NOT YET SCHEDULED FOR ORAL ARGUMENT

CASE NO.: 22-5314

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

KIALEGEE TRIBAL TOWN,

Plaintiff/Appellant,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants/Appellees.

Appeal from the United States District Court for the District of Columbia

No.: 1-21-cv-00590-CKK (Hon. Colleen Kollar-Kotelly)

Moises T. Grayson
25 SE 2nd Ave 730
Miami Florida 33131
305-379-2300
Moises.grayson@blaxgray.com

And

Tyler A. Mamone
MAMONE VILLALON
100 SE 2nd St
Suite 2000
Miami, FL 33131
786−751−0054
Email: tyler@mvlawpllc.com

List of all parties, intervenors, amici curiae, and their counsel in the trial court or agency proceeding and in the appellate proceeding:

1. KIALEGEE TRIBAL TOWN,

   Represented by Moises T Grayson and Tyler Mamone

2. U.S. DEPARTMENT OF THE INTERIOR

   Represented by the US Department of Justice.

This appeal is from a final order or judgment that disposes of all parties' claims.

Table of Contents

Table of Authorities

Articles

Statutes

Statement of the issues presented for review.

The issues presented for review are:

1. The Court below overlooked 25 U.S.C. § 476(f) and 25 U.S.C. § 476(g) and the decisions that are controlling authority, including but not limited to United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs (U.S. Dept. of Interior) (June 24, 2009).
2. Did the Court below err when it dismissed the Plaintiff's complaint for failure to state a cause of action, saying in the order of dismissal, "This is a final appealable order, without allowing a chance for KTT to amend.
3. Is KTT collaterally estopped by *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 296, 304, 1991 WL 279615.

Statement of the case briefly indicating the nature of the case, the course of the proceedings, and the disposition below.

The Kialegee Tribe filed the case below because the US denied its rights and decided that it is not part of the "Whole Creek Nation of Indians," as defined in Article 4 of the Creek Treaty of February 14, 1833, that the tribe is not a beneficiary of Article 4 of said treaty when it refers to the property of the whole Muskogee or Creek nation, and that the tribe does not exercise jurisdiction over any lands, including its own allotments.

The tribe sued below-filed Case No. 1:17-cv-01670 ("Kialegee One"), which was dismissed as not being ripe for lack of conduct by US. The lower court ruled that Kialegee "needs to allege with some specificity the actions allegedly taken by "Federal Defendants", which gave rise to Plaintiff's cause of action." In addition, Footnote 11 of the lower Court's "Memorandum Opinion" states that "Federal Defendants indicate that "[i]t may be that in the future, after the IBIA issues its final decision on Plaintiff's challenge to the Regional Director's April 26, 2017, decision. This happened and the Kialegee filed a second case ("Kialegee Two").

Thus, since the 2017 memorandum opinion required a specific action, this occurred when the application for a liquor license was denied to the Tribe, and the claim was ripe. Thus, the Kialegee Tribe brought this action before the lower court. However, the lower court, surprising the Tribe, and dismissed on totally different grounds, that the Kialegee Tribe is not a part of the Whole Creek nation of Indians or beneficiary of article 4 of the Creek Treaty of February 14, 1833, and finally, that the Kialegee did not state a cause of action below.

Statement of facts relevant to the issues submitted for review

The Kialegee Tribe ("Kialegee") filed the complaint in the trial court below because the United States Department of the Interior (the "US") claims that:

1. Kialegee is not a part of the "Whole Creek Nation of Indians," as defined in Article 4 of the Creek Treaty of February 14, 1833, (7 Stat. 417),

2. that Kialegee is not a beneficiary of Article 4 of the said treaty when it refers to "the property of the whole Muskogee or Creek Nation as well as those residing upon the land" and that it does not exercise jurisdiction over its lands.

The US' position is based entirely on the argument that treaties entered between the United States of America and the "Whole Creek Nation of Indians" gave jurisdiction. The US even considers the lands allotted to Kialegee members also to be solely under the jurisdiction of the Muskogee Creeks. As a result, the only simple question to be determined is whether Kialegee, who are part of the historic Creek Nation, are included under the treaties signed by the historic Creek Nation. The Kialegee respectfully submits that history, law, and logic overwhelmingly answer in the affirmative (A 58) [1]

