IN THE 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.: 18-cv-01705 (CKK)

PLAINTIFFS' OPPOSITION TO PRINCIPAL CHIEF FLOYD'S MOTION TO DISMISS

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I. INTRODUCTION

Defendant Principal Chief James Floyd ("Principal Chief Floyd" or "Defendant") seeks to hide from any responsibility for the systematic discrimination of rightful Creek citizens on the basis of their race and legal status as descendants of enslaved Africans. Defendant invokes arguments that this Court does not have jurisdiction to enforce the Treaty of 1866 (essentially a federal contract), the venue is wrong, and that Plaintiffs should be forced to "exhaust tribal remedies" before bringing suit here. The effect of Defendant's arguments would be that the Muscogee (Creek) Nation, ("MCN") led by Principal Chief Floyd, is allowed to repeatedly violate the Treaty of 1866 and perpetuate the badges of slavery in violation of the Thirteenth Amendment and the Indian Civil Rights Act.

Principal Chief Floyd, as the chief executive of the MCN, oversees and approves the denial of the basic citizenship rights of Creeks of African descent, including members of the Muscogee Creek Indian Freedman Band ("MCIFB") and the other plaintiffs here (collectively the "Creek Freedmen"). Principal Chief Floyd willfully and purposefully directs a government that strips the Creek Freedmen of their very heritage, denies the Creek Freedmen equal protection under the laws, and deprives the Creek Freedmen their share of trust assets and tribal benefits. Plaintiffs brought suit to enjoin Principal Chief Floyd from denying citizenship rights and attendant benefits to the Creek Freedmen.

The Creek Freedmen's claims are properly before this Court. Personal jurisdiction is established over the MCN by the Nation's contacts with the jurisdiction. Those contacts, including Principal Chief Floyd's efforts in the District of Columbia to exclude Creek Freedmen from their rightful place among MCN citizens are not constitutionally-protected government contacts that shield him from this Court's jurisdiction. Moreover, the plain language of the

MCN Constitution vests Principal Chief Floyd with the ultimate responsibility to enforce the laws of the MCN, and therefore this Court has jurisdiction to hear this case under *Ex Parte Young*. This Court therefore has both personal and subject matter jurisdiction to hear Plaintiffs' suit. Finally, the Creek Freedmen have alleged events of operative significance that occurred in the jurisdiction, making this Court an appropriate venue to adjudicate these claims.

Defendant's tribal exhaustion arguments are not relevant here. Tribal exhaustion is not required where an action in tribal court violates express jurisdictional prohibitions, as here. Even if tribal exhaustion were required, the futility exception applies. But Defendant's interpretation of the futility exception would have this Court swallow the exception whole. Requiring a plaintiff to actually undertake an action it alleges is futile would mean that plaintiff has, in fact, exhausted its tribal remedies. The futility exception would have no meaning if given that interpretation.

The Creek Freedmen's claims against Principal Chief Floyd, in his official capacity, are properly before this Court and must be heard on the merits. Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied.

II. BACKGROUND

The Creek Freedmen are the direct lineal descendants of individuals who were enslaved in the Creek Nation, free blacks living alongside the Creeks, and Creeks of African descent who were listed on the final Dawes Rolls of 1906 as "Creek Nation Freedmen." Am. Compl. ¶¶ 49-50. Pursuant to Article 2 of the Treaty of 1866, the Creek Freedmen "shall have and enjoy all the rights and privileges of native citizens . . . ." Treaty of 1866, art. 2, June 14, 1866, 14 Stat. 785. The Treaty of 1866 remains a valid agreement, binding both the MCN and the United States. The MCN excludes Creek Freedmen from its citizenry, despite this ironclad promise and

legal obligation to accept Freedmen into the Nation. The MCN's sole basis to illegally exclude Creek Freedmen is their ancestors' race and former enslavement.

Principal Chief Floyd is the chief executive of the MCN and, under the MCN Constitution, he is vested with general enforcement powers of all laws of the MCN. *See* MCN Mot. Dismiss Ex. 2 (MCN Constitution), art. V., § 1(a); MCN Mot. Dismiss 19. Defendant was elected Principal Chief in 2015, in an election that illegally excluded Creek Freedmen voters. *See* Am. Compl. ¶ 74. Under Principal Chief Floyd's leadership, the MCN has received and continues to receive federal resources intended to benefit all MCN citizens. *See* Am. Compl. ¶ 76.

Events in the District of Columbia are central to Plaintiffs' claims. Principal Chief Floyd, by his own admission, often travels to the District in his official capacity to meet with the federal agencies from which federal and trust resources flow to the MCN, as well as private citizens. Plaintiffs here allege that Principal Chief Floyd directs and approves the management of these resources and derivative tribal benefits in a discriminatory manner. *Id.* Further, the effects of the Defendant's and the MCN's discrimination against Plaintiffs reach the District, where at least some active MCN citizens reside.

A. Scope of the Contractual Relationship Established Under the Treaty of 1866

The Treaty of 1866 is a bilateral agreement negotiated and signed by two sovereign entities using their executive and legislative governmental powers. The Treaty of 1866 forms the foundation of the MCN's relationship with the United States today. Indeed, no further treaties between the MCN and the United States have been signed since. *See Harjo v. Kleppe,* 420 F. Supp. 1110, 1120 (D.D.C. 1976).

