IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

CITIZENSHIP BOARD OF THE MUSCOGEE (CREEK) NATION, Appellant, vs. RHONDA K. GRAYSON and JEFFREY D. KENNEDY, Respondents.	)	Case No: SC-2023-10 (District Court Case No.: CV-2020-34)

Respondents' Opposition to Appellant's Petition for Rehearing

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INTRODUCTION

Appellant's arguments in favor of rehearing are not permitted under the Muscogee (Creek) Nation Supreme Court's Rules of Appellate Procedure. Rule 24, which governs Petitions for Rehearing, specifies exactly two grounds for rehearing "and no others": (1) That decisive facts or questions submitted by counsel were "overlooked," or (2) "that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed." MCN RAP 24 (emphasis added). Appellant instead bases its arguments on an impermissible third ground—because it thinks this Court was incorrect, it boldly demands that this Court reverse its unanimous opinion in Respondents' favor. As this Court considered the facts and questions presented by the parties, and its unanimous (and correct) opinion did not conflict with any statute or controlling decision to which the Court was not previously directed, Appellant's Petition for Rehearing should be denied.

ARGUMENT

Appellant Does Not Comply With Rule 24.

Appellant's Petition for Rehearing is doomed because it does not rest on either of the two exclusive grounds for rehearing identified by Rule 24 alone. MCN RAP 24 (establishing two limited reasons for rehearing, "(1) [t]hat "facts[] material to the decision" or "some question decisive of the case submitted by counsel" were "overlooked," or (2) "that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed") (emphasis added). Tellingly, Appellant never even references Rule 24. Instead, Appellant states that this Court must grant rehearing "so this Court can cure its legal errors." Pet. for Reh'g at 1. That is not one of the two grounds for rehearing this Court authorized in Rule 24. Appellant's Petition should be denied for the simple reason that it is procedurally

infirm and fails to follow this Court's clear statement in Rule 24 that only those two grounds—"and no others"—can support rehearing.

Appellant's Petition for Rehearing should also be denied because it does not comply with the substance of Rule 24. Nowhere in the Petition for Rehearing is there any reference to a dispositive fact or question raised in the briefs that this Court overlooked, nor is there any reference to a dispositive statute or controlling decision to which this Court was not previously directed. Even a quick review of the Tables of Authorities in the briefs submitted in this case reveals that many of the authorities that Appellant cites now were previously brought to this Court's attention—and none of the new cited authorities are "controlling decision[s]" of this Court that would bear on this case, in any event.[1]

The sole "fact[]" that Appellant raised and allege this Court "overlooked" is that the United States "used particular language" in other treaties "which demonstrates that the United States knew how to use various words of perpetuity."[2] Pet. for Reh'g at 6. But Appellant itself overlooks that the 1866 Treaty stated that "[t]he Creeks hereby covenant and agree that henceforth" descendants of "Creeks of African Descent" ("Muscogee (Creek) Freedmen")[3]

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[1] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992), *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), *Horne v. Caughlin*, 191 F.3d 244 (2d Cir. 1999), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), *Local 514 Transp. Workers Union of Am. v. Keating*, 2003 OK 110, *Oliver v. Muscogee (Creek) Nat'l Council*, SC-06-04 (Muscogee (Creek) 2006), *PDK Lab'ys, Inc. v. DEA*, 362 F.3d 786 (D.C. Cir. 2004), *Union Pac. R.R. Co. v. U.S.*, 99 U.S. 700 (1878), and *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) are new to the Petition for Rehearing. They are not dispositive of any of the issues raised in this case, however, and so cannot be considered "controlling decision[s]" within the meaning of Rule 24. M(C)NCA Title 7 § 1-102 and M(C)NCA Title 26 § 3-205 are also cited for the first time in the Petition for Rehearing but similarly are not dispositive of any of the issues raised in this case.

[2] It bears mention that Appellant claims this "fact[]" was only "raised at oral argument." Pet. for Reh'g at 6. However, this Court forbade "[a]ll audio or video recording, photographs, and/or reproductions" of the oral argument in this case. Apr. 28, 2025 Notice of Removal of Stay of Proceedings and Order Resetting Oral Argument at 3. How Appellant can assert this point was raised at oral argument without any recording to reference (to say nothing of how verification can be performed by Respondents or this Court) is a mystery.

