IN THE SUPREME COURT OF THE CHEROKEE NATION

In re: Effect of Cherokee Nation v. Nash and Vann v. Zinke, District Court for the District of Columbia, Case No. 13-01313 (TFH) and Petition For Writ of Mandamus requiring the Cherokee Nation Registrar to Begin Processing Citizenship Applications,	)	Case No. SC-17-07

Petitioners:
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Before: **Lee W. Paden, Chief Justice**
Shawna S. Baker, Justice
Mark L. Dobbins, Justice
John C. Garrett, Justice
Rex Earl Starr, Justice

Opinion by: **Shawna S. Baker, Justice**

FINAL ORDER

This Matter came before the Court on an *Amended Motion for Final Disposition* filed by the Cherokee Nation on February 8, 2021. The Court finds as follows:

Procedural History

This matter began on September 1, 2017 when the Cherokee Nation, represented by the Office of the Attorney General, filed an *ex parte Petition for Declaratory Action, Petition for Writ of Mandamus and Request for Preliminary Order* finding that the memorandum opinion issued by the United States District Court, Washington D.C., in *Cherokee Nation v. Nash et al, and Vann et al, and Zinke*, 267 F. Supp. 3d 86 (D.D.C. 2017), *enforced sub nom. In re Effect of Cherokee Nation v. Nash*, No. SC-17-07, 2017 WL 10057514 (Cherokee Sup. Ct. Sept. 1, 2017) ("Nash Opinion") was binding upon the Cherokee Nation. Pursuant to Supreme Court Rule 4, the Chief Justice issued a *Preliminary Order Granting Declaratory Action and Petition for Writ of Mandamus* stating the *Nash* Opinion was binding within and against the Cherokee Nation. On December 11, 2017, proposed Intervenors filed a *Motion to Intervene, for Writ of Mandamus; and to Set Aside Preliminary Order*. The Court denied the *Motion to Intervene* on May 16, 2018, finding that the proposed Intervenors lacked standing. On December 7, 2018 a *Motion for Hearing and Final Disposition* was filed by the Office of the Attorney General. The Court in an Order dated September 9, 2019, adopted once again its earlier *Preliminary Order*. An *Amended Motion for Hearing and Final Disposition* was filed by the Office of the Attorney on February 8, 2021, followed by proposed Intervenors *Motions to Intervene* and the *Motion of Cherokee Councilor Wes Nofire, Councilor Harley Buzzard, and Councilor Julia Coates, to file an Intervention, and or in the Alternative, for Leave to File*

Amicus Curiae Brief. Today, the Court issued a *Combined Order* denying the relief sought finding that standing was lacking by the proposed Intervenors including Tribal Councilors Wes Nofire, Harley Buzzard, and Julia Coates. The Court notes that no one with standing challenged the *Preliminary Order.*

Discussion

On war-torn soil in Indian Territory during Reconstruction, thousands of miles from their respective homelands, the heartbeats of three First Nations, the Cherokees, the Shawnees, and the Delawares, and three continents of flesh tones and cultures, Native Americans, African Americans, and adopted or intermarried-European Americans, were forced to coalesce and weave together a single nation to be known by only one name henceforth: the Cherokee Nation. One hundred and fifty-five years after the 1866 Treaty,[1] native Cherokees must step fully into the promise they made "[o]n the far end of the Trail of Tears"[2]. By doing so, the Cherokee Nation, as a whole, lifts itself into the 21st century and sheds the heavy weight of antebellum and the pervasiveness of racism and racial injustice in favor of equality and justice for all.

Unequivocally, Freedmen have rights equal to "by blood" or native Cherokees.[3] Freedmen are men, women, and persons whose "right to citizenship does not exist solely

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[1] Treaty with the Cherokee, 1866, U.S.-Cherokee Nation of Indians, July 19, 1866, *hereinafter* ("1866 Treaty").

[2] McGirt v. Oklahoma, 591 U.S. __ , 140 S. Ct. 2452 (2020).