The Treaty of 1866 also determines the scope of the government-to-government relationship between the MCN and the United States. For example, Article 10 provides for the

formation of a Creek government with which the United States is to interact, and Article 3 identifies the lands to be held in trust for the MCN. Treaty of 1866, arts. 3, 10, 14 Stat. 785. The Creek Nation also agreed to "such legislation, as Congress and the President of the United States may deem necessary." *Id.* art. 10. Critically, in pertinent part, the treaty also declares:

> [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 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 said Nation shall be equally binding upon and give equal protection to all such persons . . . .

Treaty of 1866, art. 2.

B. Denial of Citizenship Rights and Litigation Efforts in MCN Courts

Pursuant to the Treaty of 1866, descendants of enslaved Africans and Creeks of African descent were granted citizenship in the MCN and served in important positions in MCN government. *See* Am. Compl. ¶ 43. In the late 1970s however, the MCN sought to adopt a new constitution and gain increased autonomy provided under the Oklahoma Indian Welfare Act ("OWIA) 25 U.S.C. § 5203. *See* Am. Compl. ¶ 52. In adopting a new constitution, the MCN was also determined to disenfranchise the descendants of enslaved Africans – the Creek Freedmen. *See* Am. Compl. ¶ 55. Indeed, in 1979 Principal Chief Claud Cox articulated that a new constitution would address the issue that "the FULLBLOOD lost control" because the "FREEDMEN bands . . . would outnumber [them]." *Id.* (citing MCN Council Minutes, October 29, 1977 at 31) (capitalization in original). In 1979, the MCN adopted a new constitution that effectively disenfranchised the Creek Freedmen. *See* Am. Compl. ¶ 60.

Between 1979 and the present, Creek Freedmen and their descendants, including the Plaintiffs, have applied for citizenship in the MCN. ¶ 63; *see also* ¶¶ 4-10. These applications have been summarily denied by the MCN Citizenship Board ("Citizenship Board") in all cases for the express reason that they are descendants of enslaved Africans listed on the Dawes Rolls of 1906 as "Creek Freedmen" and are therefore not eligible for enrollment. *See* Am. Compl. ¶ 63.

In 2004, two Creek Freedmen descendants eligible for citizenship by the terms of the Treaty of 1866 challenged their denial by the Citizenship Board. *See* Am. Compl. ¶ 64. Fred Johnson and Ron Graham were repeatedly denied enrollment between 1983 and 2003. *Id.* at ¶ 65. They brought suit in MCN District Court alleging that those denials were an arbitrary and capricious abuse of discretion, and therefore should be reversed. *See* Zorn Decl. Ex. B (*Johnson and Graham v. Muscogee (Creek) Nation of Oklahoma Citizenship Board*, CV 2003-54); Am. Compl.¶ 69.[1]

In its March 27, 2006 opinion, the MCN District Court did not to reach the substantive issues directly related to the Johnson and Graham's citizenship because it found the Citizenship Board did not follow MCN law when it failed to even process their citizenship applications. *See* Zorn Decl. Ex. B (*Johnson and Graham v. Muscogee (Creek) Nation of Oklahoma Citizenship Board*, CV 2003-54); Am. Compl.¶ 69. Undeterred, the Citizenship Board ignored the MCN District Court's order to process the applications. *Id.* at ¶ 70. More than a year later, the MCN Supreme Court unanimously reversed the MCN District Court decision regarding the procedural defects of the Citizenship Board, and then refused to rule on Johnson and Graham's arguments

[1] This Court may take judicial notice of matters of public record in deciding a motion to dismiss. *See Kaempe v. Myers,* 367 F.3d 958, 965 (D.C. Cir. 2004).

that they and all Freedmen citizenship rights were being violated pursuant to the Indian Civil Rights Act, the MCN Constitution, and the Freedmen citizenship guarantee contained in Article 2 of the Treaty of 1866. *See* Zorn Decl. Ex. C (*Johnson and Graham v. Muscogee (Creek) Nation of Oklahoma Citizenship Board*, CV 2006-03); Am. Compl.¶ 70. Fred Johnson and Ron Graham sought the same relief now sought by the Creek Freedmen here – vindication of their citizenship rights and their heritage.

III. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), "the district court must accept all of the complaint's well-pleaded factual allegations as [t]rue and draw all reasonable inferences from those allegations in the plaintiff's favor." *Pitney Bowes, Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998). While the "plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence," *Pitney Bowes, Inc*., 27 F. Supp. 2d at 19, "the plaintiff need only make a prima facie showing of jurisdiction." *Robinson v. Overseas Military Sales Corp*., 21 F.3d 502, 507 (2d Cir. 1994). "In resolving a motion to dismiss for lack of subject-matter jurisdiction, the Court may consider materials outside the pleadings to determine whether it has jurisdiction." A*dams v. U.S. Capitol Police Bd*., 564 F. Supp. 2d 37, 40 (D.D.C. 2008).

"A motion to dismiss . . . for lack of subject matter jurisdiction should not prevail 'unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.'" *All. For Democracy v. Fed. Election Comm'n*, 362 F. Supp. 2d 138, 142 (D.D.C. 2005) (citing *Kowal v. MCI Communications Corp*., 16 F.3d 1271, 1276 (D.C.Cir.1994)); *see also Beverly Enters., Inc. v. Herman,* 50 F.Supp.2d 7, 11 (D.D.C.1999).

