UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MUSCOGEE CREEK INDIAN FREEDMEN BAND, INC., *et al.* Plaintiffs, v. ZINKE, *et al.* Defendants.	Case No. 1:18-cv-01705 (CKK)

DEFENDANT JAMES FLOYD'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(3), Defendant James Floyd, in his official capacity as Principal Chief of the Muscogee (Creek) Nation ("Principal Chief Floyd"), respectfully moves this Court for entry of an order dismissing with prejudice Plaintiffs' Amended Complaint, (ECF No. 12), in the above-captioned matter.

For the reasons set forth below and more fully in the accompanying memorandum of points and authorities in support of this Motion, Plaintiffs' Amended Complaint suffers from the following deficiencies and, accordingly, must be dismissed with prejudice:

1. This Court lacks personal jurisdiction over Principal Chief Floyd. Plaintiffs fail to allege that Principal Chief Floyd has any contacts with the District of Columbia giving rise to their claims. In any event, the government contacts exception precludes exercising personal jurisdiction over Principal Chief Floyd;

2. Venue is improper in the District of Columbia because all defendants do not reside here and a substantial part of the events giving rise to Plaintiffs' claims did not occur here;

3. This Court does not have subject matter jurisdiction over the claims because the *Ex Parte Young* exception does not apply; and

4. Plaintiffs fail to allege that they have exhausted their tribal administrative and judicial remedies prior to bringing this action, and allege only in conclusory fashion that the futility exception applies, which is insufficient to trigger that doctrine.

WHEREFORE, Principal Chief Floyd respectfully requests that the Court grant his motion to dismiss Plaintiffs' Amended Complaint with prejudice, and grant any further relief the Court deems necessary or appropriate.

Oral Hearing Request

Defendant Principal Chief Floyd requests an oral hearing on this Motion pursuant to LCvR 7(f).

Date: October 5, 2018

Respectfully submitted,

/s/ Brenna M. Spinner
David L. Feinberg (D.C. Bar 982635)
Brenna M. Spinner (D.C. Bar 187399)
VENABLE LLP
600 Massachusetts Avenue, N.W.
Washington, D.C. 20001
T: 202.344.4000
F: 202.344.8300
dlfeinberg@venable.com
bmspinner@venable.com

Kevin W. Dellinger (*admitted pro hac vice*)
Attorney General's Office

Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447
T: 918.295.9720
F: 918.756.2445

Counsel for Defendant Principal Chief James Floyd

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INTRODUCTION

Despite nearly forty years separating the passage of the 1979 Muscogee (Creek) Nation (the "Nation") Constitution from the filing of this case, Plaintiffs bring this action alleging that the 1979 Constitution is unlawful. Plaintiffs have sued Principal Chief James Floyd ("Principal Chief Floyd") in his official capacity for actions allegedly taken pursuant to the federally-approved 1979 Constitution. Namely, Plaintiffs allege that the 1866 Treaty between the United States and the Nation requires the Nation to enroll Plaintiffs as citizens of the Nation. Denying their enrollment, Plaintiffs allege, violates a host of federal laws they say are applicable to the Nation.

Even though Plaintiffs' claims are untimely, and even assuming the truth of Plaintiffs' allegations at this stage, their claims against Principal Chief Floyd can and should be dismissed for the following reasons.

First, this Court lacks personal jurisdiction over Principal Chief Floyd. Plaintiffs fail to allege that Principal Chief Floyd has any contacts with the District giving rise to their claims. Regardless, the "government contacts exception" precludes exercising personal jurisdiction over Principal Chief Floyd.

Second, venue is improper in the District of Columbia because all defendants do not reside here and a substantial part of the alleged events giving rise to Plaintiffs' claims did not occur here.

Third, this Court does not have subject matter jurisdiction over the claims because the *Ex Parte Young* exception does not apply.

Finally, Plaintiffs fail to allege that they have exhausted their tribal administrative and judicial remedies prior to bringing this action, and allege only in conclusory fashion that the futility exception applies, which is insufficient to trigger that doctrine.

For each of these reasons, this case should be dismissed as to Principal Chief Floyd.

FACTUAL BACKGROUND

Plaintiffs filed their Amended Complaint on August 17, 2018. (Am. Compl., ECF No. 12.) The Plaintiffs are one association, the Muscogee Creek Indian Freedmen Band, Inc. ("MCIFB"), and seven Individual Plaintiffs. (*Id.* ¶¶ 3-10.) Five of the seven Individual Plaintiffs and the MCIFB appear to be residents of or domiciled in Oklahoma. (*Id.* at 1; Cert. of Corporate Disclosure, ECF No. 2.) The two remaining Individual Plaintiffs appear to be residents of California and Maryland. (Am. Compl. at 1.)

Plaintiffs bring this action against Principal Chief Floyd in his official capacity as Principal Chief of the Muscogee (Creek) Nation, Ryan Zinke in his official capacity as Secretary of the Department of Interior, and the Department of Interior (Ryan Zinke and the Department of Interior are collectively referred to as the "Federal Defendants"). (*Id.* ¶¶ 11-13.) Plaintiffs purport to sue Principal Chief Floyd and Ryan Zinke in their official capacities pursuant to the *Ex Parte Young* doctrine. (*Id.* ¶¶ 19-20.)

Principal Chief Floyd's Contacts with the District of Columbia

Although Plaintiffs do not so state, Principal Chief Floyd is a resident of Okmulgee, Oklahoma. (Decl. of Principal Chief Floyd, ¶ 3, attached hereto as **Exhibit 1**.) Plaintiffs do not allege any acts tying Principal Chief Floyd to the District of Columbia. As set forth in his declaration, Principal Chief Floyd's presence in the District since his election as Principal Chief in 2015 has been limited to meeting with various members of Congress and Federal governmental agencies, giving testimony before committees of Congress, and occasional attendance at conferences and cultural heritage events, such as those sponsored by the Smithsonian's National Museum of the American Indian. (Ex. 1 ¶¶ 5-8.) Since his election as Principal Chief, he has visited the District of Columbia from time to time on official tribal business for the purpose of

meeting with various members of Congress and governmental agencies, for example, the Department of the Interior, and the Department of Health and Human Services, Indian Health Service. (Ex. 1 ¶ 5.)

Plaintiffs' Alleged Entitlement to Citizenship in the Nation

Plaintiffs rely on the Nation's Treaty with the United States which includes the following provision:

> [I]nasmuch as there are among the Creek many persons of African descent, . . . it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof], shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons . . . .

(Am. Compl. ¶ 38; Treaty between the United States of America and the Creek Nation of Indians, 14 Stat. 785 (1866).) Plaintiffs contend that in the early 1900s, the congressionally-created Dawes Commission prepared two citizenship lists for the Nation: the "Creek Nation Creek Roll" and the "Creek Nation Freedmen Roll." (Am. Compl. ¶ 47.) Plaintiffs allege that the Creek Nation Creek Roll contains individuals of Creek blood, and the Creek Nation Freedmen Roll contains individuals of African descent, regardless of their degree of Creek blood. (*Id.* ¶¶ 48-50.) The Individual Plaintiffs claim that they are lineal descendants of individuals whose names appear on the Creek Nation Freedmen Roll. (*Id.* ¶¶ 4-10.)

The 1979 Constitution and Citizenship Code

Plaintiffs allege that in 1975, the Nation submitted to the Department of Interior ("DOI") the Nation's proposed constitution, which denied Freedmen and their descendants citizenship in

the Nation. (Am. Compl. ¶ 52.) Plaintiffs state that DOI approved for referendum the proposed constitution on August 17, 1979, (*id.* ¶ 56), and that the constitution was approved in an election held on October 6, 1979. (*Id.* ¶ 57.) Plaintiffs contend that Freedmen were not allowed to vote in the election. (*Id.* ¶ 59.) The 1979 Constitution provides that a Citizenship Board shall have authority over the enrollment process and the establishment and maintenance of the Nation's citizenship rolls. (1979 Constitution of the Muscogee (Creek) Nation, art. III, true and correct copy attached hereto as **Exhibit 2**[1] for the Court's convenience.) On November 13, 1980, the Nation enacted Title 7 of the Muscogee (Creek) Nation Code, which prescribes extensive enrollment procedures and tribal court remedies. (Muscogee (Creek) Nation Code Ann., tit. 7 § 1-101 *et seq.* (2008), attached hereto as **Exhibit 3**[2] for the Court's convenience.)

Prior Alleged Freedmen Litigation in Tribal Court

Plaintiffs do not allege that they applied for citizenship in the Nation or pursued the Nation's administrative process for enrollment. They also do not allege that they pursued the Nation's judicial remedies for any adverse enrollment decision. Instead, each Individual Plaintiff, merely alleges in conclusory fashion that he or she is a Creek Freedman descendant, has been denied enrollment as a citizen of the Nation,[3] and that pursuing administrative remedies would be futile. (Am. Compl. ¶¶ 4-10, 71.) Plaintiffs also allege that since 1979, the Nation has denied citizenship to other alleged Creek Freedmen, including Fred Johnson and Ron Graham. (*Id.* ¶¶ 61, 63-64.)

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1 This Court may take judicial notice of matters of public record, including administrative body records and reports and records of prior litigation, on a motion to dismiss. *Cf. Harding-Wright v. Dist. of Columbia Water & Sewer Auth.*, 04-cv-00558, 2016 WL 4211773, at *6 (D.D.C. Apr. 14, 2016); *see Latson v. Holder*, 82 F. Supp. 3d 377, 382-83 (D.D.C. 2015).

2 *See supra* n.1.

3 Except for the minor Plaintiff, who does not allege to have been denied enrollment.

Plaintiffs allege that Johnson and Graham applied for citizenship in the Nation, but were denied. (*Id.* ¶ 65.) Plaintiffs also allege that Johnson and Graham appealed the citizenship denials in the Nation's District Court, alleging arbitrary and capricious decision-making by the Citizenship Board and abuse of discretion. (*Id.* ¶ 66.) Plaintiffs allege that Johnson and Graham contended "that they and all Freedmen were eligible for citizenship in MCN pursuant to the Treaty of 1866, the Muscogee (Creek) Nation Constitution, and the MCN Citizenship Code." (*Id.* ¶ 67.) Plaintiffs state that in 2006, the Nation's District Court found that the Citizenship Board acted arbitrarily and capriciously, but declined to reach the substantive issues related to Freedmen's alleged right to citizenship. (*Id.* ¶ 69.) Plaintiffs also admit that the Nation's Supreme Court refused to rule on the substantive issue of Freedmen's alleged citizenship rights. (*Id.* ¶ 70.) Yet, based on the result of that case Plaintiffs contend that further litigation regarding their alleged citizenship rights would be futile. (*Id.* ¶ 71.)

Allegations Against Principal Chief Floyd

The bulk of Plaintiffs' allegations appear to be directed at the Federal Defendants. All allegations against Principal Chief Floyd stem from actions purportedly taken pursuant to the 1979 Constitution, which DOI approved on August 17, 1979. (Am. Compl. ¶ 56.) For example, Plaintiffs allege that after ratification of the 1979 Constitution, "[t]he MCN began to summarily deny Creek Freedmen and their Descendants applications for citizenship." (Am. Compl. ¶ 60.) Plaintiffs also allege that "Principal Chief Floyd oversees and approves the continuing disenfranchisement of and denial of citizenship rights and benefits to the Creek Freedmen Descendants." (*Id.* ¶ 88.) Finally, Plaintiffs allege that Principal Chief Floyd "willfully and purposefully implements and/or enforces policies denying Creek Freedmen Descendants, including Plaintiffs, the right to enroll as citizens of the MCN." (*Id.* ¶ 103.) Based on these

threadbare allegations, Plaintiffs claim that Principal Chief Floyd has violated the 1866 Treaty, the Oklahoma Indian Welfare Act, the Indian Civil Rights Act, the Principal Chiefs Act, and the Fifth and Thirteenth Amendments to the United States Constitution. (*Id.* ¶¶ 89-90, 103.) Plaintiffs seek expansive injunctive and declaratory relief, including what amounts to nullification of the 1979 Constitution. (*Id.* at 22-24.)

ARGUMENT

At the outset, it is important to note that Plaintiffs have not sued the Nation, a sovereign entity, in this action. Instead, they have sued Principal Chief Floyd in his official capacity as Principal Chief of the Nation under the *Ex Parte Young* doctrine. (Am. Compl. at 1.) The *Ex Parte Young* doctrine is a limited doctrine that permits a plaintiff to avoid a sovereign's immunity from suit by suing an official of the sovereign who allegedly enforced a purportedly unlawful statute against the plaintiff for prospective injunctive and declaratory relief. *Vann v. U.S. Dept. of Interior*, 701 F.3d 927, 928 (D.C. Cir. 2012) (citing *Ex Parte Young*, 209 U.S. 123, 155-60 (1908)). The *Ex Parte Young* doctrine does not apply in this case for all of the reasons set forth below. Moreover, the Court lacks jurisdiction over Principal Chief Floyd, venue is improper, and tribal remedies have not been exhausted.

I. This Case Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(2) as to Principal Chief Floyd Because This Court Lacks Personal Jurisdiction Over Him.