[3] *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 127 (D.D.C. 2017). The United States District Court for the District of Columbia held that while the Cherokee Nation maintains a sovereign right to determine its membership, it must do so equally with respect to native Cherokees and the descendants of Freedmen per Article 9 of the 1866 Treaty with the Cherokee because "neither has rights either superior or, importantly, inferior to the other." *Id.* at 140. Thus, any rights of citizenship for native Cherokees must be extended to Cherokee Freedmen. *Id.* This would necessarily include the right to run for elected office, so long as, other age, residency, and criminal history requirements are met.

under the Cherokee Nation Constitution and therefore, [their right to citizenship] cannot be extinguished solely by amending the Constitution" to exclude them.[4] Likewise, their right of citizenship cannot be enlarged by its inclusion in the Cherokee Nation Constitution. Freedmen rights are inherent. They extend to descendants of Freedmen as a birthright springing from their ancestors' oppression and displacement as people of color recorded and memorialized in Article 9 of the 1866 Treaty.

The request before the Supreme Court is whether it may strike the "by blood" language found in the Cherokee Nation Constitution, the 2007 Cherokee Nation Constitutional Amendment, tribal statutes, administrative procedures, and other laws wherever found. The Cherokee Nation Attorney General grounds her request in a single authority: the actions taken by the 2009 Tribal Council and former Principal Chief Chadwick Smith and the resulting, binding, federal court decision arising therefrom.

On February 26, 2009, Speaker Meredith Frailey sponsored a Resolution Ratifying Litigation in the United States District Court for the Northern District of Oklahoma.[5] The Resolution states in part:

> WHEREAS, Legislative Act 07-01[6] provides that **litigation brought on behalf of the Cherokee Nation** and **involving** substantial assets and **sovereignty** of the Nation **be authorized by the Principal Chief and authorized by the Council**;
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[4] *Id.* In light of *Nash*, *Lucy Allen v. Cherokee Nation Tribal Council*, et al., JAT-04-09, improperly holds that the Cherokee people have the right to amend the Cherokee Constitution regarding a blood quantum requirement when said blood quantum requirement limits the rights of Freedmen.

[5] R-22-09, https://cherokee.legistar.com/View.ashx?M=F&ID=631997&GUID=C3E852FF-8389-4CDD-AFB6-1DFA9BBBF8FB

[6] LA-07-01 citing Article V, Section 7 of the Cherokee Nation Constitution for its authority.

> WHEREAS, it is desirable for **a federal court** to determine the narrow issue of construction of the 1866 Treaty language and any federal law affecting the treaty regarding any federal rights, if any, of freedman and their descendants;
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> WHEREAS, such a federal court **ruling would be binding upon both parties** to the Treaty of 1866....

Emphasis added.

Following introduction of the Resolution in the Rules Committee Meeting, a motion in favor of the same carried 17-0. *Id.* Members of the 2009 Tribal Council included: Meredith A. Frailey, Julia Coates, Harley L. Buzzard, Cara Cowan Watts, Buel Anglen, Bradley Cobb, Chris Soap, Bill John Baker, S. Joe Crittenden, David Thornton, Sr., Chuck Hoskin, Jr., Tina Glory Jordan, Jodie Fishinghawk, Jack Baker, Janelle Lattimore Fullbright, Don Garvin, and Curtis Snell. Less than thirty days later at the Tribal Council meeting held on March 16, 2009, the Resolution again carried with a vote of 17-0.[7]

Former Principal Chief Smith, who is on record in early 2008 stating Article 9 of the 1866 Treaty was "*bilaterally abrogated*" by the U.S. and Cherokee Nation,[8] signed Resolution 22-09 on March 23, 2009 fulfilling the requirements of LA-07-01 and waived the tribe's sovereign immunity for the limited purpose of litigating the 1866 Treaty. In doing so, the "by blood" language found limiting the rights of Freedmen descendants, whether found in the Cherokee Nation Constitution or elsewhere, was placed in the hands

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[7] See https://cherokee.legistar.com/View.ashx?M=F&ID=631997&GUID=C3E852FF-8389-4CDD-AFB6-1DFA9BBBF8FB

[8] Principal Chief Chadwick Smith, *Cherokee Nation Shadow Report to Committee on the Elimination of Racial Discrimination*, February 5, 2008.

of a federal court. The Cherokee Nation agreed to be bound, for all time, to the court's ruling.