Should this Court find a procedural defect, transfer or dismissal without prejudice are the appropriate remedies. "Generally, the interests of justice require transferring such cases to the

appropriate judicial district rather than dismissing them." *Poku v. FDIC*, 752 F.Supp.2d 23, 25 (D.D.C.2010). The "standard for dismissing a complaint with prejudice is high" and "dismissal with prejudice is warranted only when ... the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012) (citing *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006). Indeed, "[d]ismissal with prejudice is the exception, not the rule." *Rudder v. Williams*, 666 F.3d at 794.

IV. ARGUMENT

A. This Court has Personal Jurisdiction Over Principal Chief Floyd in His Official Capacity as MCN Principal Chief.

Plaintiffs have brought their action against Principal Chief Floyd in his official capacity as chief executive of the MCN and not as an individual in his personal capacity. The Defendant's argument against this Court's personal jurisdiction incorrectly focuses on his personal contacts with the District. Rather:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' . . . It is *not* a suit against the official personally, for the real party in interest is the *entity*.

Kentucky v. Graham, 473 U.S. 159, 165–66 (1985) (emphasis added). The proper analysis, therefore, involves the *entity's* contacts with the jurisdiction. *Ass'n for Molecular Pathology v. U.S. PTO*, 669 F. Supp. 2d 365, 394 (S.D.N.Y. 2009) ("When confronted with the issue of specific personal jurisdiction over a non-forum state official, courts routinely examine the contacts of the state officials in their capacity as representatives of the state, rather than their contacts with the forum in their individual capacity.") (*rev'd in part on other grounds, Ass'n for Molecular Pathology v. United States PTO*, 653 F.3d 1329 (Fed. Cir. 2011)).

Here, the proper analysis involves the MCN's contacts with the jurisdiction. Principal Chief Floyd argues that the action must be dismissed because he personally lacks sufficient contacts with the District of Columbia. However, Principal Chief Floyd is the Defendant in name only. The official capacity suit against Principal Chief Floyd is to be treated as a suit against the MCN. All the same, this Court has jurisdiction to hear Plaintiffs' claims whether viewed through the lens of the MCN's contacts with the District or Principal Chief Floyd's. Both "conduct business" in the District within the meaning of D.C. Code § 13-423 in furtherance of the MCN's contractual relationship with the federal government. Further, the "government contacts" exception to the District's long arm statute is inapplicable here, where the Defendant's interactions with the government include activities other than those protected by the First Amendment.

1. The MCN has Sufficient Contacts with the District to Satisfy the Long Arm Statute.

The Creek Freedmen have properly alleged facts supporting the exercise of personal jurisdiction over Principal Chief Floyd within the meaning of D.C. Code § 13-423. Specifically, personal jurisdiction exists because Defendant and MCN transact business in the District of Columbia by the maintenance and execution of the contractual relationship established in the Treaty of 1866. Maintenance and execution of a contractual relationship meets the demands of due process.

a. A Contract With Effects in the District Satisfies Jurisdictional Due Process Requirements.

Section 13-423(a)(1) provides that "A District of Columbia court may exercise personal jurisdiction over a person . . . as to a claim for relief arising from the person's --(1) transacting

any business in the District of Columbia."[2] D.C. Code § 13-423(a)(1). The transacting business "provision is interpreted 'to provide jurisdiction to the full extent allowed by the Due Process Clause' such that" "the statutory and constitutional jurisdictional questions . . . merge into a single inquiry: would exercising personal jurisdiction accord with the demands of due process*?"* *Brit UW, Ltd. v. Manhattan Beachwear, LLC*, 235 F. Supp. 3d 48, 55 (D.D.C. 2017), *appeal dismissed*, No. 17-7031, 2018 WL 1046108 (D.C. Cir. Feb. 2, 2018) (citing *Thompson Hine, LLP v. Taieb*, 734 F.3d 1187, 1189 (D.C. Cir. 2013)) (internal quotation marks and citation omitted). In turn, due process is satisfied if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal citations omitted). The defendant "should reasonably anticipate being haled into court . . . ." in the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The D.C. Court of Appeals has held that a contract falls within section 13-423(a)(1). *See Cockrell v. Cumberland Corp*., 458 A.2d 716, 717 (D.C. 1983) ('"It is now well-settled that the 'transacting any business' provision [of Section 13-423(a)(1)] embraces those contractual activities of a nonresident defendant which cause a consequence here.'"). (internal citation omitted) Further, the D.C. Circuit has held that where a contractual relationship causes a wide-reaching consequence in the District of Columbia it "alone" can satisfy the due process requirement for personal jurisdiction. *See Thompson Hine, LLP*, 734 F.3d at 1193 ("[A] contract may well create such a 'substantial connection' between the non-resident and the forum that the contract 'alone' could supply the necessary 'minimum contacts.'") (internal citations omitted).

[2] The MCN, as a legal entity incorporated under the laws of the United States (*i.e.* the Oklahoma Indian Welfare Act), is a person under the meaning of section 13-423.