Plaintiffs fail to allege any acts connecting Principal Chief Floyd to the District and Plaintiffs' alleged injuries.[4] Dismissal on this basis alone is proper. Even if Plaintiffs had alleged specific acts tying Principal Chief Floyd to the District, which they did not, all such acts are

[4] It is an open question in this Circuit whether, in *Ex Parte Young* cases, the court should look to the sovereign's contacts with the District or to the official's contacts with the District for the limited purpose of determining whether the court has personal jurisdiction. *West v. Holder*, 60 F. Supp. 3d 190, 195 (D.D.C. 2014). The resolution of this question is immaterial here.

unrelated to the injury of which Plaintiffs complain, or are exempted by the government contacts exception. Accordingly, all counts against Principal Chief Floyd should be dismissed for lack of personal jurisdiction.

A. Rule 12(b)(2) legal standard.

To survive a motion to dismiss under Rule 12(b)(2), a plaintiff bears the burden of showing that the court has personal jurisdiction over the defendant. *Frost v. Catholic Univ. of Am.*, 960 F. Supp. 2d 226, 231 (D.D.C. 2013) (citing *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1092 (D.C. Cir. 2008)). "To meet this burden, a plaintiff must allege specific facts on which personal jurisdiction can be based; it cannot rely on conclusory allegations." *Id.* (internal quotation marks omitted). In making a personal jurisdiction determination, the Court need not treat a plaintiff's allegations as true. *Id.* The Court may consider materials outside the pleadings, such as affidavits, in determining personal jurisdiction. *Id.*; *see also Bigelow v. Garrett,* 299 F. Supp. 3d 34, 41 (D.D.C. 2018).

B. The D.C. long-arm statute does not authorize jurisdiction over Principal Chief Floyd.

Plaintiffs do not allege, and cannot show, that Principal Chief Floyd's contacts with the District are sufficient to confer personal jurisdiction. This Court may only exercise personal jurisdiction over Principal Chief Floyd if jurisdiction is authorized by the applicable D.C. statute, and the exercise of jurisdiction comports with constitutional due process. *Frost*, 960 F. Supp. 2d at 231. The D.C. long-arm statute, D.C. Code § 13-423(a)(1)-(7) (2012), confers specific jurisdiction[5] over a defendant only in certain enumerated circumstances. In addition, a plaintiff's claims must arise from the acts enumerated in the long-arm statute. D.C. Code § 13-423(b);

[5] Plaintiffs do not, and cannot, allege that this Court has general jurisdiction over Principal Chief Floyd because he is not domiciled in the District. D.C. Code § 13-422 (2012).

Bigelow, 299 F. Supp. 3d at 44; *Cherokee Nation of Okla. v. Babbitt*, No. 96-02284, at *2-3 (D.D.C. Nov. 3, 1998).[6]

Plaintiffs appear to allege that this Court has personal jurisdiction over Principal Chief Floyd pursuant to D.C. Code § 13-423(a)(1) because "he transacted and continues to transact business in the District of Columbia," or pursuant to § 13-423(a)(4) because he "caused tortious injury in the District of Columbia by an act or omission outside the District of Columbia, while regularly doing and/or soliciting business in the District of Columbia." (Am. Compl. ¶ 17.) Such conclusory allegations are insufficient to authorize jurisdiction over Principal Chief Floyd under either section of the long-arm statute. *See Frost*, 960 F. Supp. 2d at 231.

Plaintiffs have not alleged **any** facts connecting Principal Chief Floyd to the District for the purposes of establishing personal jurisdiction over him. Plaintiffs cannot allege any such facts. As set forth in his declaration,[7] Principal Chief Floyd's presence in the District since his election as Principal Chief in 2015 has been limited to meeting with various members of Congress and Federal governmental agencies, giving testimony before committees of Congress, and occasional attendance at conferences and cultural heritage events, such as those sponsored by the Smithsonian's National Museum of the American Indian. (Ex. 1 ¶¶ 5-8.)

Plaintiffs have not alleged that any of Principal Chief Floyd's contacts with the District have been related to the passage of the 1979 Constitution, any of its amendments, or decisions or the process regarding membership in the Nation. Thus, Plaintiffs have not alleged, and cannot

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[6] This case is not available in electronic format and hard copies have been archived and are not readily accessible. Therefore, a copy of the *Cherokee Nation of Oklahoma v. Babbitt* opinion obtained from a filing in *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 73 (D.D.C. 2006), is attached hereto as **Exhibit 4** for the Court's convenience.

[7] As noted above, the Court may consider materials outside the pleadings in its jurisdictional analysis without converting this Motion into a motion for summary judgment. *Frost*, 960 F. Supp. 2d at 231.

show, that their claims arise out of Principal Chief Floyd's contacts with the District under § 13-423(b). Satisfaction of § 13-423(b) is a prerequisite to establishing jurisdiction under §§ 13-423(a)(1) and (a)(4), and this Court need not determine whether Principal Chief Floyd "transacted business" or "caused tortious injury in the District of Columbia" while doing business in the District to find that the long-arm statute does not authorize jurisdiction over him.

In any event, Plaintiffs fail to allege that Principal Chief Floyd "transacted business" sufficient for the Court to exercise personal jurisdiction over him under §§ 13-423(a)(1) or (a)(4). Under § 13-423(a)(1), a plaintiff must show that the defendant "transacted business" by purposefully engaging in commercial or business activity directed at District residents. *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 270-71 (D.C. 2001); *West v. Holder*, 60 F. Supp. 3d 190, 195 (D.D.C. 2014) (citing *Mouzavires v. Baxter*, 434 A.2d 988, 992 (D.C. 1981) (en banc) (per curiam) (plurality opinion)). In *West v. Holder*, 60 F. Supp. 3d 190, 195 (D.D.C. 2014), an *Ex Parte Young* case, the court determined that it did not have jurisdiction over the governor of the state of Washington because plaintiffs there failed to allege that the governor's communications and coordination with federal officials regarding Washington state marijuana laws constituted commercial activity. Likewise, here, Plaintiffs fail to allege that Principal Chief Floyd's contacts with federal officials and government agencies in the District were commercial in nature and directed at District residents. Thus, Plaintiffs do not meet their burden of showing that this Court has jurisdiction over Principal Chief Floyd under § 13-423(a)(1).

Plaintiffs also fail to include any facts demonstrating that the more restrictive requirements of § 13-423(a)(4) have been satisfied. *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C. Cir. 2000) (stating that § 13-423(a)(4) is construed narrowly and appears to be more restrictive than the limits of constitutional due process). As discussed above, Plaintiffs fail

to allege that Principal Chief Floyd transacted **any** business in the District, let alone "regularly" as required by § 13-423(a)(4). This failure alone ends the inquiry under § 13-423(a)(4).