Shortly thereafter, Attorney General A. Diane Hammons filed litigation in the Northern District of Oklahoma. The *Nash* case, for which the Resolution was passed, was transferred to the D.C. Circuit and combined with the *Vann* case. Eight years later on August 30, 2017, the case was decided by a federal court. *Nash* states, in relevant parts, that:

> The Cherokee Nation's sovereign right to determine its membership is no less now, as a result of this decision, than it was after the Nation executed the 1866 Treaty. The Cherokee Nation concedes that its power to determine tribal membership can be limited by treaty. [Citation omitted]. The Cherokee Nation can continue to define itself as it sees fit but must do so equally and evenhandedly with respect to native Cherokees and the descendants of Cherokee freedmen. By interposition of Article 9 of the 1866 Treaty, neither has rights either superior or, importantly, inferior to the other. Their fates under the Cherokee Nation Constitution rise and fall equally and in tandem. In accordance with Article 9 of the 1866 Treaty, the Cherokee Freedmen have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees.[9]

On September 1, 2017, the Cherokee Nation Supreme Court was asked by Former Attorney General Todd Hembree to:

> [I]ssue a preliminary order as valid and enforceable as against the Nation, and direct the Cherokee Nation Registrar, and the Cherokee Nation government and its offices to begin processing the registration applications of eligible Freedmen descendants, and that such Freedmen descendants, upon registration as Cherokee citizens shall have all the rights and duties of any native Cherokee, including the right to run for office.[10]

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[9] *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86.

[10] *In re: Effect of Cherokee Nation v. Nash, and Vann v. Zinke,* SC-2017-07. https://www.cherokeecourts.org/Supreme-Court/SC-2017-07-In-Re-Effect-of-Cherokee-Nation-v-Nash-and-Vann-v-Zinke

The Court entered its Preliminary Order on the same date enforcing the decision by the federal district court and granting the relief sought holding:

> Therefore, the Court hereby Orders, Adjudges, and Decrees that the memorandum opinion issued August 30, 2017 by the District Court of the District of Columbia in case no. 13-01313 is enforceable within and against the Cherokee Nation, and that therefore the Cherokee Nation Registrar, and the Cherokee Nation government and it offices, are directed to begin processing the registration applicants of eligible Freedmen descendants, and that such Freedmen descendants, upon registration as Cherokee Nation citizens shall have all the rights and duties of any other native Cherokee, including the right to run for office. Because it violates the Treaty of 1866 between the Cherokee Nation and the United States, the 2007 amendment to the Constitution that purported to limit citizenship within the Cherokee Nation to Cherokees by blood, Delaware Cherokees and Shawnee Cherokees is held to be void and without effect.[11]

On December 7, 2018, Attorney General Todd Hembree filed a Motion for Hearing and Final Disposition wherein he requested the Court set the case for hearing and issue an "Order or Opinion finally disposing of the case."[12] On September 9, 2019, the Supreme Court issued an Order denying the Motion and adopted its earlier Preliminary Order.[13]

On February 8, 2021, Attorney General Sara Hill filed an Amended Motion for Hearing and Final Disposition[14] wherein she requested the Court strike "by blood" from the 1999 Cherokee Nation Constitution as such language is inconsistent with the Court's earlier ruling. Attorney General Hill's request to strike the "by blood" language is a more specific request than that made by her predecessor.

For approximately three and one-half years, the gap in time between the Court's Preliminary Order and Attorney General Hill's Amended Motion, the Cherokee Nation

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

government and the Cherokee Nation Registrar have complied with the Court's Order. During this time, neither the legislative branch nor the people have initiated the laborious task to repeal the "by blood" language by a constitutional amendment. Furthermore, the Tribal Council has been remiss in drafting, circulating, and passing legislation to update the Cherokee Nation Code to comply with the ruling in *Nash*. For example, the Cherokee Nation Code still contains "by blood" references in the Citizenship Act, Title 11; the Election Code, Title 26; The Freedom of Information Act, Title 67; and the Constitutional Convention Act, Title 73.