Kialegee previously filed Case No. 1:17-cv-01670 (CKK), which was dismissed as not being ripe for lack of conduct by the US. See "Memorandum Opinion" A136). This Court ruled that Kialegee "needs to allege with some specificity the actions allegedly taken by "Federal Defendants", which give rise to Kialegee's cause of action." (A 155). In addition, Footnote 11 of the Court's "Memorandum Opinion" states that "Federal Defendants indicate that "[i]t may be

[1] References to A 58 means appendix page 58.

that in the future, after the IBIA issues its final decision on *Kialegee*'s challenge to the Regional Director's April 26, 2017, decision, Kialegee will have an action for which it may want to seek judicial review[.]" Fed. Defs' Reply at 8." (A 154). The United States Department of Interior now erroneously ruled that the Kialegee "does not exercise jurisdiction over any area of Indian Country" and rejected a Liquor Control Ordinance to the Bureau of Indian Affairs. (A59)

The case of *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255, 258 (D.D.C. 2018) confirmed that:

> a. After the ratification of the United States Constitution in 1788, the United States entered into a treaty with the Creeks on June 29, 1796 (the "1796 Treaty"), and one of the signatories to the 1796 Treaty is the Kialegee.
>
> b. "By means of the Treaty with The Creeks, 1832 ("Treaty of 1832"), the Creeks ceded their homelands in the eastern United States in exchange for lands in the western United States. … The Creek Treaty of February 14, 1833, between the Creeks and the United States, was supposed to "establish boundary lines which [would] secure a country and permanent home to the whole Creek nation of Indians[.]" … By its terms, the Treaty of 1833 establishes that land assigned to the Creek Indians "shall be taken and

considered the property of the whole Muscogee or Creek Nation, as well as those now residing upon the land."

c. "On October 12, 1867, the Creeks adopted a constitution and a code of laws for the "Muskogee Nation (**which differs from the present Muskogee Nation**)." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d at 1441 (D.C. Cir. 1988); *McGirt*, 140 S. Ct at 2467.

d. "In 1936, Congress passed the Oklahoma Indian Welfare Act of 1936 ("OIWA"), which allowed "any recognized tribe or band of Indians residing in Oklahoma .... to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. …**Plaintiff Kialegee is a federally recognized Indian tribe**, organized under Section 3 of the OIWA, which first received federal recognition in 1936, and is governed in accordance with a constitution and bylaws that were approved by the Assistant Secretary of the Interior, on April 14, 1941, and ratified by the town members on June 12, 1941. … Kialegee also has a corporate charter that was approved by the Assistant Secretary of the Interior on July 23, 1942, and ratified by town members on September 17, 1942, which states that "[n]o property rights or claims of the Kialegee Tribal Town existing prior to the ratification of this Charter shall be in any way impaired by anything contained in this Charter [and further,] [t] the Tribal

> Town ownership of unallotted lands, whether or not occupied by any particular individuals, is hereby expressly recognized."

Thus, Kialegee was included and was a member of the Historic "Muskogee Nation" (**which differs from the present Muskogee Nation**3)." *Muscogee (Creek) Nation v. Hodel,* 851 F.2d at 1441 (D.C. Cir. 1988); *McGirt*, 140 S. Ct at 2467. Similarly, the present-day Muscogee (Creek) Nation was also a member of and included within the Historic Muskogee Nation. Nonetheless, Nonetheless, although a successor tribe4 to the Historic Muskogee Nation, KTT has not been treated with the equal dignity it deserves. This is exactly the model for which Congress enacted 25 U.S.C. § 476(f) and 25 U.S.C. § 476(g).

Summary of the arguments.

The arguments made in this appeal are that

I. The US violated 25 U.S.C.A. § 5123, against the Kialegee because it diminishes the Kialegee's rights relative to the present day Creeks (which are not the historic Creek nation)

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations**
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and

> immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

> **(g) Privileges and immunities of Indian tribes; existing regulations**
>
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

II. The Court below should have allowed the amendment of the Complaint and not dismissed it with prejudice.

III. Collateral estoppel cannot apply against the Kialegee when the law relied upon to collaterally estop the Kialegee tribe has been voided by Congress' amendment of §476 of the IRA to add subsections (f) and (g) ("1994 IRA Amendment"). May 31, 1994, Pub.L. 103-263, § 5(b), 108 Stat. 709. 25 U.S.C. § 476(f) provides that:

> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

and 25 U.S.C. § 476(g) provides that:

> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes **shall have no force or effect.**[2]

According to its legislative history, the 1994 IRA Amendment makes it clear that it is and has always been Federal law and policy that **Indian tribes recognized by the Federal Government stand on an equal footing with each other**.

[2] Bolding added for emphasis.