Plaintiffs also allege, without providing a single fact in support of their allegation, that Principal Chief Floyd "has caused tortious injury in the District of Columbia . . . ." (Am. Compl. ¶ 17.) Such a conclusory assertion is insufficient to establish personal jurisdiction and defeat a 12(b)(2) motion. *Frost*, 960 F. Supp. 2d at 231. Moreover, even if Principal Chief Floyd's contacts with the District could be construed to have caused Plaintiffs tortious injury, that injury "was not felt 'in the District of Columbia' as the statute requires," because determinations as to citizenship[8] in the Nation would be felt in Oklahoma where the Nation is situated, or where the Plaintiffs reside, but in any event not in the District. *West*, 60 F. Supp. 3d at 194 (stating that § 13-423(a)(4) not satisfied because even if Washington state governor's coordination with federal officials caused plaintiffs tortious injury, that injury would be felt in Washington state where marijuana enforcement procedures would be implemented, not in the District). Plaintiffs fail to meet their burden of establishing that this Court has personal jurisdiction over Principal Chief Floyd pursuant to § 13-423(a)(4).

C. Exercise of jurisdiction over Principal Chief Floyd would not comport with federal due process.

A court may exercise personal jurisdiction over a defendant only if the requirements of the D.C. long-arm statute are met and exercise of jurisdiction comports with federal due process. *Frost*, 960 F. Supp. 2d at 231. Normally, the court would first determine whether the requirements of the long-arm statute had been satisfied and, if so, whether jurisdiction comports with federal

[8] As discussed below, Principal Chief Floyd does not make citizenship determinations. *See infra* at pp. 16-19. Even if he did, the effects of any adverse citizenship determinations would be felt in Oklahoma, or where the Plaintiffs reside, not the District.

due process. *Mouzavires*, 434 A.2d at 992. Section 13-423(a)(1), however, has been interpreted to be co-extensive with the requirements of federal due process. *Haarmann & Reimer Corp.*, 779 A.2d at 269-70 (quoting *Mouzavires*, 434 A.2d at 990). As discussed *supra*, Plaintiffs fail to show that any of Principal Chief Floyd's contacts with the District constitute "transacting business," nor that his contacts gave rise to the claims that Plaintiffs allege. As the requirements of § 13-423(a)(1) are not met, the requirements of federal due process are also not met. *Id.* Exercise of personal jurisdiction over Principal Chief Floyd would not comport with federal due process.

D. The government contacts exception precludes exercise of personal jurisdiction over Principal Chief Floyd.

Assuming *arguendo* that Plaintiffs could demonstrate that jurisdiction is proper under the long-arm statute and comports with federal due process, the government contacts exception precludes exercise of jurisdiction over Principal Chief Floyd. It is well-settled that the government contacts exception "precludes the assertion of personal jurisdiction over a nonresident whose only contacts with the District of Columbia are for purposes of dealing with a federal agency or Congress." *Bigelow*, 299 F. Supp. 3d at 43-44 (finding no personal jurisdiction where defendant's alleged contacts with the District arose out of his employment as a member of Congress and were exempted by the government contacts exception); *see also Cherokee Nation of Okla.*, No. 96-02284, at *3-5 (holding that extensive contacts with District, including meetings in pursuit of federal recognition, meetings with members of Congress and federal agencies, letters and 660 phone calls from tribe's D.C. headquarters, and lobbying of National Conference of American Indians fell under government contacts exception and precluded jurisdiction over tribe).

The exception exists to protect public participation in government and prevent the District from being converted into a "national judicial forum." *Morgan v. Richmond Sch. of Health & Tech., Inc.*, 857 F. Supp. 2d 104, 108 (D.D.C. 2012) (citing *Envtl. Research Int'l, Inc. v. Lockwood*

Greene Eng'rs, Inc., 355 A.2d 808, 813 (D.C. 1976) (en banc)); *Cherokee Nation of Okla.*, No. 96-02284, at *4. Activities such as meeting with federal officials in the District or receiving federal funding are insufficient to establish personal jurisdiction. *Morgan*, 857 F. Supp. 2d at 108 (holding that court did not have personal jurisdiction over defendant college whose only contact with the District was participation in federal financial aid programs through the Department of Education pursuant to Title IV of the Higher Education Act).

Here, Principal Chief Floyd's contacts with the District have almost exclusively been for the purpose of working and meeting with various Federal governmental agencies—quintessential "government contacts." (Ex. 1 ¶¶ 5-7); *see Bigelow*, 299 F. Supp. 3d at 43; *Cherokee Nation of Okla.*, No. 96-02284, at *4-5. *Cherokee Nation of Oklahoma v. Babbitt*, No. 96-02284, at *3-5 (D.D.C. Nov. 3, 1998) is on point. In that case, this court held that it did not have personal jurisdiction over a tribe because, although extensive, the tribe's only contacts with the District arose solely from the tribe's "campaign to influence the policies of a federal agency." The court stated that when analyzing whether the government contacts exception applies, "it is the nature of the contacts, and not their quantity, that must control." *Id.* Here, too, even if Plaintiffs had alleged that Principal Chief Floyd's contacts with the District have been regular or numerous, they have been for the purpose of engaging with the Federal government. (Ex. 1 ¶¶ 5-8.) The government contacts exception therefore precludes exercise of personal jurisdiction over Principal Chief Floyd.

II. Venue is Improper in the District of Columbia, and this Case Should be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(3).

Plaintiffs fail to allege any facts showing that venue is proper in the District of Columbia. Instead, Plaintiffs offer only an unsupported legal conclusion that venue is proper here. (*See* Am. Compl. ¶ 18.) This Court should not accept such a conclusion. Venue is improper in the District of Columbia because Principal Chief Floyd does not reside in the District of Columbia, and a

substantial part of the alleged events or omissions giving rise to the claim did not occur in the District of Columbia. Therefore, this case should be dismissed for lack of venue.

A. Rule 12(b)(3) legal standard.

Under Fed. R. Civ. P. 12(b)(3), a case may be dismissed for improper venue. *E.g., Martin v. U.S. Equal Emp't Opportunity Comm'n*, 19 F. Supp. 3d 291, 301 (D.D.C. 2014). The plaintiff bears the burden of showing that venue is proper in the district in which the case was brought. *Id.* The plaintiff must also demonstrate that venue is proper with respect to "each cause of action and each defendant." *Id*. (emphasis added). For the purposes of a 12(b)(3) motion, a court "accepts the plaintiff's well-pled factual allegations regarding venue as true, draws all reasonable inferences from those allegations in the plaintiff's favor, and resolves any factual conflicts in the plaintiff's favor." *Id.* In making a venue determination, the court need not accept the plaintiff's legal conclusions as accurate, and may consider materials outside of the pleadings. *Haley v. Astrue*, 667 F. Supp. 2d 138, 140 (D.D.C. 2009).