The "by blood" language found within the Cherokee Nation Constitution, and any laws which flow from that language, is illegal, obsolete, and repugnant to the ideal of liberty. These words insult and degrade the descendants of Freedmen much like the Jim Crow laws found lingering on the books in Southern states some fifty-seven years after the passage of the 1964 Civil Rights Act. "By blood" is a relic of a painful and ugly, racial past. These two words have no place in the Cherokee Nation, neither in present day, nor in its future.

Attorney General Hill's request to remove the unenforceable language is not unreasonable. She is the chief legal officer of the Cherokee Nation and her job is to represent the public interest. The descendants of Freedmen are part of the larger constituency that she both serves and represents.

Two Tribal Councilors, Julia Coates and Harley Buzzard, who voted in favor of R-22-09 have stated in their Brief in Support of the Movants' Motion to Intervene filed herein,

"The sovereignty of the Cherokee Nation is at the heart of this litigation."[15] They are correct. Along with fourteen other Councilors and Speaker Frailey, Julia Coates and Harley Buzzard, as the people's representatives, unanimously waived the Cherokee Nation's sovereignty by the casting of their votes and Chief Smith joined them with the stroke of his pen. Today, the consequences of their collective decision to waive sovereignty, authorize federal litigation, and an agreement to be bound by the ruling of a federal court is the heart of this litigation.

Today's unanimous opinion in SC-2017-07 holds that the words "by blood" are *void ab initio*, were never valid from inception, *and* must be removed wherever found throughout our tribal law when said words are used in reference to the Dawes Rolls. In doing so, this Court recognizes the importance of the 1866 Treaty for purposes of our nation's prospective sovereignty and the underpinnings of citizenship.

Article VII, Section 4 of the 1999 Cherokee Constitution demands that this Court declare unconstitutional legal acts *void ab initio* and void from inception. Henceforth, any language existing in contradiction to *Nash* found within our laws, on or after July 19, 1866, whatever the source, never had any force or effect upon its enactment. This includes provisions within the Cherokee Nation Constitution, the 2007 Cherokee Nation Constitutional Amendment, tribal statutes, administrative procedures, and laws wherever found. As such, all Supreme Court and JAT opinions issued pre-*Nash,* to the extent they examine and opine on laws in contradiction to *Nash*, are no longer binding precedent.

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[15] *Id.* SC-2017-07: Motion of Cherokee Councilor Wes Nofire, Councilor Harley Buzzard, and Councilor Julia Coates, to file an Intervention, and or in the Alternative, for Leave to File Amicus Curiae Brief.

To be clear, the 1976 Cherokee Nation Constitution illegally includes the words "by blood" for Chief and Council qualifications. The 1999 Cherokee Nation Constitution illegally includes the words "by blood" for Chief and Council qualifications. Furthermore, there is no 2007 Cherokee Nation Constitutional Amendment. It is as though the Amendment was never passed by a vote of the people.

When a law is *void ab initio*, there can be no balancing of equities as none exist. The 1866 Treaty rights were enacted to place limits on our government. By enforcing them, this Court protects each and every citizen equally. It is a misnomer to refer to any of the violations of Article 9 of the 1866 Treaty in our code, policies, procedures, JAT and Supreme Court opinions, and or Constitution as law. Despite having form and features of the same, these provisions and others, were never law. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed, as they never provided authority nor protection to anyone." *Norton v. Shelby County*, 118 U.S. 425, 442, 6 Sup. Ct. 1121, 30 L. Ed. 178 (1886).

It is the paramount duty of this Court to draw a bright line of demarcation, to erase confusion and misinformation, and to be fundamentally honest about the laws to which we are bound. Otherwise, the consequences could place our nation in peril.[16]

