) Nat'l Council R. of Proc. § 116(L). Yet, in the Emergency Session, the National Council adopted Tribal Resolutions authorizing Chief Hill to submit a grant application (TR 24-065), grant firework sales permits (TR 24-069, TR 24-070), and to submit 2024 Cops School Violence Prevention Program grants (TR 24-071). Pet'rs App. at Ex. 2. The National Council also authorized a supplemental appropriation to the Mvskoke Nation Youth Services budget (NCA 24-078). These are just a few of the actions taken at this "Emergency" Session.

IV. Petitioners' Claims Are Justiciable.

Petitioners' claims are ripe for review. A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (cleaned up). "'[T]he fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration' must inform any analysis of ripeness." *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 581 (1985) (citation omitted).

This dispute is not a hypothetical, academic exercise, but one brought to remedy a contemporary, live controversy. It is not based upon a contingent future event, but rather an event that has already happened: the appointment of the Special Justices to hear Petitioners' appeal.

The Supreme Court's decision in *Thomas* is instructive. In *Thomas*, plaintiffs challenged FIFRA's binding arbitration provision as unconstitutional. 473 U.S. at 576-79. The Supreme Court found the dispute ripe for review, given that the passage of the arbitration provision affected ongoing litigation. *Id.* at 579-82 ("At a minimum [plaintiffs] . . . , suffers the continuing uncertainty and expense of depending for [legal remedy] on a process whose authority is undermined because its constitutionality is in question."). The same logic applies here. The Special Justice Laws impact ongoing litigation and call into question the constitutionality of the forum in which Petitioners' case is being heard.

Nor does the Petition present a nonjusticiable political question. *See Marbury v. Madison*, 5 U.S. 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under the doctrine of judicial review, the Court may declare the actions of the legislature unconstitutional. *See, e.g.*, *Ellis v. Muscogee (Creek) National Nat. Council*, 10 Okla. Trib. 341, at *11 (Muscogee (Creek) 2006) ("This Court has reviewed countless cases which have continued to spell out our separate but equal principles and the need for a system of checks and balances."). This is the very foundation of constitutional law, and to rule otherwise would reduce the judiciary to a mere formality.

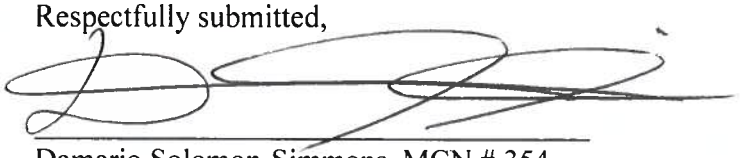
The United States Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), further underscores the need to uphold the rule of law. Under *McGirt*, tribal courts have broad-reaching jurisdiction and are often the only available tribunal in Eastern Oklahoma.

As such, it is axiomatic that these courts uphold the rule of law and respect basic legal concepts such as separation of powers. To hold otherwise would be to deprive the MCN of access to constitutionally legitimate courts.

CONCLUSION & PRAYER FOR RELIEF

For the reasons stated above, Petitioners respectfully request that the Court declare NCA 24-077 unconstitutional and hold that NCA 24-077, TR 24-073, and TR 24-074 are void and unenforceable.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2024, a true and correct copy of the foregoing document was mailed to the following, postage prepaid:

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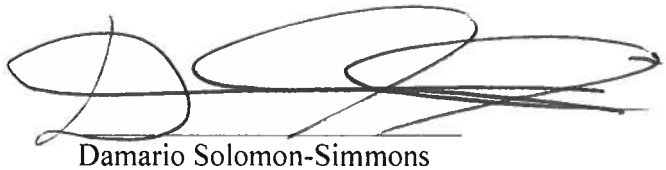

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