In *Thompson Hine*, the D.C. Circuit bookended the spectrum of contacts that will and will not support personal jurisdiction in this Court. It found that cases involving ongoing and deeply-involved contractual relationships support personal jurisdiction, while contracts involving a "narrowly specialized" relationship do not. *Id.* at 1190–91.

This Court has further looked to analyze the '"prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing"' to conclude if the party '"purposefully established minimum contacts within the forum."' *Brit UW, Ltd.*, 235 F. Supp. 3d at 56 (internal citations omitted).

All of these considerations, when applied to the contractual relationship between the MCN and the United States, support personal jurisdiction of the MCN.

b. The Treaty of 1866 Is a Contract Negotiated, Executed and With Effects in the District.

It is well-established that a treaty between an Indian tribe and the federal government is a contract. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."). As an initial matter, the Treaty of 1866 was negotiated and executed in the District of Columbia. Preamble, Treaty of 1866. Further, the Treaty of 1866, which forms the basis of Plaintiffs' claims here, is a contract with the "wide-reaching" consequences contemplated in *Thompson Hine*. *See Thompson Hine, LLP*, 734 F.3d at 1190–93. It memorialized the trust relationship between the MCN and the United States that continues to the present. As Principal Chief Floyd acknowledges, maintenance of that trust relationship requires repeated and continued contact with agencies located in the District. MCN Mot Dismiss Ex. 1 ¶ 5 (Declaration of James Floyd). Further still, at least some MCN citizens and therefore beneficiaries of the MCN-federal trust relationship reside in the District of

Columbia. In other words, both parties to the contract—the United States and the MCN—take actions in the District under the contract that have consequences in the District. Importantly, Article 2 of the Treaty of 1866 make the Creek Freedmen third party beneficiaries to this contract, with the ability to bring suit for non-performance. *See* RESTATEMENT (SECOND) OF CONTRACTS §304. This is sufficient to support personal jurisdiction for Plaintiffs' claims, which arise out of and relate to this same contractual trust relationship.

2. The Government Contacts Exception Does Not Bar Personal Jurisdiction Here.

This case is not governed by the "government contacts" exception to personal jurisdiction, contrary to Principal Chief Floyd's argument. That exception is derived from an acknowledgement of a defendant's right to petition the government and protects First Amendment speech. *See Rose v. Silver,* 394 A.2d 1368, 1374 (D.C.1978) ("First Amendment provides the only principled basis . . ." for "government contacts" exemption.). The government contacts exception is not absolute, and it has not been applied outside of First Amendment concerns. *See Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1133 n.5 (D.C. 2012) (noting apparent conflict between an *en banc* decision and the panel opinion in *Rose* and declining to decide whether the government contacts doctrine reaches beyond First Amendment concerns).

The MCN's contacts, as a sovereign, under its contractual agreement with the United States do not implicate the First Amendment concerns at the core of the exception. The government contacts exception was established to protect constitutionally-guaranteed rights to speak freely to government. The MCN's contacts are business discussions and government-to-government negotiations that are distinct from the right to make a complaint to or seek the assistance of the government without fear of retribution, as contemplated by the First

Amendment. The MCN's contacts are unique to the tribal context, meaning courts in the District would not become national courts. *See Envtl. Research Int'l, Inc. v. Lockwood Greene Engineers, Inc*., 355 A.2d 808, 813 (D.C. 1976) (expressing concern that considering government contacts in jurisdictional analysis "would threaten to convert the District of Columbia into a national judicial forum."). Further, it is the MCN and Principal Chief Floyd's contacts arising out of the Treaty of 1866 that underlie Plaintiffs' claims against Principal Chief Floyd. The MCN and Principal Chief Floyd cannot use the First Amendment as both a sword and a shield to justify their infringement of Plaintiffs' Thirteenth Amendment rights. Plaintiffs' interests in relief from this Court to enjoin the MCN from perpetuating the badges of slavery and illegally excluding the Creek Freedmen from those who benefit from the MCN-federal trust relationship are unrelated to MCN's First Amendment rights. Therefore, the government contacts exemption does not apply and personal jurisdiction is proper here.

B. This Court has Subject Matter Jurisdiction Pursuant to *Ex Parte Young*.

Principal Chief Floyd's attempt to downplay the authority the MCN Constitution grants him is unpersuasive and does not provide grounds for dismissal of this action. Principal Chief Floyd is the chief executive of the MCN, vested with the authority and responsibility to enforce the laws of the MCN. Moreover, the MCN Constitution and Code assign Principal Chief Floyd responsibility for selecting the members of the MCN citizenship board and his signature is required on all citizenship determinations. The Creek Freedmen have properly alleged justiciable claims against Principal Chief Floyd in his official capacity for authorizing and otherwise allowing the MCN to discriminate against the Plaintiffs and their descendants. This is precisely the situation in which *Ex Parte Young* controls.

This Court is bound by precedent directly on point. In a suit involving similar claims against the Principal Chief of the Cherokee Nation, who has authority nearly identical to that of

Principal Chief Floyd, the D.C. Circuit held that the chief executive of a tribe is not protected by sovereign immunity under *Ex Parte Young*, and thus subject matter jurisdiction in federal court is proper. *See Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008) ("*Vann II*") ("Faced with allegations of ongoing constitutional and treaty violations, and a prospective request for injunctive relief, officers . . . cannot seek shelter in the tribe's sovereign immunity."); *see also Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012) (holding the same). The same result is mandated here.