B. Plaintiffs fail to demonstrate that venue is proper in this District pursuant to 28 U.S.C. § 1391, and therefore the case should be dismissed.

The general venue statute, 28 U.S.C. § 1391 (2012), applies when no specific venue statute governs the plaintiff's claims. *Haley*, 667 F. Supp. 2d at 140. Plaintiffs state that venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because the Federal Defendants reside in this District. (Am. Compl. ¶ 18.) Section 1391(e), however, applies only to the Federal Defendants. Venue as to Principal Chief Floyd must be determined pursuant to § 1391(b). Section 1391(b) states that a civil action may be brought in:

> (1) a judicial district in which any defendant resides, **if all defendants are residents of the State in which the district is located**;

> (2) a judicial district in which a **substantial part of the events or omissions giving rise to the claim occurred**, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b)(1)-(3) (emphasis added). Residency of a natural person is the judicial district in which the person is domiciled. *Id.* § 1391(c)(1).

Plaintiffs fail to plead **any** facts demonstrating that venue is proper in this District as to Principal Chief Floyd. *See Martin*, 19 F. Supp. 3d at 301. Notably absent from the Amended Complaint is any factual allegation establishing Principal Chief Floyd's residency. This Court need not accept Plaintiffs' legal conclusion that venue is proper, and may consider materials outside of the Amended Complaint, including Principal Chief Floyd's declaration. *Haley*, 667 F. Supp. 2d at 140. As stated in his declaration, Principal Chief Floyd resides in Okmulgee, Oklahoma. (Ex. 1 ¶ 3.)

Venue is improper in this District under any subsection of § 1391(b). *First*, venue is improper in this District under § 1391(b)(1) because the Federal Defendants and Principal Chief Floyd reside in different states.

Second, Plaintiffs do not allege **any** facts showing that a "substantial part of the events" (or any events) underlying Plaintiffs' claims against Principal Chief Floyd took place in this District. It is unclear what specific action Plaintiffs allege Principal Chief Floyd took that underlies Plaintiffs' claims. Nevertheless, any such alleged action—and any resultant effects—would have occurred in Oklahoma where the Nation is located, and felt where the Plaintiffs reside, but not the District. *See Martin*, 19 F. Supp. 3d at 308-09 (finding venue improper in District of Columbia

under § 1391(b)(2) where breach of contract claim was based on contract that was negotiated, entered into, and performed in Texas). Thus, venue is improper in the District under § 1391(b)(2).

Finally, venue is improper under § 1391(b)(3) because there is a venue where this action could be brought under § 1391(b)(2)—a district court in Oklahoma—*and* this Court does not have personal jurisdiction over Principal Chief Floyd as discussed *supra* at pp. 7-12. *See Martin*, 19 F. Supp. 3d at 309 (stating that § 1391(b)(3) is only applicable if plaintiff can show that there is no other district in which his claims could have been brought).

III. The Case Should be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(1) Because this Court Does Not Have Subject Matter Jurisdiction over Plaintiffs' Claims against Principal Chief Floyd.

As stated above, Plaintiffs have not sued the Nation in this action. By expressly bringing this action against Principal Chief Floyd under an *Ex Parte Young* theory, Plaintiffs effectively concede that the Nation, as a sovereign entity, is immune from suit. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Plaintiffs have not alleged, and cannot allege, that the Nation has waived its sovereign immunity in this matter. In order to avoid the issue of the Nation's sovereign immunity, Plaintiffs sue Principal Chief Floyd in his official capacity under *Ex Parte Young*. *See Vann v. U.S. Dept. of Interior*, 701 F.3d 927, 929-30 (D.C. Cir. 2012) (citing *Ex Parte Young*, 209 U.S. 123, 155-56 (1908)). However, *Ex Parte Young* does not apply because Principal Chief Floyd does not have the requisite "enforcement connection" to the alleged denial of Plaintiffs' enrollment in the Nation. Accordingly, this Court does not have subject matter jurisdiction over Plaintiffs' claims against Principal Chief Floyd, and the case should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

A. Rule 12(b)(1) legal standard.

A court must dismiss a case pursuant to Fed. R. Civ. P. 12(b)(1) when it lacks subject matter jurisdiction over the claims. "[T]he defense of sovereign immunity, if applicable, divests a

federal court of jurisdiction over a plaintiff's suit against [a] sovereign." *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 135 (D.D.C. 2015). The plaintiff bears the burden of demonstrating that the court has subject matter jurisdiction. *Id.* at 136. The court must construe the allegations in the complaint in the light most favorable to the plaintiff. *Id.* at 137. However, the allegations bear close scrutiny because a Rule 12(b)(1) motion "imposes on the court an affirmative obligation to ensure that it is acting within the scope of its judicial authority." *Id.* at 137. The court need not accept legal conclusions "couched as . . . factual allegations," or allegations unsupported by the facts set forth in the complaint. *Kialegee Tribal Town v. Zinke*, No. 17-cv-1670, 2018 WL 4286406, at *4 (D.D.C. Sept. 7, 2018) (citing *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006)). In determining whether it has jurisdiction, the court may consider materials outside the pleadings as necessary to resolve the jurisdictional question. *Gregorio v. Hoover*, 238 F. Supp. 3d 37, 44 (D.D.C. 2017) (citing *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

B. The *Ex Parte Young* exception does not apply because Principal Chief Floyd does not have the requisite enforcement connection to the alleged denial of Plaintiffs' enrollment in the Nation, and therefore this action is barred by sovereign immunity.

In order for the *Ex Parte Young* doctrine to apply, the named tribal official must have the "requisite enforcement connection to the challenged law." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (dismissing tribal chairman from case because, although he had executive authority over tribe, plaintiffs did not allege he was responsible for enforcing the tax challenged in the case); *cf. Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (finding that governor and attorney general did not have authority to enforce allegedly unconstitutional law allowing tort damages against doctors providing abortions and *Ex Parte Young* did not authorize suit against them); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999) (ordering dismissal of claims against governor, attorney general, and district

attorney as barred by Eleventh Amendment because none of the officials had any relationship or ability to enforce the civil provision of a partial-birth abortion statute sufficient to invoke *Ex Parte Young* exception); *Hope Clinic v. Ryan*, 195 F.3d 857, 875 (7th Cir. 1999) (stating that relief against states' attorneys general for allegedly unlawful civil liability provisions in abortion statute would be "pointless" because attorneys general had no enforcement powers over provisions), *vacated on other grounds by* 530 U.S. 1271 (2000); *Snoeck v. Brussa*, 153 F.3d 984, 987 (9th Cir. 1998) (affirming dismissal of claims against Nevada Commission on Judicial Discipline as barred by Eleventh Amendment because Commission did not have power to enforce contempt provision of which plaintiffs complained).