Argument:

25 U.S.C.A. § 5123 was violated by the US

Congress enacted 25 U.S.C.A. § 5123, which is plainly stated and is not subject to another interpretation and it is a statute that controls any IBIA decision or ruling:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations**
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

> **(g) Privileges and immunities of Indian tribes; existing regulations**
>
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

The US attempts to ignore the impact of 25 USC 5123 (f) and (g). The Defendant argues that the 1991 IBIA Decision does not implicate § 5123 ECF No. 37 at page 5). However, it does. See *Koi Nation of N. California v. United States Dep't of Interior*, 361 F. Supp. 3d 14, 52 (D.D.C. 2019), amended sub nom. *Koi*

Nation of N. California v. United States Dep't of the Interior, No. CV 17-1718 (BAH), 2019 WL 11555042 (D.D.C. July 15, 2019), which rejected the US's very same argument, and held that:

> The defendants' argument that the "privileges and immunities" referenced in § 5123(f) are limited to certain "powers of self-governance," … is incorrect. First, the defendants offer no textual support for this narrow reading of the plain language of the statute. …. That text, to the contrary, makes § 5123(f) applicable to "any" agency regulation or decision, pursuant to the IRA or "any other Act of Congress," and without limiting the "privileges and immunities" protection to particular powers of self-governance as the defendants urge… (explaining that 25 U.S.C. § 476(g), which is now codified at § 5123(g) and contains identical language to § 5123(f) **except that it applies to regulations and decisions issued before the 1994 IRA amendments, "does more than prohibit the Secretary from distinguishing between 'historic' and 'created' tribes ..., although that may have been Congress's chief purpose in enacting it"). Internal citations omitted.**

Thus, § 5123 could not be clearer that the subject IBIA decision (which is prior to May 31, 1994) enhances the Muscogee (Creek) Nation (hereafter the "MCN") and diminishes the privileges of the Plaintiff. It is disingenuous to argue, as defendant does, that the 1991 IBIA decision "simply recognize that the MCN, not plaintiff, exercised jurisdiction over the Creek reservation" and that the IBIA simply recognized, as a factual matter, Plaintiff does not presently exercise jurisdiction." Somehow the defendant justifies ignoring that the Plaintiff is a successor in interest to Historic Creek Nation by stating the MCN has exclusive jurisdiction as a matter of fact. However, the issue of exclusive jurisdiction is a question of law for the court.

U.S. v. Hart, C.C.N.D.Fla.1908, 162 F. 192. Moreover, there is not a single decision or agency action that states that the MCN has exclusive jurisdiction. They only state that the MCN has jurisdiction, but they did not strip the Kialegee Tribal Town of their rights as successors in interest. For example, in Kialegee Tribal Town of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 296, 302, 1991 WL 279615, the decision is devoid of the word exclusive ("The former Creek Indian Reservation has consistently been recognized by the Federal government as the Nation's reservation, over which the Nation has authority to exercise jurisdiction"). The Kialegee are being treated differently and therefore are being diminished by not being treated as a successor in interest where other similarly situated tribes are, and this is exactly why 25 USC 5123 (f) and (g) were enacted. In the present case, the Kialegee have equal rights to the MCN because they are both descendants from the historic Creek nation. Moreover, any interpretation, decision, regulation, or law that is contrary, including but not limited to the IBIA 1991 decision "shall have no force or effect."

The Defendant argues that *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs (U.S. Dept. of Interior)* (June 24, 2009) (hereafter the UKB Decision) holds that the Cherokee Nation "maintains **exclusive** jurisdiction "over the Cherokee Reservation is nowhere in the UKB Decision. Instead, the UKB Decision states that the MCN has

jurisdiction and also illustrates that the Plaintiff is a successor in interest to the Historic Creek Nation: and should be afforded the same rights, especially over its own lands:

> It is well settled that a successor in interest enjoys the rights of the historical tribe. *See United States v. Washington*, 520 F.2d 676 (successors in interest enjoy treaty rights of predecessor tribes.) It is not clear whether a successor in interest steps into the place of the historical tribe for the purposes of Section 5.
>
> This issue is not confined to the UKB and CNO. It implicates many tribes. The Department is

In an attempt to further mislead this Court, the US cites the *Oklahoma V. Hobia* case that was overturned but acknowledges, only in the footnote, that it has no preclusive effect. At best, Defendant misconstrues the ruling in Oklahoma v. Hobia. The appellate court reversed and remanded to the district court with instructions to vacate the injunction. The court made no finding regarding jurisdiction.