Principal Chief Floyd concedes that an official of the sovereign who enforces a purportedly unlawful statute waives sovereign immunity in a suit for prospective injunctive and declaratory relief. *See* MCN Mot. Dismiss 6. The *Ex Parte Young* doctrine is an "important limit on the sovereign-immunity principle" and "'permit[s] the federal courts to vindicate federal rights."' *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254-55 (2011) (internal citation omitted). "In determining whether the Ex parte Young doctrine avoids a[] [sovereign immunity] bar to suit, a court need only conduct a 'straightforward inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 636 (2002) (internal citation omitted). Here, the Creek Freedmen seek prospective equitable relief requiring Principal Chief Floyd to refrain from violating the U.S. Constitution, the Treaty of 1866, the Principal Chiefs Act of 1970, and the Indian Civil Rights Act ("ICRA), 25 U.S.C. § 1302. *See* Am. Compl. ¶ 91.

1. This Court is Bound by *Vann II*

In analogous litigation by the Cherokee Freedmen, the D.C. Circuit engaged in a "straightforward inquiry" and explicitly held that the chief of the Cherokee Nation could be sued under *Ex Parte Young*. *See Vann II*, 534 F.3d at 750. Just as here, the Cherokee Nation signed a

post-Civil War treaty with the United States affirming the citizenship rights of Freedmen, only to later deny those rights. *Id.* at 744. In *Vann II*, the parties explicitly litigated the issue of sovereign immunity and the court concluded it was "clear that tribal sovereign immunity does not bar the suit against tribal officers." *Id*. at 750. In *Vann v. U.S. Dep't of Interior,* the Cherokee Nation attempted to re-litigate the issue of sovereign immunity of tribal officers. 701 F.3d 927 (D.C. Cir. 2012). The D.C. Circuit again confirmed that a tribal chief was not protected by sovereign immunity and held that there was no "basis for distinguishing this case involving an American Indian tribe from a run-of-the-mill Ex parte Young action." *Id.* at 930.

Principal Chief Floyd's attempt to distinguish the Cherokee Freedmen cases fails. Principal Chief Floyd has almost identical enforcement responsibilities for citizenship laws as the Principal Chief of the Cherokee Nation ("Cherokee Chief"), who was twice held to be subject to suit under *Ex Parte Young.* As Defendant confirms, Principal Chief Floyd and the Cherokee Chief are vested with all executive power and general enforcement powers. *See* MCN Mot. Dismiss 19. Likewise, both nations have a separate body with administrative and procedural responsibility over citizenship enforcement. The MCN has vested these activities in a Citizenship Board, appointed by the Principal Chief. *See id.*; MCN Mot. Dismiss Ex. 2 §§1-3. Similarly, the Cherokee Nation vests citizenship tasks in a "Registration Committee," appointed by the Principal Chief. *See* Zorn Decl. Ex. A (Cherokee Const., art. IV, §2(a)). Far from distinguishing D.C. Circuit precedent, these subordinate clerical bodies highlight the similarity between Principal Chief Floyd and the Cherokee Chief. Just as the D.C. Circuit did with respect to the Cherokee Freedmen in the *Vann* litigation, this Court should conclude that it has jurisdiction over the Creek Freedmen's claims.

2. Principal Chief Floyd has the Requisite Enforcement Connection

Even putting aside binding precedent, it is clear nevertheless that Principal Chief Floyd has the requisite enforcement connection to support a claim under *Ex Parte Young.* "As noted in *Ex parte Young* . . . the important and material fact is simply the existence of some connection with the enforcement of the act by virtue of the office held by the party defendant." *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 988 n.7 (S.D.N.Y.), *aff'd*, 400 U.S. 806, 91 S. Ct. 65, 27 L. Ed. 2d 38 (1970). Principal Chief Floyd, by virtue of his position, is vested with all executive authority and thus has "some connection" to the enforcement of the MCN's citizenship laws. *See Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 (6th Cir. 1982)(holding that even absent a specific enforcement provision, a Governor has a "sufficient connection" because "substantial public interest in enforcing the … legislation involved here places a significant obligation upon the Governor to use his general authority to see that state laws are enforced."). Indeed unlike the obscure possessory interest tax collection at issue in *Burlington Northern & Santa Fe Railway Co. v. Vaughn,* 509 F.3d 1085 (9th Cir. 2007), relied upon by Principal Chief Floyd, ensuring the Freedmen's MCN citizenship is an issue of particular public interest such that there is a "significant obligation . . . to see that state laws are enforced" and thus jurisdiction is proper. *See Allied Artists Picture Corp.*, 679 F.2d at 665.

Moreover, the MCN Constitution and Code outlines specific connections to citizenship decisions vested in the Principal Chief. Principal Chief Floyd affirmatively appoints the members of the Citizenship Board, with consent of the National Council. *See* MCN Mot. Dismiss Ex. 2, (MCN Const. Art. III, §1). Further, each enrollment card must be signed or stamped by the Principal Chief. *See* MCN Mot Dismiss Ex. 3, (MCN Code, tit. 7, ch. 4, §4-109). In other words, it is ultimately Defendant's authority that validates each citizenship determination.

