UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT JAMES FLOYD'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. This Court Lacks Personal Jurisdiction Over Principal Chief Floyd, and the Claims Against Him Should Be Dismissed. 1

II. Venue is Improper in the District of Columbia, and the Claims Against Principal Chief Floyd Should Be Dismissed. 6

III. This Court Does Not Have Subject Matter Jurisdiction Over the Claims Against Principal Chief Floyd, and They Should Be Dismissed. 8

IV. Plaintiffs Must Exhaust All Available Tribal Remedies Before Seeking Redress in Federal Court. 11

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

1st Westco Corp. v. School Dist. of Philadelphia,
6 F.3d 108 (3d Cir. 1993)....................9

Aguilar v. Rodriguez,
No. 17-cv-1264, 2018 WL 4466025 (D.N.M. Sept. 18, 2018)....................15, 16

Alkanani v. Aegis Defense Servs., LLC,
976 F. Supp. 2d 13 (D.D.C. 2014)....................5

Allied Artists Picture Corp. v. Rhodes,
679 F.2d 656 (6th Cir. 1982)....................9

Beattie v. United States,
756 F.2d 91 (D.C. Cir. 1984)....................7

Boggs v. United States,
987 F. Supp. 11 (D.D.C. 1997)....................7

Bonaccorsy v. District of Columbia,
685 F. Supp. 2d 18 (D.D.C. 2010)....................2

Burlington N. & Santa Fe Ry. Co. v. Vaughn,
509 F.3d 1085 (9th Cir. 2007)....................9

Burlington N. R. Co., v. Crow Tribal Council,
940 F.2d 1239 (9th Cir. 1991)....................13, 14

Cherokee Nation of Okla. v. Babbitt,
No. 96-02284 (D.D.C. Nov. 3, 1998)....................4

Cherokee Nation v. Nash,
267 F. Supp. 3d 86 (D.D.C. 2017)....................3

Children's Healthcare is a Legal Duty, Inc. v. Deters,
92 F.3d 1412 (6th Cir. 1996)....................9

Delta Sigma Theta Sorority Inc. v. Bivins,
20 F. Supp. 3d 207 (D.D.C. 2014)....................6

FC Inv. Grp. LC v. IFX Mkts., Ltd.,
529 F.3d 1087 (D.C. Cir. 2008)....................6

Frost v. Catholic Univ. of Am.,
960 F. Supp. 2d 226 (D.D.C. 2013) 6

Fuentes-Fernandez & Co., PSC v. Caballero & Castellanos, PL,
770 F. Supp. 2d 277 (D.D.C. 2011) 5

Garcia v. Rivas,
No. 15-cv-377, 2016 WL 10538197 (D.N.M Mar 11, 2016) 16

Gerber Prods. Co. v. Vilsack,
No. 16-cv-01696, 2016 WL 4734357 (D.D.C. Sept. 9, 2016) 5

Gingras v. Rosette,
No. 5:15-cv-101, 2016 WL 2932163 (D. Vt. May 18, 2016) 2

Hall v. Babbitt,
208 F.3d 218 (8th Cir. 2000) 13

Holder v. Haarmann & Reimer Corp.,
779 A.2d 264 (D.C. 2001) 4

Iowa Mut. Ins. Co. v. LaPlante,
480 U.S. 9 (1987) 14

Kialegee Tribal Town v. Zinke,
No. 17-cv-1670, 2018 WL 4286406 (D.D.C. Sept. 7, 2018) 3

Kingman Park Civic Ass'n v. Gray,
27 F. Supp. 3d 142 (D.D.C. 2014) 13

Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,
523 U.S. 751 (1998) 2

Kwok Sze v. Johnson,
172 F. Supp. 3d 112 (D.D.C. 2016) 2

Martin v. U.S. Equal Emp't Opportunity Commn.,
19 F. Supp. 3d 291 (D.D.C. 2014) 7

McKesson Corp. v. Islamic Rep. of Iran,
539 F.3d 485 (D.C. Cir. 2008) 3

Middlemist v. Secretary of United States Department of Interior,
824 F. Supp. 940 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994) 13, 14

Morgan v. Richmond Sch. of Health & Tech., Inc.,
857 F. Supp. 2d 104 (D.D.C. 2012) 4

National Farmers Union Insurance Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985)....................12, 13, 14