Defendant treats Poarch Creek as a successor to the Creek Nation but refuses to treat the Kialegee as a successor when it denies the Kialegee alcohol ordinance (A 157). and jurisdiction over original Kialegee allotments. The reasoning offered is circular. The Department refuses to recognize Kialegee as a successor tribe to share and exercise jurisdiction over allotments originally given to and still held by Kialegee tribal members. In fact, there are several examples in Oklahoma alone, where tribes share jurisdiction. First, tribes share jurisdiction in the KCA reservation

the Kiowa, Comanche, and Apache tribes share jurisdiction. Each tribe shares jurisdiction over the allotments belonging to their members. Several tribes share jurisdiction over lands in Northeast Oklahoma. Unlike the KCA, the Kialegee are not permitted to exert jurisdiction over original Kialegee allotments still owned by Kialegee Tribal members. A clear violation of 25 USC 5123 (f).

The BIA's determination that the MCN has exclusive jurisdiction over Kialegee allotments (the reasoning for denying the Plaintiff-Kialegee's Liquor Ordinance) clearly and unequivocally diminishes the rights and privileges of the Kialegee Tribe relative to other federally recognized tribes.

Indian tribes are generally presumed to possess tribal jurisdiction within "Indian country," including allotted lands. *See DeCoteau*, 420 U.S. at 427, 446-47 ("Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities."); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114,128 (1993) ("Absent explicit congressional direction to the contrary, we presume against a State's having jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities."); *Indian Country U.S.A., Inc. v. State of Okla*., 829 F.2d 967, 973, 976 (10th Cir. 1987); see also Memorandum to Director, Indian Gaming Management Staff, from Robert T. Anderson, Associate Solicitor, Div. of Indian Affairs, re: Sampson Johns

Allotment as "Indian land" under IGRA, Sept. 25, 1996 ("Johns Memo") (stating that "[t]here is a presumption in favor of tribal jurisdiction over all land within tribal reservations, over dependent Indian communities and lands held in trust for a tribe or its members").

The exclusive nature of the Plaintiff-Kialegee Tribal Town's territorial jurisdiction over allotted land belonging to Plaintiff-Kialegee Tribal members is supported by the NIGC's 2010 memorandum (A 108).regarding the Iowa Tribe's jurisdiction over the "Whitecloud Allotment," which concluded that the Indian tribe possessing territorial jurisdiction over a certain allotment depends on the tribal membership of the original allottee, and does not change when ownership becomes fractionated among members of different tribes, or when an owner changes his or her enrollment.

In the present context, Kialegee Indian country was allotted to individual Indians who were citizens of the Kialegee Tribal Town. When the Kialegee separated from the historic Muskogee Nation and organized as an independent tribe, tribal jurisdiction over the Kialegee allotments remained with the Kialegee government, now no longer part of, or subject to the jurisdiction of, the Muskogee national government. Consistent with the Interior opinions and the department's treatment of other federally recognized tribes, the Indian tribe with jurisdiction over the land allotted to its members has remained the tribe in possession of jurisdiction. The

BIA's refusal to recognize the Kialegee jurisdiction over original Kialegee allotments violates Section 5123(f).

The Bureau and US' insistence that the MCN has **exclusive** jurisdiction within the former Creek reservation is erroneous. At issue in Indian Country, U.S.A. was whether a bingo site owned by the Muscogee (Creek) Nation qualified as Indian country under 25 U.S.C. 1151. The Tenth Circuit determined it did since the site fell within treaty lands set aside for the "Creek Nation" and because it was "still held by the Creek Nation." By identifying the historic Creek Nation with the OIWA Muscogee (Creek) Nation, the Tenth Circuit acknowledged no more than that the latter had succeeded to the treaty rights of the former. The decision said nothing about when succession occurred or whether other successors-in-interest existed. Nor was there reason to, since such issues formed no part of the appeal. The Tenth Circuit's decision is therefore also consistent with the NIGC's position that the historic Creek Nation "now exists as the Poarch Band of Creek Indians in Alabama, the Muscogee (Creek) Nation in Oklahoma, and several recognized tribal towns

In 1994, Congress was concerned about disparate treatment of Indian tribes and passed an amendment of the Indian Reorganization Act to emphasize its existing policy, and to ensure that federally recognized tribes receive equal treatment by the federal government. Section 476(f) now 5123(f) of the IRA prohibits the Department from finding that the Kialegee lacks territorial jurisdiction while other tribes have

territorial jurisdiction. Therefore, the Kialegee tribe should not be treated unequally and their privileges and immunities diminished in favor of those available to other federally recognized tribes by their status as Indian tribes.