The D.C. Circuit has already established, under nearly identical circumstances, that *Ex Parte Young* means this Court has subject matter jurisdiction over a principal chief with nearly identical authority and duties. The *Vann* cases require this Court to reach the same conclusion with respect to Principal Chief Floyd.

C. Venue is Proper Because a Substantial Part of the Events Giving Rise to the Creek Freedmen's Claim Occurred in the District of Columbia.

The Creek Freedmen have sufficiently alleged that a substantial part of the events giving rise to their claims occurred in the District of Columbia. *See* Am. Compl. ¶ 18.[3] Venue is proper under 28 U.S.C. § 1391.

This Court has clearly articulated that "[i]n ruling on a motion to dismiss for lack of venue, the question is not which district is the 'best' venue, or which venue has the most significant connection to the claim." *Johns v. Newsmax Media, Inc*., 887 F. Supp. 2d 90, 96 (D.D.C. 2012). The question before the Court is simply **"**whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts." *Id.; see also, Weinberger v. Tucker*, 391 F. Supp. 2d 241, 244 (D.D.C. 2005) ("[I]t is not necessary '"to identify the district having the most significant connection to the claim at issue"' since venue may be proper in more than one district."). A substantial connection is determined not by "adherence to mechanical standards" but rather should involve an analysis of the events having operative significance in the case. *Lamont v. Haig*, 590 F.2d 1124, 1134 (D.C. Cir. 1978).

[3] Plaintiffs assert venue is proper under 28 U.S.C. § 1391(e), which defines the proper venue for actions in where the defendant is an officer or agency of the United States and incorporates the general venue provisions for non-federal defendants. *See* Am. Compl. ¶ 18; 28 U.S.C. § 1391(e) ("Additional persons may be joined as parties to any such action in accordance . . . with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party."). Plaintiffs' Amended Complaint therefore incorporates the general venue provisions of 28 U.S.C. § 1391(b).

There is a substantial connection between Plaintiffs' claims against Principal Chief Floyd and the District of Columbia. The Treaty of 1866 was negotiated and executed in the District of Columbia. Principal Chief Floyd acknowledges that he travels to the District to ensure MCN citizens receive the trust benefits to which they are entitled. Plaintiffs allege Principal Chief Floyd and the MCN administer those trust benefits and actively seek other federal benefits to the illegal exclusion of the Creek Freedmen, perpetuating the badges of slavery. In addition, the MCN's discriminatory administration of federal benefits Plaintiffs allege affects District residents who also happen to be MCN citizens. The MCN publicly notes that twenty-five MCN citizens reside in the District. *See* MCN Citizenship Facts and Stats, http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/ (Last visited Oct. 26, 2018). Plaintiffs were not required to pick the "best" venue for their claims; there is, however, sufficient basis to find venue is proper in the District of Columbia.

Even if the District of Columbia was found not to be a proper venue for the Creek Freedmen's claims against the Defendant, the Court could still, in an exercise of its discretion, hear the claims under the doctrine of pendant venue. *See Beattie v. United States*, 756 F.2d 91, 100–03 (D.C. Cir. 1984) *abrogated on other grounds by Smith v. United States*, 507 U.S. 197 (1993). Federal courts may exercise their discretion to hear claims as to which venue is lacking if those claims arise out of a "common nucleus of operative fact" with claims as to which venue is proper. *Beattie* at 102. In determining whether to exercise such discretion, federal courts consider factors that bear upon judicial economy, convenience, and fairness. *Id.* at 103. This Court clearly has venue over the Creek Freedmen's claims against the Federal Defendants, which share arise from the same foundational document – the Treaty of 1866. *See* 28 U.S.C. § 1391(e).

Judicial economy, convenience and fairness are further promoted by hearing all claims in the District of Columbia, where an identical case has previously been heard.

D. Creek Freedmen Did Not Have to Exhaust Tribal Remedies.

The tribal exhaustion doctrine does not bar this Court from hearing the Creek Freemen's claims. Tribal exhaustion is not required where the tribal court does not have jurisdiction over the claims, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985), such that adherence to the exhaustion requirement "would serve no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 354 (2001). In the similar case by the Cherokee Freedmen, this Court held that tribal exhaustion did not bar a suit against officers of the Nation and the United States, seeking to remedy racially motivated disenfranchisement. *See Vann v. Kempthorne,* 467 F.Supp. 2d 56, 73 (D.D.C. 2006) (*Vann I*), *rev'd on other grounds,* 534 F.3d 741 (D.C. Cir. 2008). The tribal court had no jurisdiction over the Secretary and the Department of the Interior. *Id.* Both are defendants here, so the same reasoning is equally persuasive.

What is more, even if tribal exhaustion were required, the Creek Freedmen have properly alleged that seeking a tribal remedy would be futile and thus excused. *See LECG, LLC v. Seneca Nation of Indians,* 518 F. Supp. 2d 274, 277 (D.D.C. 2007). The Amended Complaint describes with specificity two similarly situated Freedmen's fruitless efforts to engage the MCN administrative and judicial process. It is clear on the face of the pleadings that a remedy from Citizenship Board or the MCN courts is "merely hypothetical." *See Aguilar v. Rodriguez,* No. 17-cv-1264, 2018 WL 4466025, at *2 (D.N.M. Sept. 18, 2018). In short, the tribal exhaustion requirement should not prohibit this Court from getting the merits of the Creek Freedmen's claims.