Pennington Seed, Inc. v. Produce Exchange No. 299,
457 F.3d 1334 (Fed. Cir. 2006)....................9

Peterson v. Martinez,
707 F.3d 1197 (10th Cir. 2013)....................8

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981)....................8

Rosebud Sioux Tribe of S.D. v. Driving Hawk,
407 F. Supp. 1191 (D.S.D. 1976), *aff'd*, 534 F.2d 98 (8th Cir. 1976)....................15, 16, 17

Rosenblatt v. Fenty,
734 F. Supp. 2d 21 (D.D.C. 2010)....................2, 6

Russell v. Lundergan-Grimes,
784 F.3d 1037 (6th Cir. 2015)....................9

Schmid Labs., Inc. v. Hartford Acc. & Indem. Co.,
654 F. Supp. 734 (D.D.C. 1986)....................8

Smith v. Moffett,
947 F.2d 442 (10th Cir. 1991)....................12

Stinnie v. Holcomb,
734 Fed. App'x 858 (4th Cir. 2018)....................8

Thlopthlocco Tribal Town v. Stidham,
762 F.3d 1226 (10th Cir. 2014)....................17

Thompson Hine, LLP v. Taieb,
734 F.3d 1187 (D.C. Cir. 2013)....................4

Tillett v. Lujan,
931 F.2d 636 (10th Cir. 1991)....................13

Toya v. Toledo,
No. 17-0258, 2017 WL 3995554 (D.N.M. Sept. 9, 2017)....................16

United States v. Ferrara,
54 F.3d 825 (D.C. Cir. 1995)....................2

United States v. Yakima Tribal Court,
806 F.2d 853 (9th Cir. 1986)....................11, 12

Vann v. Kempthorne,
467 F. Supp. 2d 56 (D.D.C. 2006) 11

Vann v. United States Department of Interior,
701 F.3d 927 (D.C. Cir. 2012) 10, 11, 12

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,
443 U.S. 658 (1979) 3

West v. Holder,
60 F. Supp. 3d 190 (D.D.C. 2014) 2

Wounded Knee v. Andera,
416 F. Supp. 1236 (D.S.D. 1976) 16

Statutes

28 U.S.C. § 1391 (2012) 6

D.C. Code § 13-423 (2012) 2, 3, 4, 5

Rules

Fed. R. Civ. P. 12(b)(1) 10

Fed. R. Civ. P. 12(b)(2) 6

Fed. R. Civ. P. 12(b)(3) 8

INTRODUCTION

Plaintiffs' Opposition to Principal Chief James Floyd's ("Principal Chief Floyd") Motion to Dismiss highlights the dearth of support for their position. Straightforward application of the relevant law demonstrates that each of the claims pleaded against Principal Chief Floyd should be dismissed for each of the following reasons.

First, this Court lacks personal jurisdiction over Principal Chief Floyd, irrespective of whether this Court looks to his contacts or, as Plaintiffs urge, the contacts of the Muscogee (Creek) Nation (the "Nation") with the District of Columbia. The D.C. long-arm statute does not authorize personal jurisdiction over Principal Chief Floyd or the Nation, the government contact exception applies, and Plaintiffs fail to plausibly allege a causal nexus between their alleged injuries and Principal Chief Floyd or the Nation's contacts with the District. *Second*, venue is improper in the District of Columbia because a substantial part of the alleged acts or omissions did not occur in this District. *Third*, under *Ex Parte Young* and its progeny, the claims pleaded against Principal Chief Floyd must be dismissed because Principal Chief Floyd does not have the requisite authority over the allegedly improper citizenship determinations. *Finally*, Plaintiffs should be required to exhaust their tribal remedies prior to bringing suit in federal court. Accordingly, the claims against Principal Chief Floyd should be dismissed.

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over Principal Chief Floyd, and the Claims Against Him Should Be Dismissed.

Straightforward application of applicable law from this Circuit, which Plaintiffs ignore, demonstrates that this Court does not possess personal jurisdiction over Principal Chief Floyd. The

D.C. long-arm statute, D.C. Code § 13-423(a)(1) (2012),[1] does not authorize it, exercise of jurisdiction would not comport with due process, and the government contacts exception applies. (*See* Opening Br. at 6-12.)