FAILURE TO STATE A CAUSE OF ACTION

On September 29, 2022, this Court dismissed the Kialegee's complaint (A 11) stating in the order of dismissal "this is a final appealable order." In *Odhiambo v. Republic of Kenya,* 947 F. Supp. 2d 30, 39 (D.D.C. 2013), it was explained that such dismissal is with prejudice:

> Although the Court's order dismissing this case did not explicitly state that the dismissal was "with prejudice," its use of the phrase "[t]his is a final appealable order" indicated that "the order had terminated the action." See Ciralsky, 355 F.3d at 667. Odhiambo argues that "the Court's silence on this point signifies that the effect of the Court's dismissal was in fact to dismiss the action 'without prejudice' " in accordance with Federal Rule of Civil Procedure 41(a)(2). Pl.'s Rule 59(e) Mem. at 2 n. 1. This argument fails on its face. Rule 41(a)(2) relates to when "an action may be dismissed at the plaintiff's request." That rule does not apply here because this case was not dismissed "at the plaintiff's request"; it was dismissed over plaintiff's objection.

Therefore, the dismissal by this Court on September 29, 2022, was with prejudice. However, In *Kialegee No. 1*, this Court dismissed the Complaint without prejudice only because there was no action taken by the Federal Defendants since the liquor ordinance administrative proceeding was still pending, and in footnote 11

the Court stated that the US even acknowledged that the Kialegee stated a cause of action:

> Federal Defendants indicate that "[i]t may be that in the future, **after the IBIA issues its final decision on Plaintiff's challenge to the Regional Director's April 26, 2017 decision, Plaintiff will have an action** for which it may want to seek judicial review[.]" Fed. Defs' Reply at 8.

Although the Kialegee stated a cause of action in Kialegee No.1, it is respectfully requested that this Court agrees with Plaintiff that there is no issue preclusion, that this Court grant an extension of time for Plaintiff to file an amended complaint with the appropriate motions because justice requires it. Fed. R. Civ. P. 15 states that:

> **(2)** ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Nonetheless, Defendant's argument that 25 U.S.C. §5123 does not grant a private cause of action is circular. 25 U.S.C. §5123 prohibits the Defendants from any action or inaction that "classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes." 25 U.S.C. §5123(g). Any such regulation is declared by Congress to "have no force or effect." The Kialegee is not suing under 25 U.S.C. §5123. However, the effect of 25 U.S.C. §5123

is to make *Kialegee Tribal Town of Okla. v. Muskogee Area Dir., Bureau of Indian Affairs*, 19 IBIA 296, 298 (1991) "have no force or effect and therefore the Kialegee do state a cause of action.

Collateral Estoppel

The Court below dismissed the Complaint based on issue preclusion and failure to state a cause of action.(A11) However, on the issue preclusion, the Court based its decision on the following: (1) a 1991 Board of Indian Appeals decision, *Kialegee Tribal Town of Okla. v. Muskogee Area Dir., Bureau of Indian Affairs*, 19 IBIA 296, 298 (1991) and (2) a federal court decision *Oklahoma v. Hobia*, No. 12-cv-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012. The Court's Memorandum Opinion crystalized the critical issue as being "whether KTT exercises jurisdiction over Indians lands within the Creek reservation in Oklahoma such that KTT is entitled to the approval of their proposed Ordinance under 18 U.S.C. § 1161

However, the 1991 Board of Indian Appeals decision, *Kialegee Tribal Town of Okla. v. Muskogee Area Dir., Bureau of Indian Affairs*, 19 IBIA 296, 298 (1991) has been voided (voided and shall have no force or effect) by Congress' amendment of §476 of the IRA to add subsections (f) and (g) ("1994 IRA Amendment"). May 31, 1994, Pub.L. 103-263, § 5(b), 108 Stat. 709. 25 U.S.C. § 476(f) provides that:

> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

and 25 U.S.C. § 476(g) provides that:

> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes **shall have no force or effect.**[3]

According to its legislative history, the 1994 IRA Amendment makes it clear that it is and has always been Federal law and policy that **Indian tribes recognized by the Federal Government stand on an equal footing with each other** and the Federal Government. That is, each federally recognized Indian tribe has the same governmental status as other federally recognized tribes. Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authority. 140 CONG. REC. S6,147 (daily ed. May 19, 1994) (statement of Sen.