A general duty to oversee implementation of tribal laws does not provide the requisite enforcement connection. *Cf. Okpalobi*, 244 F.3d at 416 (entering judgment of dismissal after finding that governor and attorney general, who had mere duty to uphold laws of state, did not have requisite enforcement connection to abortion tort law sufficient to apply *Ex Parte Young* exception to overcome sovereign immunity). Rather, it is the particular duty to enforce the challenged statute or general right and power to enforce tribal laws, including the statute in question. *Cf. id.* at 416-17. This Court need not accept at face value Plaintiffs' conclusory statements that Principal Chief Floyd is the proper Defendant. *Kialegee Tribal Town*, 2018 WL 4286406, at *4. Instead, the Court may look outside the pleadings to determine that Plaintiffs have failed to establish the requisite enforcement connection necessary for the *Ex Parte Young* exception to apply.[9] Here, it is plain from the face of the 1979 Constitution that Principal Chief Floyd does not make citizenship decisions. (Ex. 2, art III, §§ 1-3.) Nor does he have authority to

[9] This Court may consider materials outside the pleadings necessary to resolve the jurisdictional question. *Gregorio*, 238 F. Supp. 3d at 44.

implement or enforce the process for determining citizenship. *Id.* Plaintiffs have sued an official who has no role or authority in the Nation's process for determining eligibility for citizenship. The Principal Chief cannot grant the Plaintiffs citizenship. (Ex. 2, art. III.)

The facts on this point are analogous to those in *Burlington Northern & Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). In *Burlington*, a railway company sued two tribal officials (the finance director and the tribal chairman) over the tribe's efforts to collect and enforce an allegedly unlawful tax on the railway's use of a right-of-way through the reservation. 509 F.3d at 1088. The tribal officials filed a motion to dismiss on sovereign immunity grounds. The Court of Appeals for the Ninth Circuit found that the *Ex Parte Young* doctrine permitted suit against the finance director because she was responsible for enforcing the challenged tax. *Id.* at 1092-93. The court, however, ordered the tribal chairman dismissed from the case because, although he had executive authority over the tribe, he was not in any way responsible for enforcing the tax. *Id.* at 1093. Likewise, Principal Chief Floyd is in no way responsible for making citizenship determinations and has no authority over the Citizenship Board that does. (Ex. 2, art. III, §§ 1-3.)

At least four Circuits that have addressed the enforcement connection issue have dismissed actions against officials under *Ex Parte Young* who did not have the power to enforce the challenged law. *See Okpalobi*, 244 F.3d at 416 (Fifth Circuit); *Summit Med. Assocs., P.C.*, 180 F.3d at 1341 (Eleventh Circuit); *Hope Clinic*, 195 F.3d at 875 (Seventh Circuit); *Snoeck*, 153 F.3d at 987 (Ninth Circuit). Where the official sued had mere general enforcement powers akin to those Principal Chief Floyd possesses, but did not have enforcement power over the challenged law or provision, courts dismissed claims against the official for lack of the requisite enforcement connection. *See Burlington*, 509 F.3d at 1093; *Okpalobi*, 244 F.3d at 416.

Vann v. United States Department of Interior, 701 F.3d 927, 929-30 (D.C. Cir. 2012), is not to the contrary. *Vann* was a case in this Circuit addressing Cherokee Freedmen citizenship issues. There, the court found that the Cherokee Principal Chief had the requisite connection to enforce membership determinations sufficient to apply *Ex Parte Young*. *Id.* at 930. The court apparently only relied upon two clauses in the Cherokee constitution—one vesting all executive power in the Principal Chief, and the other requiring him to faithfully execute the laws of the Cherokee Nation. *Id.*

The Muscogee (Creek) Nation's constitution is distinguishable. On its face, the Nation's constitution vests all power over citizenship determinations in the Citizenship Board, an entirely separate and independent entity from the Principal Chief. (Ex. 2, art. III, §§ 1-3.) Principal Chief Floyd has no authority over the Citizenship Board or tribal enrollment, despite his general enforcement powers. (*Id.*; *see also id.*, art. V, § 1(a) (vesting executive power in Principal Chief).) Obtaining relief against Principal Chief Floyd would be "pointless" because he has no authority over citizenship determinations. *See Hope Clinic*, 195 F.3d at 857. Where the official named in the action lacks the requisite enforcement connection, *Ex Parte Young* does not apply, and sovereign immunity is not overcome. Thus, this Court does not have subject matter jurisdiction over Plaintiffs' claims against the Principal Chief Floyd.

IV. Dismissal is Warranted Because Plaintiffs Fail to Allege that they have Exhausted their Tribal Remedies, and the Futility Exception Does Not Apply.

Plaintiffs fail to show that they have exhausted their tribal administrative and judicial remedies, or that any of the exceptions to the rule applies. The Amended Complaint is devoid of any facts supporting Plaintiffs' conclusory claims that they have been denied enrollment in the Nation. (*See* Am. Compl. ¶¶ 4-6, 8-10.) Plaintiffs in fact do not allege that they have even applied for citizenship in the Nation. Instead, Plaintiffs conclusorily argue that exhaustion would be futile

because two alleged Freedmen, who are not parties to this suit, were denied citizenship a decade ago. (Am. Compl. ¶ 64-71.) Inherent in this argument is the admission that Plaintiffs have not themselves pursued any tribal administrative or judicial remedies prior to bringing this action, even though these remedies exist and are clearly outlined in the Nation's code. (Ex. 3, tit. 7.) In addition, Plaintiffs admit that the case on which they base their futility argument did not reach the substantive issue of Freedmen's alleged citizenship rights. (Am. Compl. ¶¶ 69-70.) Accordingly Plaintiffs do not meet their burden of showing that exhaustion would be futile.

A. Plaintiffs fail to allege that they have exhausted their tribal remedies.

Where a tribe has jurisdiction over the claim at issue, a plaintiff must exhaust tribal remedies, both administrative and judicial, including any tribal appellate remedies, before bringing suit in federal court. *E.g.*, *Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1247 (9th Cir. 1991); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1501-02 (10th Cir. 1997); *see also Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993) ("[A]s a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies.").

The Supreme Court has espoused three policy reasons for enforcing the tribal exhaustion rule: "(1) to further the congressional policy of supporting tribal self-government; (2) to promote the orderly administration of justice; and (3) to obtain the benefit of tribal expertise." *Texaco, Inc.*, 5 F.3d at 1377-78 (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985)). Exhaustion of tribal remedies is particularly appropriate where, as here, a tribe's membership is the underlying issue—an issue that is central to tribal sovereignty and self-government.