First, Plaintiffs argue that in an *Ex Parte Young* case such as this, it is the sovereign Nation's contacts with the District, not Principal Chief Floyd's, that matter for personal jurisdiction purposes. (Pls.' Opp. at 7-8.) We disagree.[2] But even if the Court were to agree with Plaintiffs on that point of reference, Plaintiffs' position actually cuts against them. D.C. Code § 13-423 does not authorize personal jurisdiction over sovereigns such as the Nation. *See Kwok Sze v. Johnson*, 172 F. Supp. 3d 112, 123 (D.D.C. 2016) (Kollar-Kotelly, J.) ("States are not considered to be 'legal or commercial entit[ies],' meaning that they are not included under the long-arm statute.") (citing *United States v. Ferrara*, 54 F.3d 825, 831 (D.C. Cir. 1995) ("The Supreme Court has counseled that, in common usage, the term person does not include the sovereign . . . .")); *see also West v. Holder*, 60 F. Supp. 3d 190, 194 (D.D.C. 2014). As Plaintiffs admit, the Nation is a sovereign entity. (Pls.' Opp. at 11); *see Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

---

[1] Plaintiffs fail to oppose, and therefore concede, that this Court does not have personal jurisdiction pursuant to § 13-423(a)(4). *See Rosenblatt v. Fenty*, 734 F. Supp. 2d 21, 22 (D.D.C. 2010) ("[A]n argument in a dispositive motion that the opponent fails to address in an opposition may be deemed conceded . . . ."); *Bonaccorsy v. District of Columbia*, 685 F. Supp. 2d 18, 24 (D.D.C. 2010).

[2] Amongst the cases debating this issue, this Circuit has recognized that in an *Ex Parte Young* case, it may be the individual official's contacts, rather than the sovereign's, that matter when determining whether personal jurisdiction exists. *See West*, 60 F. Supp. 3d at 196 ("It is an open question in this circuit whether, under the D.C. long-arm statute, a court may exercise personal jurisdiction over an official sued under Ex Parte Young."); *see also Gingras v. Rosette*, No. 5:15-cv-101, 2016 WL 2932163, at *9 (D. Vt. May 18, 2016) (finding that a tribe's contacts with the forum state "are not vicariously attributed to its officials any more than directors of a corporation are subject to suit personally in any forum where the actions of the corporation satisfy the minimum contacts test").

Contrary to Plaintiffs' claims, the long-arm statute therefore does not authorize jurisdiction over the Nation, regardless of the Nation's contacts with the District.

Second, even if the long-arm statute could authorize jurisdiction over the Nation, which it does not, the Treaty of 1866 is not a "contract" for the purposes of § 13-423(a)(1).[3] Rather, "[t]reaties between the United States and Indian tribes are congressional acts akin to statutes." *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 115 (D.D.C. 2017). The only case Plaintiffs cite for their proposition that a treaty actually constitutes a "contract" for personal jurisdiction purposes is a case regarding rules of treaty interpretation that has nothing to do with personal jurisdiction. (*See* Pls.' Opp. at 10) (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)). Plaintiffs do not cite to, and Principal Chief Floyd is not aware of, any cases in which the negotiation, execution, or existence of a treaty with the United States may serve as the basis for personal jurisdiction over a signatory to the treaty. That the Court may possess subject matter jurisdiction over a federal question (i.e., the 1866 Treaty) has nothing to do with whether the Court has personal jurisdiction over Principal Chief Floyd. Plaintiffs' argument boils down the assertion that because the Creek Nation signed the 1866 Treaty in Washington D.C., the Court therefore has personal jurisdiction over Principal Chief Floyd more than 150 years later. That is not the law, which is why Plaintiffs cite none on this point.

Moreover, Plaintiffs do not, and cannot, allege that the negotiation and execution of the Treaty during the nineteenth century somehow constitutes business or commercial activity in the

---

[3] Moreover, Plaintiffs' contention that they are third-party beneficiaries to the Treaty entitled to bring suit for non-performance is both legally incorrect and unrelated to the personal jurisdiction analysis. Treaties, even those directly benefitting private individuals, "generally do not create private rights or provide for a private cause of action" in federal courts. *Kialegee Tribal Town v. Zinke*, No. 17-cv-1670, 2018 WL 4286406, at *8 (D.D.C. Sept. 7, 2018) (citing *McKesson Corp. v. Islamic Rep. of Iran*, 539 F.3d 485, 489 (D.C. Cir. 2008)).