1. Exhaustion is Not Required Where the Tribal Court Cannot Hear the Claims Alleged

The tribal exhaustion doctrine does not apply in situations whereas here, there are claims against the Secretary and the Department of the Interior that are not subject to tribal jurisdiction. *See Vann I* at 73. In *Vann I*, a practically identical case brought by the Cherokee Freedmen, this Court rejected the Cherokee Nation's tribal exhaustion arguments. Judge Kennedy held that because the Cherokee Freedmen's case included claims against the Secretary and the Department of the Interior, it could not be heard in tribal court and exhaustion was not required. *Id.* Tribal courts cannot hear a case against the Secretary or an agency unless there is an applicable waiver of the United States' sovereign immunity. *Id.* As Judge Kennedy noted that under the Administrative Procedure Act ("APA"), Congress waived sovereign immunity only as to federal courts. *See id.; see also* 5 U.S.C. § 702; *Aminoil U. S. A., Inc. v. California State Water Res. Control Bd*., 674 F.2d 1227, 1233 (9th Cir. 1982) ("[T]he waiver of sovereign immunity in section 702 is expressly limited to actions brought 'in a court of the United States.'") (citing 5 U.S.C. §702). A suit alleging an APA violation, therefore could not be heard in tribal court.

Just like the Cherokee Freemen, the Creek Freedmen have brought claims here which cannot be heard in an MCN court. *See* Am. Compl. ¶¶ 85-91, 92-96, 97-100. Indeed, even Principal Chief Floyd specifically does not argue that the Creek Freedmen could have filed the Amended Complaint in MCN District Court. *See* MNC Mot. Dismiss at 24 n.5 ("To be clear, Principal Chief Floyd does not suggest that Plaintiffs sue the Federal Defendants in tribal court."). It is precisely because of this lack of jurisdiction over Federal Defendants, that tribal exhaustion is not necessary here. *See Vann I,* 467 F. Supp. 2d at 73; *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) ("[E]xhaustion was pointless because tribal court jurisdiction clearly was foreclosed by the sovereign immunity of the United States").

The cases cited by Principal Chief Floyd do not change this analysis. In *Smith v. Moffett* for example, the federal officers sued were determined to be subject to tribal jurisdiction and thus exhaustion was appropriate. 947 F.2d 442, 444 (10th Cir. 1991). The act giving rise to the plaintiff's civil rights claim was an arrest on the reservation. Civil jurisdiction over such activities presumptively lies in the tribal courts. *Id.* ("Tribal authority over the activities of non-Indians on reservation lands . . . presumptively lies in the tribal courts") (internal citation omitted). Here Principal Chief Floyd does not, and indeed cannot argue that Federal Defendants are similarly subject to tribal jurisdiction.[4]

Finally, as Defendant notes, the tribal exhaustion doctrine is "matter of comity" meaning it is a "prudential [and] nonjurisdictional" rule. *Strate v. A-1 Contractors*, 520 U.S. 438, 439 (1997); MCN Mot. Dismiss 20. The Supreme Court notes that a justification for this discretionary rule is "to promote the orderly administration of justice." *See Nat'l Farmers Union Ins. Companies,* 471 U.S. at 856. Invoking exhaustion of tribal remedies here is inapposite to that proposition. Litigation in tribal court of the Creek Freedmen's claims would necessarily require a separate suit against the Federal Defendants, creating the possibility of protracted litigation in two separate legal systems over the same issues. The exhaustion doctrine is also invoked to "further the congressional policy of supporting tribal self-government." MCN Mot. Dismiss 20 (citing *Texaco, Inc., v. Zah*, 5 F.3d 1374, 1377-78 (10th Cir. 1993). Defendant goes to great lengths to argue that citizenship is a matter of tribal integrity and self-government. *See* t

[4] Principal Chief Floyd's reference to *Smith v. Babbit* is similarly unhelpful. *See* MCN Mot. Dismiss. 23 (citing to *Smith v. Babbitt*, 875 F. Supp. 1353, 1366 (D. Minn. 1995), *judgment aff'd, appeal dismissed in part*, 100 F.3d 556 (8th Cir. 1996). In *Babbit,* the court addressed tribal exhaustion only in dicta, as it dismissed the claims against the tribal defendants in their entirety on tribal sovereign immunity grounds. *Id.* Moreover, the plaintiffs had already brought a parallel tribal court suit seeking similar relief and the court did not discuss possible lack of jurisdiction against the agency defendants. *Id.* at 1367. Such disparate circumstances are not relevant here.

MCN Mot. Dismiss 20-21. To be sure, as a general matter, it is. But the MCN has already exercised its role of self-government by negotiating and executing the Treaty of 1866, which guaranteed citizenship for the Creek Freedmen. This case is about enforcing those treaty obligations and other matters of federal law that do not infringe on tribal integrity. Consequently, this Court need not invoke its discretion here to require exhaustion of tribal remedies.