[3] Bolding added for emphasis.

Inouye); see also 140 CONG. REC. H3,803 (daily ed. May 23, 1994 (statement of Rep. Richardson).

The literature has recognized that KTT is entitled to the same privileges and immunities as the Historic Creek Nation. See Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 Conn. L. Rev. 1281, 1312 (1995)

> In response to another set of memoranda reviving distinctions between "historical" tribes whose status is uncontested and non-historical tribes "created" through federal statutes, Congress passed legislation to quell some of this legal disorder. [4]

[4] In this "historical" tribes controversy, Congress showed it could fulfill its federal responsibility in a timely way. Letter from Acting Assistant Secretary for Indian Affairs to Rep. George Miller (Jan. 14, 1994) (on file with the University of Connecticut Law Review); Memorandum from John D. Leshy, Solicitor, Department of Interior, to Ada E. Deer, Assistant Secretary for Indian Affairs (July 13, 1994) (on file with the University of Connecticut Law Review). The discussion of historic and nonhistoric tribes was revived because of a 1936 memo interpreting the IRA which resurfaced and aroused concern among Indian tribes and Senators Inouye and McCain about arbitrary decisions on tribal status. The result of the discourse was Technical Amendments: Indians, Pub. L. 103-263 (May 31, 1994) (codified at 25 U.S.C. S 476(f):

Privileges and immunities of Indian tribes; prohibition on new regulations. Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et. seq., 48 Stat. 984) as amended or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

In addition, 25 U.S.C. S 476(g) states:

Privileges and immunities of Indian tribes: existing regulations. Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available

And in the Decision of *United Keetoowah Band of Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs (U.S. Dept. of Interior)* (June 24, 2009) (A 45) Larry Echo Hawk, the Assistant Secretary – Indian Affairs, stated that:

> The historical Cherokee Nation (historical CN) as it existed in 1934 no longer exists as a distinct political entity. … Even though the historical CN no longer exists, its sovereignty continues in the descendants of its members who have reorganized as the UKB and the CNO. They are successors in interest to the historical CN. … The question is whether a successor in interest stands in the place of its predecessor for the purposes of Section 5.
>
> **A successor in interest is a tribe whose members descend from members of a historical tribe and that has maintained a governmental organization**. ... Both the UKB and the CNO descend from the historical CN. …("Another descendant of the old Cherokee tribe [other than the UKB is the Cherokee Nation.") and both have maintained their governmental organizations since they formed- the UKB in 1950 and the CNO in 1975. Accordingly, both the UKB and the CNO are successors in interest to the historical CN.[5]

---

to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.).

[5] The CNO has long maintained there is no distinction between it and the historic CN. By closing the rolls in 1907, Congress effectively imposed a sunset provision on its relationship with the historical CN. The Federal relationship would exist so long as its members survived. This is consistent with Congress's expectation that the government of the historical CN, like the governments of the other Five Civilized Tribes, would not be permanent. *See, e.g.,* Act of April 26, 1906, 34 Stat. 137, § 11. Moreover, there are significant political differences in governmental organization between this historical CN and the CNO which render the CNO a new political organization. The Secretary of the Interior appointed the Chief of the historic CN to perform ministerial acts. The Secretary could remove the Chief for failure to perform his duties. Act of April 26, 1906, 34 Stat. 137, § 6. Tribal voters elect the Principal Chief of the CNO to perform all executive functions. The historic CN did not have a functioning legislature, and if it had, its enactments would have been subject to presidential approval.

It is well settled that a successor in interest enjoys the rights of the historical tribe. See *United States v. Washington*, 520 F.2d 676 (successors in interest enjoy treaty rights of predecessor tribes.) It is not clear whether a successor in interest steps into the place of the historical tribe for the purposes of Section 5.

This issue is not confined to the UKB and CNO. It implicates many tribes. …

The Regional Director's conclusion that there would be problematic conflicts of jurisdiction between the CNO and the UKB if this land were taken into trust for the UKB is premised on the conclusion that the CNO has exclusive jurisdiction over its former reservation. This conclusion, in um, is premised on a narrow reading that the 1946 Act authorizing the Keetoowahs to organize as a band under the OIWA withheld from the tribe any territorial jurisdiction. This reading is incorrect.

…Section 476(f) of the IRA mandates this conclusion. That section provides:

> Departments or agencies of the United States shall not ... make any decision or determination pursuant to the [IRA], or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

25 U.S.C. § 476(f). **This section, therefore, prohibits the Department from finding that the UKB lacks territorial jurisdiction while other**

The CNO has an elected Tribal Council which is free of presidential oversight. The courts of the historic CN had been outlawed by Congress in the Curtis Act. The CNO has a functioning court system. The CNO is a new political organization, therefore, because the historical CN no longer exists and the CNO government is a new government.