twenty-first century sufficient to qualify as "transacting business" under § 13-423(a)(1), *see Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 270-71 (D.C. 2001), nor that negotiation and execution of the Treaty plausibly had any "wide-reaching" consequences in the District espoused in *Thompson Hine, LLP v. Taieb*, 734 F.3d 1187, 1190-94 (D.C. Cir. 2013).[4]

Third, the government contacts exception plainly precludes exercise of personal jurisdiction here. (Opening Br. at 11-12.) Plaintiffs have not alleged that the Nation or Principal Chief Floyd has any contacts with the District except to engage with the federal government. (*See* Pls.' Opp. at 3) (detailing Nation's receipt of federal resources and Principal Chief Floyd's travels to the District "to meet with the federal agencies from which federal and trust resources flow . . . ."). This squarely falls within the government contacts exception. (Opening Br. at 11-12); *see also Cherokee Nation of Okla. v. Babbitt*, No. 96-02284, at *3-5 (D.D.C. Nov. 3, 1998).

To the extent Plaintiffs allege that the Nation's receipt of federal funds confers personal jurisdiction over Principal Chief Floyd, Plaintiffs are incorrect. Receipt of federal funds also falls squarely within the government contacts exception. *See Morgan v. Richmond Sch. of Health & Tech., Inc.*, 857 F. Supp. 2d 104, 107-08 (D.D.C. 2012).[5]

Also, to the extent that Plaintiffs contend that the mere fact that the Treaty is between the Nation and the federal government, seated in Washington, D.C., somehow serves as a "business transaction" upon which personal jurisdiction may be based, that contention is also incorrect. *See*

---

[4] Plaintiffs assert that "at least some" members of the Nation live in the District, and imply that is enough to constitute "wide-reaching" consequences. (Pls.' Opp. at 10.) They fail to note, however, that members of the Nation who live in the District account for only 0.029% of all members in the Nation. MCN Citizenship Facts and Stats, http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/. Plaintiffs do not and cannot explain how a "contract" that purportedly affects less than 1/30th of 1 percent of individuals is wide-reaching enough to confer personal jurisdiction.

[5] For that matter, receipt of federal funds proves nothing, as the Nation receives federal funding in Oklahoma, not the District of Columbia.

Alkanani v. Aegis Defense Servs., LLC, 976 F. Supp. 2d 13, 25 (D.D.C. 2014) (finding contract that company negotiated with Department of Defense is not a "business transaction" under § 13-423(a)(1) because contacts with federal government are not factored into the jurisdictional analysis). That the Nation is a sovereign that may engage in business discussions with the federal government is immaterial. *See Fuentes-Fernandez & Co., PSC v. Caballero & Castellanos, PL*, 770 F. Supp. 2d 277, 281-82 (D.D.C. 2011) (Louisiana Housing Authority's relationship with HUD could not serve as basis for personal jurisdiction because the housing authority's contacts with HUD were "uniquely governmental contacts"); *Gerber Prods. Co. v. Vilsack*, No. 16-cv-01696, 2016 WL 4734357, at *4 (D.D.C. Sept. 9, 2016) (in *Ex Parte Young* suit against Virginia officials, court found no personal jurisdiction because officials' contacts with the District were to communicate with the federal government about implementation of a federal program in Virginia, which were "uniquely governmental activities" covered by the government contacts exception).

Finally, and perhaps most importantly, Plaintiffs fail to allege ***how*** any of their purported harms arise from Principal Chief Floyd's contacts with the District as required by § 13-423(b). (*See* Pls.' Opp. at 12) (conclusorily stating that "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"). As noted in Principal Chief Floyd's Opening Brief, (Opening Br. at 8-9), satisfaction of § 13-423(b) is a prerequisite to establishing jurisdiction under any subsection of § 13-423(a). Plaintiffs rather quizzically argue that personal jurisdiction arises from the negotiation, execution, and carrying out of the 1866 Treaty. (Pls.' Opp. at 9-12.) Yet, Plaintiffs' alleged harm—denial of citizenship in the Nation—cannot arise from actions taken pursuant to the Treaty; rather, the harm arises if at all from actions that allegedly breach the Treaty. Plaintiffs have not, therefore, plausibly alleged that any actions giving rise to their alleged harm occurred in the District.