When the basis for the claim arises in Indian country or is a matter of tribal self-governance, the Supreme Court's policies behind the exhaustion rule dictate that parties must first exhaust tribal remedies before bringing suit in federal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Texaco, Inc.*, 5 F.3d at 1378; *see also Jeffredo v. Macarro*, 599 F.3d 913, 918, 921 (9th Cir. 2010). Tribal self-governance goes to the heart of the dispute here: there is perhaps nothing more important to a tribe's exercise of self-government than determining its own membership.

Courts have consistently held that a tribe's authority to determine its own membership is a fundamental exercise of self-government and is essential to its continuing existence as an independent sovereign entity. *See, e.g.*, *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1463 (10th Cir. 1989) ("Applying the statutory prohibitions [of federal civil rights statute, 42 U.S.C. § 1981] against race discrimination to a tribe's designation of tribal members would in effect ***eviscerate the tribe's sovereign power to define itself***, and thus would constitute an unacceptable interference with a tribe's ability to maintain itself as a culturally and politically distinct entity.") (internal quotation marks omitted) (emphasis added); *see also Santa Clara Pueblo*, 436 U.S. at 72 n.32 ("[A] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."); *Smith v. Babbitt*, 875 F. Supp. 1353, 1367 (D. Minn. 1995) ("[A] sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations."), *judgment aff'd, appeal dismissed in part on other grounds by* 100 F. 3d 556 (9th Cir. 1996).

Accordingly, when issues of tribal membership underlie the dispute, federal courts have recognized that tribal exhaustion is appropriate before suit can be brought in federal court. *See,*

e.g., *Jeffredo*, 599 F.3d at 918, 921 (describing an action brought by individuals disenrolled from tribal rolls as a "claim arising in Indian country" and requiring exhaustion of tribal remedies, acknowledging that the Supreme Court's policy of supporting tribal self-government "strongly discourages federal courts from assuming jurisdiction" over such claims until tribal remedies are exhausted); *Nero*, 892 F.2d at 1460 (suit against tribe by Cherokee Freedmen alleging entitlement to citizenship was barred notwithstanding narrow exception to sovereign immunity rule because plaintiffs "failed to pursue available tribal remedies and because the dispute concern[ed] the internal tribal affairs of membership and government"); *Smith*, 875 F. Supp. at 1367 (acknowledging that even if federal court had subject matter jurisdiction over dispute challenging tribe's membership determinations, the court would nevertheless dismiss the complaint for failure to exhaust tribal remedies pending final resolution of issue in tribal forums).

Because a tribe's determination of its membership is so fundamental to its existence as a self-governing and sovereign entity, the importance of requiring Plaintiffs in this case to first exhaust tribal remedies cannot be overstated. Where, as here, tribal membership is central to the dispute—even where Plaintiffs allege that tribal membership is subject to a treaty right—federal courts should first allow the appropriate tribal bodies to make their determinations before weighing in. *See Nero*, 892 F.2d at 1459-60.

Notably, Plaintiffs in this case have not even alleged to have applied for citizenship in the Nation. The Nation has a simple and documented process in place for individuals to apply for citizenship and to appeal any citizenship decisions to tribal court. (Ex. 3, tit. 7.) Accordingly, that process should be pursued—in the appropriate tribal forums—until exhaustion. Requiring that the exhaustion process occur before this case is heard in federal court will serve "the orderly administration of justice in the federal court . . . by allowing a full record to be developed in the

Tribal [forums] before either the merits or any question concerning appropriate relief is addressed [in federal court]." *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856. Moreover, it is imperative that the Plaintiffs be required to exhaust their tribal remedies so that a complete administrative and judicial record may be developed. Without such a record, it is impossible for Principal Chief Floyd to ascertain if and when Plaintiffs were actually injured in order to formulate possible defenses such as standing and statute of limitations.

Requiring exhaustion of tribal remedies in this instance will also clearly serve the other policies articulated by the Supreme Court for enforcing the tribal exhaustion rule: supporting tribal self-government and benefiting from tribal expertise, the benefit of which may be of particular importance to federal courts on issues relating to tribal law and membership. *See Iowa Mut. Ins. Co.*, 480 U.S. at 16 ("T]ribal courts are best qualified to interpret and apply tribal law.")

Tribal exhaustion is beneficial and should be followed even where, as here, issues of federal law are involved. *See Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991); *Middlemist v. Secretary of U.S. Dept. of Interior*, 824 F. Supp. 940, 943-44 (D. Mont. 1993) ("[T]he continuous exposure of tribal courts to jurisdictional questions involving issues of federal law increases the value of their explanations to subsequent reviewing courts."), *aff'd by* 19 F.3d 1318 (9th Cir. 1994). It is also immaterial that some defendants may be non-Indians, including federal officials. *See, e.g., Moffett*, 947 F.2d at 444 (finding that tribal exhaustion rule applied where tribal officials, federal officials, and private individuals were sued in federal court for allegedly violating a Navajo tribal member's constitutional rights during an arrest occurring on the Navajo reservation); *Smith*, 875 F. Supp. at 1367 (stating that in Eighth Circuit, tribal exhaustion is mandatory, and dismissing claims brought under federal and tribal law against tribe and federal officials arising out of tribe's membership determinations); *Hall v. Babbitt*, 208 F.3d 218 (8th Cir. 2000) (requiring exhaustion

of tribal remedies in case brought against tribal officials alleging misappropriation and spending of federal money for improper purposes notwithstanding fact that Plaintiff also named Secretary of the Interior as defendant and dispute involved federal statutes); *Tillett v. Lujan*, 931 F.2d 636, 640-41 (10th Cir. 1991) (requiring exhaustion of tribal remedies in suit brought against federal and tribal officials, noting that the tribal exhaustion rule "does not preclude [plaintiff] from thereafter bringing a suit in federal court").[10]

Exhaustion in this case requires simply that tribal forums—the bodies with the most appropriate and requisite expertise and the specific processes in effect to do so—have the opportunity to decide the issue of tribal citizenship in the first instance. In fact, the issues concerning the Federal Defendants in this case are, at their core, dependent on the same basic issue underlying the rest of the dispute—tribal membership. The issue of tribal membership can and should therefore be presented in tribal forums first, without the Federal Defendants, so that the necessary determinations can be made by the appropriate tribal administrative and judicial bodies, and a full record may be developed as to the membership eligibility of these particular Plaintiffs. Should Plaintiffs then decide to bring suit in federal court, the federal court will benefit from a thoroughly developed record and the expertise of the tribal administrative and judicial bodies on