> **tribes have territorial jurisdiction**. UKB, like CNO, possesses the authority to exercise territorial jurisdiction over its tribal lands. The Regional Director relies on letters from an Acting Assistant Secretary, the Office of Law Enforcement Services, and two Regional Directors to state that "The Secretary has consistently opined that the [CNO] exercises exclusive jurisdiction over trust and restricted lands within the former Cherokee treaty boundaries." The letter from the Acting Assistant Secretary was written in 1987, before Congress prohibited the Department from making distinctions as to the privileges and immunities of tribes. The Law Enforcement Services and Regional Director letters[6] are not binding on me. Moreover, their conclusions are suspect because they do not reveal their analysis and basis and fail to address Section 476(f). The Regional Director maintains that the Federal courts have "confirmed" the view that the CNO exercises exclusive jurisdiction over the former Cherokee reservation. But the decisions she cites, United Keetoowah Band v. Secretary, No. 90- C-608-B (N.D. Okla Order May 31, 1991, and United Keetoowah Band v. Mankiller, No. 92-C- 585-B (N.D. Okla Order January 27, 1993, aff'd 2 F.3d 1161 (10th Cir. 1993), were both decided before Congress passed section 476(f) and are based on the Department's position at that time that CNO had exclusive jurisdiction.

Finally, in a letter opinion from the Chairman of the National Indian Gaming Commission (the "NIGC") to the Poarch Band of Creek Indians (A 108), the NIGC concluded that the Poarch Band of Creek Indians – a successor to the historic Creek Nation **just as the Kialegee Tribe** – that the Poarch Band of Creek Indians is entitled to the same rights as any other successor to the historic Creek Nation, which successors include the tribal towns:

[6] The letters are dated September 22, 2003, October 31, 2002, and September 26, 2003 (See Appendix____).

> The historic Creek Nation, politically organized around tribal towns, now exists as the Poarch Band of Creek Indians in Alabama, the Muskogee (Creek) Nation in Oklahoma, **and recognized tribal towns** - tribes with multi-branch governments established through tribal constitutions. See, eg., Constitution of Poarch Band of Creek Indians, Art. IV (June 1, 1985. **To suggest that the United States' recognition of the historic Creek Nation is not recognition of the Band - or the Muscogee (Creek) Nation for that matter - because the Band is not identical in form to the historic Creek Nation is inconsistent with federal Indian policy generally and with case law. …. To suggest, then, that the recognition of the historic Creek Nation does not also apply to the Band because of the change in form and composition over time is inconsistent with the fundamental policy of encouraging tribal self-government.** (Bolding added)

National Indian Gaming Commission Chairman Philip N. Hogen, May 19, 2008 Final Opinion Letter to Poarch Bank of Creek Indians, pp.12-13 (A108)

In fact, both the brief and the Assistant Secretary of the Interior-Indian Affairs relied on the 1994 amendments to provide the Keetoowah with rights as a successor in interest to the Cherokee Nation and therefore had the right to territorial jurisdiction. In 2008, the NIGC concluded that the Poarch Band shares the same history as the other federally recognized Creek Tribes and are therefore entitled to the same rights as any other successor to the historic Creek Nation. The Poarch Creek was never a tribal town, with its own chief. Nor did the Poarch Creek own land in Georgia, just like the Kialegee Tribal Town. The Kialegee Tribal Town, however, was a signatory to treaties signed with the U.S. and participated in the

government of the Creek Confederacy (the predecessor to today's federally recognized Creek tribes). A Kialegee Chief once sat in the seat as the Chief for the entire Creek Confederacy. Notwithstanding, the NIGC in 2008, applying 476(f) determined that Poarch Creek, was a successor in interest to the Creek confederacy entitled to exert jurisdiction over Creek lands in Alabama. This determination squarely contradicts the rationale and analysis used to deny the Kialegee Tribal Town similar rights and violates 476(f).