Plaintiffs fail to provide more than conclusory assertions and unsupported legal inferences to support their argument that this Court has personal jurisdiction over Principal Chief Floyd. This is insufficient to survive a motion to dismiss under Rule 12(b)(2). *Frost v. Catholic Univ. of Am.*, 960 F. Supp. 2d 226, 231 (D.D.C. 2013) (citing *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1092 (D.C. Cir. 2008)). Accordingly, the claims against Principal Chief Floyd should be dismissed for lack of personal jurisdiction.

II. Venue is Improper in the District of Columbia, and the Claims Against Principal Chief Floyd Should Be Dismissed.

Plaintiffs fail to plausibly allege that a "substantial part of the events or omissions giving rise to the[ir] claim[s]" occurred in the District of Columbia, 28 U.S.C. § 1391(b)(2) (2012), such that venue is appropriate here.[6] Though Plaintiffs are not required to bring suit in the "best" venue, they are required to bring suit in a **proper** venue. *Delta Sigma Theta Sorority Inc. v. Bivins*, 20 F. Supp. 3d 207, 212 (D.D.C. 2014) ("[T]he burden is still on the plaintiff to allege sufficient facts to indicate a substantial part of the events or omissions giving rise to the claim occurred in the chosen district.") (internal citations and quotation marks omitted). They have failed to do so here.

In support of their argument that the District has a "significant connection" to the claims, Plaintiffs assert that 25 of the Nation's members live in the District. (Pls.' Opp. at 17) (citing MCN Citizenship Facts and Stats, http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/). Plaintiffs fail to mention that those 25 District residents encompass only 0.029% of the Nation's 86,100 members (64,249 of whom reside in Oklahoma). *See* MCN Citizenship Facts and Stats, http://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/; *Delta Sigma Theta Sorority Inc.*, 20 F. Supp. 3d at 214 (holding that 0.2% sales in District of Columbia was

[6] Plaintiffs do not deny, and therefore concede, that venue is not appropriate under § 1391(b)(1). *See Rosenblatt*, 734 F. Supp. 2d at 22.

insufficient to constitute "substantial part" of events giving rise to plaintiff's claims). It is also unclear how any of the 25 District residents, who according to the "Citizenship Facts and Stats" are already impliedly enrolled members of the Nation, could be adversely affected by "administration of federal benefits" that allegedly excludes Freedmen. (Pls.' Opp. at 17.) Further, none of the named Plaintiffs is a resident of the District. (Am. Compl. at 1.) And, as discussed above, Plaintiffs fail to state how negotiation and execution of the Treaty gives rise to their alleged injuries. Plaintiffs have thus not pointed to a *single connection*, let alone a substantial connection, tying their claims to the District.

Perhaps recognizing their failure, Plaintiffs attempt to bootstrap their claims against Principal Chief Floyd to entirely different claims against the Federal Defendants under a theory of pendent venue. (Pls.' Opp. at 17-18.) "The pendent venue doctrine is an exception to the general rule that a plaintiff must demonstrate proper venue with respect to each cause of action and each defendant." *Martin v. U.S. Equal Emp't Opportunity Commn.*, 19 F. Supp. 3d 291, 309 (D.D.C. 2014). The Court may in its discretion exercise pendent venue over improperly-venued claims when such claims arise out of a common nucleus of operative fact, there are common issues of proof, and the interests of judicial economy, convenience, and fairness to the litigants would be furthered by hearing the claims together with claims that are properly venued. *Id.*; *Boggs v. United States*, 987 F. Supp. 11, 17 (D.D.C. 1997); *see also Beattie v. United States*, 756 F.2d 91, 103 (D.C. Cir. 1984).

Here, there are no common issues of fact or proof. The claims against Principal Chief Floyd for alleged denial of citizenship, (Am. Compl. ¶¶ 88, 103), are entirely different from the claims against the Federal Defendants for allegedly improperly disbursing funds to the Nation and recognizing James Floyd as the Principal Chief, (Am. Compl. ¶¶ 87, 94). Conclusorily stating that

the claims all relate to the 1866 Treaty, (Pls.' Opp. at 17), does not prove otherwise. The facts, witnesses, and proof needed to demonstrate each Defendant's alleged "breach" of the 1866 Treaty are different. The Court should decline to exercise pendent venue over the claims against Principal Chief Floyd on this basis alone.