[10] *But see Vann v. Kempthorne*, 467 F. Supp. 2d 56, 73 (D.D.C. 2006) (*Kempthorne I*) (stating exhaustion of tribal remedies not required where case involved federal and tribal officials because tribal court lacked jurisdiction over claim against federal officials), *rev'd on other grounds by* 534 F.3d 741 (D.C. Cir. 2008). Respectfully, *Kempthorne I* was wrongly decided. It appears that the district court there did not follow the prevailing body of law recognizing that when core issues of tribal self-government such as membership are central to the dispute, plaintiffs must exhaust tribal remedies prior to seeking redress in federal court against anyone, including the federal government. To be clear, Principal Chief Floyd does not suggest that Plaintiffs sue the Federal Defendants in tribal court. Rather, the exhaustion doctrine requires that Plaintiffs first exhaust the tribal administrative and judicial remedies available and clearly provided for under tribal law for the very injury Plaintiffs allege—denial of membership. *Burlington N. R. Co.*, 940 F.2d at 1247.

this matter that is so central to tribal existence and self-governance. *See, e.g.*, *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856; *Moffett*, 947 F.2d at 444; *Smith*, 875 F. Supp. at 1367.

B. Plaintiffs' allegations of futility are not sufficient to circumvent tribal exhaustion.

There are only four exceptions to the tribal exhaustion rule: "(1) when assertion of tribal jurisdiction is to harass or is in bad faith; (2) when the action is patently violative of express jurisdictional prohibitions; (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction; and, (4) when tribal jurisdiction serves no other purpose than delay." *LECG, LLC v. Seneca Nation of Indians*, 518 F. Supp. 2d 274, 277 (D.D.C. 2007) (quoting *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 857 n.21; *Strate v. A–1 Contractors*, 520 U.S. 438, 459 n.14 (1997)); *see also Texaco, Inc.*, 5 F.3d at 1376. The party seeking the benefit of an exception must make a "substantial showing of eligibility to invoke" the exception. *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1243 (10th Cir. 2017).

Plaintiffs in this case in effect admit that they have not sought tribal remedies in any manner. Plaintiffs instead argue that exhaustion would be futile because two individuals, who are not parties to this suit, were denied citizenship a decade ago. (Am. Compl. ¶ 64-71.) And therefore, Plaintiffs allege, "[i]t is clear . . . that further litigation in [tribal] courts is futile and that the Freedmen have exhausted their tribal remedies." (Am. Compl. ¶ 71.) But to invoke the futility exception, the aggrieved party must have ***actually sought a tribal remedy***; conclusory assertions of futility do not suffice. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984) ("[S]peculative futility is not enough to justify federal jurisdiction.").

The fact that another party not named in this suit may have previously sought a remedy on a matter that bears some resemblance or similarity to the Plaintiffs'—but that we cannot say is at

all like the Plaintiffs' case because they have failed to follow the tribal citizenship process—is not enough to trigger the futility exception to the tribal exhaustion rule—the aggrieved party must have, herself, actually sought a tribal remedy. *See id.* at 1312 ("[A]n aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility."); *Nero*, 892 F.2d at 1460 n.5. Plaintiffs admit that in the prior litigation, the tribal courts did not reach the substantive issues related to Freedmen's alleged citizenship in the Nation. (Am. Compl. ¶ 70.) As the tribal courts have not yet weighed in on Plaintiffs' claims, and in fact Plaintiffs in this case have not sought *any* tribal remedy whatsoever, Plaintiffs' "speculative futility" argument does not meet the substantial showing required to invoke the futility exception. *Pueblo of San Juan*, 728 F.2d at 1313.

To the extent that Plaintiffs may imply allegations of bad faith or bias by the tribal forums, these also do not amount to a showing of futility and are not enough to avoid exhaustion. *See, e.g.*, *Iowa Mut. Ins. Co.*, 480 U.S. at 18-19; *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (allegations of local bias and "tribal court incompetence" are not enough to avoid the tribal exhaustion requirement). Courts may waive the exhaustion requirement in limited circumstances, such as when tribal remedies "do not exist, are merely hypothetical, or are 'informal,'" and exhaustion would therefore be futile. *Aguilar v. Rodriguez*, No. 17-cv-1264, 2018 WL 4466025, at *2 (D.N.M. Sept. 18, 2018) (citing *Necklace v. Tribal Court of Three Affiliated Tribes*, 554 F.2d 845, 846 (8th Cir. 1977)).

That is not the case in this instance. The Nation has an administrative body, specifically created in its tribal constitution, tasked with citizenship determinations, and a clear, written procedure embodied in its tribal code, outlining the process for applying for citizenship and appealing such determinations in tribal court. (Ex. 2, art III, §§ 1-3; Ex. 3, tit. 7.) A written tribal code outlining the process for obtaining review and a formal remedy is evidence that a tribal

remedy exists and exhaustion must be followed. *See Aguilar*, 2018 WL 4466025, at *2 (finding that "Advisement of Rights Order," though not a written code, expressly outlined the process for plaintiff to seek redress in the tribal court and exhaustion would not be futile); *Pueblo of San Juan*, 728 F.2d at 1313 (upholding dismissal for failure to exhaust tribal remedies where tribal code prescribed process for obtaining tribal remedy, but plaintiffs took no affirmative steps to seek relief through the tribal process before filing suit in federal court). The Nation also has a fully functioning and competent court system with clear authority to hear appeals of citizenship decisions. (Ex. 2, art VII; Ex. 3, tit. 7.)

While failed attempts to obtain tribal review may demonstrate that exhaustion would be futile, *Aguilar*, 2018 WL 4466025, at *2, again, Plaintiffs in this instance have not even alleged that they attempted to seek *any* determination from tribal forums as to their citizenship eligibility. Plaintiffs therefore have not met, and cannot meet, the burden of showing that tribal exhaustion would be futile, and have not alleged any other reason to support their assertion that tribal exhaustion is not required. Accordingly, Plaintiffs claims against Principal Chief Floyd should be dismissed for failure to exhaust their tribal remedies.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims against Principal Chief Floyd should be dismissed in their entirety.

Date: October 5, 2018

Respectfully submitted,

/s/ Brenna M. Spinner

David L. Feinberg (D.C. Bar 982635)
Brenna M. Spinner (D.C. Bar 187399)
VENABLE LLP
600 Massachusetts Avenue, N.W.

Washington, D.C. 20001
T: 202.344.4000
F: 202.344.8300
dlfeinberg@venable.com
bmspinner@venable.com

Kevin W. Dellinger (*admitted pro hac vice*)
Attorney General's Office
Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447
T: 918.295.9720
F: 918.756.2445

Counsel for Defendant Principal Chief James Floyd