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[16] Today, the Cherokee Nation is dependent on federal subsidies and aid for approximately 70% of our General Operating Fund. *See* https://oklahoman.com/article/5670440/council-for-cherokee-nation-approves-record-152-billion-budget.See also, https://www.cherokee.org/our-government/office-of-financial-resources/financial-reports/ (to learn more specific details from the Cherokee Nation's Financial Reports prepared by Cherokee Nation Treasurer, Tralynna Sherrill Scott). An abrogation of the 1866 Treaty or further violations may render these funds in jeopardy. During the *Nash* litigation, the tribe's failure to abide by the 1866 Treaty drew not only drew threats from the U.S. to withhold the same, but included a temporary suspension of $33 million dollars from the Department of Housing and Urban Development. See https://www.cherokeephoenix.org/news/federal-housing-funds-for-cherokee-nation-are-suspended-over-freedmen-issue/article_8747a809-2df3-515e-ae1f-07b44302ae14.html and https://www.indianz.com/News/2011/002931.asp. *See also* House Resolution Bill H.R. 2824, Introduced

As our people rejoice the ruling in *McGirt*, and expect a similar determination in pending litigation before the Oklahoma Court of Civil Appeals,[17] may we be reminded that the Creek Nation's rights to self-governance and the recognition of its reservation was dependent upon its 1866 Treaty.[18] Likewise, Cherokee Nation's pathway to similar recognition requires upholding the 1866 Treaty, not abrogating it. Our ancestors suffered unspeakable atrocities in their fight to preserve culture, language, traditions, values, and right to self-governance. Any calls by the government or the people demanding a new amendment to the Constitution, a Constitutional Convention, or the passage of other laws, for the sole purpose of denying the right of citizenship to Freedmen descendants, must only be seen as politically and or socially motivated acts. Such words shall never be law.[19]

In conclusion, this opinion is not written to speak to any one candidate's candidacy for office in the upcoming 2021 election cycle as the Election Commission has already held that the lack of Cherokee "blood" does not prohibit an individual from seeking elective office.[20]

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on 6/21/2007; https://www.congress.gov/bill/110th-congress/house-bill/2824/text?r=9&s=1, as well as, House Resolution Bill H.R. 2761, Introduced 6/8/2009; https://www.congress.gov/bill/111th-congress/house-bill/2761/text (both bills sought to sever relations with the Cherokee Nation and to suspend the tribe's right to conduct gaming operations).

[17] *Travis Hogner vs. State of Oklahoma*, F-2018-138.

[18] *McGirt*, 140 S. Ct. 2452 (2020).

[19] "It is an extravagant proposition that a void act can afford protection to the person who executes it." *In Osborn v. Bank of the United States*, 22 U.S. 738, 6 L. Ed. 204 (1824).

[20] *In Re: Challenge to the Eligibility of Rhonda Brown-Fleming*, CNEC 2019-5.

From this day forward, may we prosper as a nation and embrace one another with mutual respect, regardless of color, race, and ancestry, as that which we are: Cherokee citizens.

CONCLUSION

Therefore, it is so Ordered that any reference to "by blood" citizenship or any other right or privilege of Cherokee citizens contained in the Cherokee Nation Constitution, including the 2007 Amendment, Article VI, Section 3, and Article VII, Section 2; the Cherokee Nation Code, including Title 11, Title 26, Title 67 and Title 73; and any and all accompanying rules, regulations, policies or procedures are *void ab initio*. The Court further Orders the Nation to remove any such reference to "by blood" citizenship from the Constitution, laws, and all accompanying rules, regulations, policies or procedure of the Cherokee Nation.

This final decision of the Cherokee Nation Supreme Court shall have the force of law, as to the construction and application there, in all the Courts of this Nation, until such construction or application shall be limited, altered or in any manner amended, by the subsequent decision of a subsequent case by the Supreme Court. (See Cherokee Nation Code, Title 20, Section 54)

IT IS SO ORDERED that this order shall be the final order and shall supersede all previous orders entered in this case.

ENTERED this 22nd day of February, 2021.

Lee W. Paden, Chief Justice

Shawna S. Baker, Justice

Mark L. Dobbins, Justice

John C. Garrett, Justice

Rex Earl Starr, Justice

Certificate of Mailing

I, Kendall Bird, certify that on the 22nd day of February, 2021, I mailed, emailed and/or faxed a true copy of the above and foregoing to the following:

Sara Hill, sara-hill@cherokee.org
Chrissi Nimmo chrissi-nimmo@cherokee.org

Kendall Bird, Court Clerk