[3] The Dawes Commission, therefore, enrolled many Creeks of African descent on the Muscogee Creek Freedmen Roll, regardless of whether they or their ancestors were ever enslaved in the MCN or how much "Creek blood" they actually possessed. In fact, Dawes Commission personnel were instructed to look for and/or inquire if a MCN citizen had any African ancestry, and to place that individual on the so-called Freedmen roll. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes 1893–1914* (1999).

"shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe." Treaty Between the United States and the Muscogee (Creek) Nation, June 14, 1866, 14 Stat. 785, art. 2 (emphasis added). Pages 3, 16, and 17 of this Court's July 23, 2025 Opinion quoted this language, and pages 16 and 17 consider Appellant's "words of perpetuity" point. This Court did not overlook any "fact" about "words of perpetuity"; rather, this Court applied the Treaty's plain language dictating that the Muscogee (Creek) Nation would "henceforth" grant equal citizenship to the descendants of Muscogee (Creek) Freedmen. As this Court recognized, Appellant's argument failed—and fails—on its own terms when compared to the Treaty's text, which "gives no endpoint at which those descendants should be excluded." Op. at 18.

The remainder of Appellant's "determinative omitted facts" are either legal arguments about application of federal and Muscogee (Creek) law masquerading as "facts," *see* Pet. for Reh'g at 7-9 (discussing canons of interpretation), or "facts" that in no way can be considered "material" to the case, *see id.* at 12 (describing as an "omitted fact" the point that "no Creek citizen, other than the five signatories of the Opinion, have actually voted" for this Court's holding invalidating several unlawful provisions of the 1979 Constitution). As this Court knows, legal arguments are not facts. The remaining "fact[s]" this Court supposedly "omitted" are otherwise entirely beside the point, were not raised before, and do not bear on the issues raised in this case.

Ultimately, Appellant's Petition for Rehearing merely rehashes its previous unpersuasive arguments, like Appellant's position that the 1979 Constitution and the 1866 Treaty can both be

given effect (by reading out the 1866 Treaty's plain language). *See* Appellant's Br. at 25.[4] It fails to identify any valid ground for rehearing under Rule 24, but it succeeds in impugning the honor and good faith of this Court's Justices.[5] It should be denied.

This Court Committed No Error.

In any event, this Court decided the case and controversy before it in the only way it could—declaring that the descendants of Muscogee (Creek) Freedmen are entitled to equal citizenship. This Court did not decide any case not presently before it, nor did it violate any law by holding that several constitutional provisions in the 1979 Muscogee (Creek) Nation Constitution were unlawful and void because they are impossible to square with the earlier 1866 Treaty with the United States.

Appellant erroneously contends that the Court acted beyond its jurisdiction in issuing declaratory relief that touches persons other than Respondents. However, such declaratory relief was necessary to decide the controversy before the Court. Respondents asked the Court to find that Appellant acted contrary to the Treaty of 1866 in denying their applications, and the Court's answer logically applies with equal force to all persons similarly situated to Respondents. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) ("The law of precedent teaches that like cases should generally be treated alike."); *cf. Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) ("[L]imiting [courts'] discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.") (emphasis added). Interpreting the 1979

[4] To the extent the Petition for Rehearing attempts to rely upon new arguments advanced by Appellant for the first time in the Petition or at oral argument, such as the "retained rights" theory, this Court need look no farther than Appellant's own statement that "appellate courts do not decide questions neither raised nor resolved below." Pet. for Reh'g at 13 n.14. As the saying goes: What's good for the goose is good for the gander.

[5] *See id.* at 16-17 (stating that this Court's Opinion "may have been intended to procedurally preclude subsequent judicial appellate review of the issues decided in the Opinion," (speculating that this Court's motive was to obstruct justice), that "this Court could later include a majority of members with legal views different than those in the Opinion" (disregarding the Opinion as a controlling precedent of this Court), and that this Court's opinion "is in reality a political act" (accusing this Court of failing to adhere to the judicial role)).