2. Exhaustion is Excused Where It Would Be Futile.

Even if tribal exhaustion were appropriate here, it would be excused as the Creek Freedmen have clearly demonstrated that seeking relief in the MCN administrative and judicial system is futile. *See Norton v. Ute Indian Tribe of Uintah and Ouray Reservation,* 862 F.3d 1236, 1243 (10th Cir. 2017). In deciding whether tribal exhaustion applies, a court must "balance[e] of the merits of exhaustion against the harm an exhaustion requirement might threaten with regard to those who claim their constitutional rights have been violated." *Rosebud Sioux Tribe of S. Dakota v. Driving Hawk*, 534 F.2d 98, 101 (8th Cir. 1976). If exhaustion "would be a futile gesture and would cause irreparable harm" it need not be required. *Id.* This balancing test applied to the pleadings clearly favors excusal on futility grounds. The Creek Freedmen pled with specificity the actions of two similarly situated Freedmen and MCIFB members, Fred Johnson and Ron Graham, which demonstrate that any proceeding before MCN would be futile. *See* Am. Compl.¶¶ 64-71. Plaintiffs have also alleged with specificity the irreparable harm that comes from being denied a forum to vindicate their constitutional rights. *See e.g., id.* ¶¶ 87-90. That balance compels this court to excuse exhaustion here.

As alleged in the Amended Complaint, both Johnson and Graham sought relief from a denial of citizenship through the MCN administrative and judicial process. *See supra,* Section II.B. Before getting to the merits, the MCN District Court held that as an initial matter the

Citizenship Board has to at least process the Johnson and Graham applications. *See* Zorn Decl. Ex. B (*Johnson and Graham v. Muscogee (Creek) Nation of Oklahoma Citizenship Board*, CV 2003-54); Am. Compl.¶ 69. Despite a Court order, the MCN Citizenship Board still did not process the application and the Johnson and Graham remained without a remedy. *See* Am. Compl.¶ 70. More than a year later, the MCN Supreme Court overruled the lower court order requiring the Citizenship Board to take the initial step to process the applications. *See* Zorn Decl. Ex. C (*Johnson and Graham v. Muscogee (Creek) Nation of Oklahoma Citizenship Board*, SC 2006-03); Am. Compl.¶ 70.

It is clear on the face of the Creek Freedmen's pleadings that a remedy from Citizenship Board or the MCN courts either does not exist, or is at the very least "merely hypothetical." *See Aguilar v. Rodriguez,* No. 17-cv-1264, 2018 WL 4466025, at *2 (D.N.M. Sept. 18, 2018). The "administrative body, specifically . . . tasked with citizenship determinations . . . ." refused to even process Creek Freedmen applications. *See* MCN Mot. Dismiss 26. The "written tribal code outlining the process for obtaining review . . . ." was sidestepped by the MCN judiciary. *Id.* In short, the tribal exhaustion requirement should not prohibit this Court from getting the merits of the Creek Freedmen's claims.

Principal Chief Floyd cites inapplicable cases involving the doctrine of tribal sovereign immunity in an attempt to heighten the burden on Plaintiffs to demonstrate futility. *See* MCN Mot. Dismiss 25-26. Defendant argues that "the aggrieved party must have, herself, actually sought a tribal remedy. *Id* at 26 (citing *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 n.5 (10th Cir. 1989)). In both cases however, the Tenth Circuit address "futility" as an '"exception to the traditional sovereign immunity bar from suit[],"' and to apply, the '"aggrieved party must have actually

sought a tribal remedy, not merely have alleged its futility."' *Nero,* 892 F.2d at 1460 n.5 (citing *White*, 728 F.2d at 1312). Principle Chief Floyd has not invoked tribal sovereign immunity and his adoption of its futility standard outside of the tribal immunity context is inappropriate.[5] Besides, Defendant's view would swallow the futility exception whole by requiring Plaintiffs to take the futile act in order to allege futility. Functionally there would be no exception at all. Even if this Court determines that exhaustion might apply, it should not hold that to be excused for futility a plaintiff must actually take the futile act.

V. CONCLUSION

Plaintiffs' claims against Principal Chief Floyd are properly before this Court. The Defendant's Motion to Dismiss is another attempt to protect the discriminatory objectives of the MCN. The Creek Freedmen are guaranteed the right of MCN citizenship and equal protection of the MCN's laws. Principal Chief Floyd and the MCN have denied the Freedmen their rights. They have availed themselves of the District of Columbia to further their discrimination against the Creek Freedmen, on the basis of race, in open breach of their obligation under the Treaty of 1866. Pursuing a tribal remedy—if one could even be crafted—is futile. Plaintiffs have a right to have their case heard here in this jurisdiction. Therefore Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied.

[5] In the tribal sovereign immunity context, the Tenth Circuit sought to keep the exception to sovereign immunity narrow so as not to run afoul of the Supreme Court's holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). No such narrowing is requiring in the context of a prudential doctrine.

Dated: October 26, 2018

Respectfully Submitted,

/s/ Graham C. Zorn

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CERTIFICATE OF SERVICE

I, Graham C. Zorn, hereby certify that on Oct. 26, 2018, I caused the foregoing Plaintiffs' Opposition to Principal Chief Floyd's Motion to Dismiss to be served on all counsel of record via this Court's CM/ECF system.

Dated: October 26, 2018 */s/ Graham C. Zorn*