Kialegee's argument is stronger than the Poarch Creek as it was a recognized tribal town throughout the Creek Confederacy and the Poarch Creek wasn't. This differentiation is motivated by present-day politics and economics and not history or the law because Poarch Creek's operations in Alabama do not interfere with or pose any threat to the MCN's casinos and businesses and therefore the MCN has no objection to the Poarch Creek exercising jurisdiction in Alabama, as a successor to the Creek Confederacy. However, the Kialegee Tribal Town is also in Oklahoma. As a result, the BIA has seen it fit deny the Kialegee its rights as a successor in interest in blatant disregard of federal law created to protect marginalized tribes such as KTT. Instead of correcting a wrong, they choose to hide behind an erroneous ruling that violates 476(f) and (g).

Kialegee is one such tribal town: federally recognized by the United States, is governed by a constitution and bylaws approved by the Assistant Secretary of the Interior and is part of the historic Creek Nation. Therefore, the KTT:

a. is "an Indian Tribe that is federally recognized pursuant to the provisions of the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967." … "*Kialegee Tribal Town v. Zinke,* 330 F. Supp. 3d 255, 258 (D.D.C. 2018).

b. "a member of the historic Creek [N]ation, is included under the treaties signed by the historic Creek Nation... has jurisdiction over all lands within the Creek Reservation as land owned in common with two other federally recognized Creek Tribal Towns and the federally recognized Muskogee Creek Nation ("MCN") in accordance with treaties entered into between Kialegee and the United States and as read in context with the Indian Canon of Construction. *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255, 258–59 (D.D.C. 2018).

c. Just like the UKB (see above) is entitled to exercise territorial jurisdiction over all lands within the Cherokee Reservation as land owned in common with two other federally recognized Creek Tribal Towns and the federally recognized Muskogee Creek Nation.

As to *Oklahoma v. Hobia*, No. 12-cv-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012, this decision was reversed in 2014[7] and this Court's September 29, 2022 Memorandum Opinion correctly rejects any attempted application of *Hobia* to the present case:[8]

> Defendants do acknowledge the reversal, but nonetheless assert the decision shows KTT had "other opportunities to make its jurisdictional case and that applying preclusion here will not work an unfairness." Defs.' Mot. at 19. True or not, the argument is irrelevant.… The Court therefore declines to give *Hobia* issue-preclusive effect or otherwise consider the decision in the issue preclusion analysis.

Defendants' attempt to invoke the 1991 BIA decision as dispositive fares no better because, as explained above, the 1991 BIA conclusions were declared null and void by 25 U.S.C. § 476(g) Thus, Plaintiff respectfully requests that this Court reconsider the September 29, 2022's Memorandum Opinion.

Standard of Review:

Appellate review of a trial court's grant of a motion to dismiss for failure to state a claim proceeds *de novo*. *Starr Surplus Lines Ins. Co. v. Mountaire Farms*, *Inc.*, 920 F.3d 111, 114 (1st Cir. 2019),

[7] "We REVERSE and REMAND to the district court with instructions to vacate its preliminary injunction and to dismiss the State's complaint with prejudice." *Oklahoma v. Hobia,* 775 F.3d 1204, 1214 (10th Cir. 2014).
[8] September 29, 2022 Memorandum Opinion at 14-15.

Because the interpretation of a statute or regulation presents a purely legal question, courts subject that interpretation to de novo review. *See United States v. Gifford,* 17 F.3d 462, 472 (1st Cir.1994); *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.,* 978 F.2d 750, 757 (1st Cir.1992).

Conclusion stating the relief sought.

The Kialegee Tribe requests that this Court reverse the lower court and rule that § 5123 controls and that the MCN, and the Kialegee exercise jurisdiction over the Creek reservation, and the there is no collateral estoppel because the law that supports issue preclusion is contrary to § 5123, and finally that the Complaint should not have dismissed with prejudice and without leave to amend.

Respectfully Submitted,

BLAXBERG GRAYSON, P.A.
Attorneys for Appellant
25 S.E. Second Avenue, Suite 730
Miami, FL 33131-1506
Telephone: (305) 381-7979
Facsimile: (305) 371-6816
Moises.Grayson@blaxgray.com
By: /s/ Moises T. Grayson
Moises T. Grayson, Esq.

and
/s/ Tyler A. Mamone, Esq.
D.C. Bar No. FL0068
MAMONE VILLALON PLLC
Miami Tower – Suite 2000
100 Southeast Second Street
Miami, Florida 33131
tyler@mvlawpllc.com

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 7,009 words. I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because I prepared it using Microsoft Word in a proportionally spaced typeface, Times New Roman 14-point.

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Appellate Electronic Filing system on November 20, 2024. All case participants registered as CM/ECF users will be served by the CM/ECF system.

/s/ Moises T. Grayson
Moises T. Grayson, Esq.
Counsel for Appellant