Constitution only as to the two Respondents is nonsensical, defeats the very purpose of judicial review and declaratory relief, risks inconsistent (and unprincipled) results in later cases, and ensures never-ending citizenship related challenges from Muscogee (Creek) Freedmen that would be a drain on the precious judicial resources of the Muscogee (Creek) Nation. The American and Muscogee (Creek) legal systems work through courts deciding live controversies, and those decisions necessarily impact similarly situated persons in future controversies because of *stare decisis*. *See Kisor v. Wilkie*, 588 U.S. 558, 586-87 (2019) ("Adherence to precedent is 'a foundation stone of the rule of law'" because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.") (citations omitted). The natural ramifications of the Court's decision for those beyond the two Respondents in this case do not render it invalid, and neither does this Court's recognition of that fact. In sum, Appellant asks this Court to rehear this case and issue a ruling that interprets the 1979 Constitution solely for the two Respondents in this case. That is not how judicial review or declaratory relief works.

Further, the M(C)N remains free to bring the hypothetical challenges it raises. *See* Pet. at 13-17. Nothing in the Court's opinion prevents the M(C)N from challenging whether future applicants can validly trace their lineage to the Dawes Freedmen Rolls. Appellant's apparent panic is both unwarranted and unjustified.

Appellant also contends that the Court erred in the very act of declaring the "by blood" citizenship language void. In arguing as much, Appellant misunderstands the purpose of a court of last resort. The judiciary's role is to determine the constitutionality of statutes and constitutional provisions when they are the subject of a live dispute, as was the case here. *See Marbury v. Madison*, 5 U.S. 137 (1803) ("It is emphatically the province and duty of the judicial

department to say what the law is."); *Ellis v. Muscogee (Creek) Nation Nat'l Council*, 10 Okla. Trib. 341 (Muscogee (Creek) 2006) ("This Court has reviewed countless cases which have continued to spell out our separate but equal principles and the need for a system of checks and balances.").

Nobody disputes that the 1866 Treaty is still in full force and effect. Art. I, Sec. 2 affirms that the political jurisdiction of the M(C)N is "based upon those Treaties entered into" between the M(C)N and the U.S. By this understanding, the 1866 Treaty's terms still govern and are incorporated into the 1979 Constitution, and the 1979 Constitution is incapable of lawfully diverting from the terms of the 1866 Treaty to which the M(C)N bound itself. *See* Op. at 15. As argued in Respondents' earlier briefing, the Treaty has not been abrogated and remains in full force. *See* Resps.' Br. at 14-19. That fact has legal consequences.

This Court struck the "by blood" language from Article III, Section 2 of the 1979 Constitution in order to comport with the Treaty of 1866. *See* Op. at 21 ("The 1979 Muscogee (Creek) Nation Constitution, in its current form (limiting citizenship only to Muscogee (Creek) Indians *by blood*, and their lineal descendants), stands as a complete barrier to Creek Freedmen citizenship and is wholly inconsistent with Article II of the Treaty of 1866."). By striking "by blood", the Court carries out its duty to interpret the laws of this Nation. *See id.* at 22 ("Under this interpretation the Nation satisfies its duties to the Creek Freedmen under Article II of the Treaty of 1866."). As this Court put it, "this is what Mvskoke law demands"—no more, no less. *Id.* at 2.

CONCLUSION

Appellant demands that this Court agree with it for the same reasons it offered in its briefing and at oral argument. But Rule 24 does not allow a Petition for Rehearing on those grounds. Much like how Appellant misapprehended Muscogee (Creek) Nation law when it

denied Respondents' citizenship applications years ago, Appellant now misapprehends this Court's procedural rules and the purpose and duty of a court of last resort. Appellant's Petition for Rehearing, which rehashes its arguments on the merits, should meet the same fate as those arguments. Respondents respectfully submit that this Court should soundly reject Appellant's request for rehearing and affirm the validity of its unanimous opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2025, I caused the foregoing *Respondents' Opposition to Appellant's Petition for Rehearing* to be transmitted to the following counsel of record via U.S. Mail, postage prepaid:

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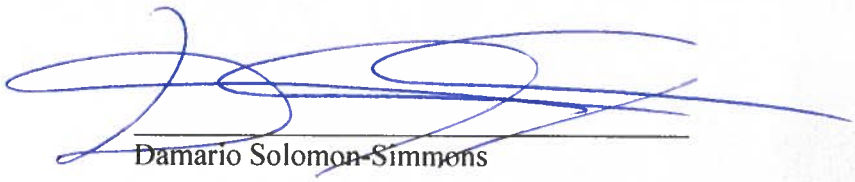

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