Finally, although courts generally give significant weight to a plaintiff's choice of forum, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981), the choice will be given less weight when the forum bears no "factual nexus" to the claims. *Schmid Labs., Inc. v. Hartford Acc. & Indem. Co.*, 654 F. Supp. 734, 737 (D.D.C. 1986). Here, a factual nexus is plainly lacking. None of the Plaintiffs live in the District. (Am. Compl. at 1.) The Nation is not located in the District. Principal Chief Floyd does not reside in the District. (Opening Br., Ex. 1 ¶ 5.) The purported actions by Principal Chief Floyd allegedly causing harm do not occur in the District. (Am. Compl. ¶¶ 88, 103.) Therefore, the claims against Principal Chief Floyd should be dismissed for improper venue under Rule 12(b)(3).

III. This Court Does Not Have Subject Matter Jurisdiction Over the Claims Against Principal Chief Floyd, and They Should Be Dismissed.

Ex Parte Young commands that in order to avoid sovereign immunity by suing an official of the sovereign, the official must have "some connection" with enforcement of the challenged act. 209 U.S. 123, 157 (1908). Contrary to Plaintiffs' suggestion, the overwhelming majority of Courts that have addressed the "connection" requirement have held that a general duty to oversee the laws of the jurisdiction does <u>not</u> provide the requisite connection. (*See* Opening Br. at 16-19 (Fifth, Seventh, Ninth, and Eleventh Circuits)); *see also Stinnie v. Holcomb*, 734 Fed. App'x 858, 874-75 (4th Cir. 2018) ("[T]he [official] must have both proximity to and responsibility for the challenged state action, such that a federal injunction will be effective with respect to the underlying claim.") (internal quotation marks omitted); *Peterson v. Martinez*, 707 F.3d 1197,

1205-07 (10th Cir. 2013) ("[W]hen a . . . law explicitly empowers one set of officials to enforce its terms, a plaintiff cannot sue a different official absent some evidence that the defendant is connected to the enforcement of the challenged law."); *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1341-43 (Fed. Cir. 2006) ("A nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation to prevent a violation; it requires an actual violation of federal law by that individual."); *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 108, 114-15 (3d Cir. 1993) (Pennsylvania officials' general duty to uphold laws did not provide sufficient connection to challenged labor law for *Ex Parte Young* to apply).

Furthermore, the Sixth Circuit case on which Plaintiffs rely, *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982), which found that general enforcement authority was sufficient under *Ex Parte Young*, has been distinguished as an outlier by subsequent decisions from that Circuit. *See Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1414-15 (6th Cir. 1996) (stating that *Allied Artists* "disregard[ed] *Young* in action against a governor, because substantial public interest in enforcing trade practices legislation significantly obliged him to enforce state laws using his general authority") (internal quotation marks omitted); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015) (reinforcing that "general authority to enforce the laws" is insufficient to make government officials proper parties to litigation). Other than *Allied Artists*, Plaintiffs do not point to, and Principal Chief Floyd is unaware of, any other cases where general enforcement powers were sufficient to sue an official under *Ex Parte Young* because of the "substantial public interest" of the law at issue.

Simply put, Plaintiffs have sued the wrong official. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007). Although Principal Chief Floyd has general

executive powers over the Nation, (Opening Br., Ex. 2, art. V, § 1), he has no authority over citizenship determinations, nor any authority to implement or enforce the process for determining citizenship or appealing adverse determinations. (Opening Br., Ex. 2, art. III, §§ 1-3; Ex. 3.) Principal Chief Floyd's connection to the Citizenship Board is limited to his appointment (subject to approval by the National Council) of the members of the Board. (Opening Br., Ex. 2, art. III, § 1.) Plaintiffs' contention that Principal Chief Floyd "validates" citizenship determinations by signing enrollment cards is misleading. (Pls.' Opp. at 15.) Title 7 of the Muscogee (Creek) Nation Code makes clear that the entire citizenship determination process is handled by the Citizenship Board. (Opening Br., Ex. 3, §§ 4-101–5-106.) Principal Chief Floyd's signature merely validates the *enrollment card itself*, not the underlying citizenship determination. (*Id.* § 4-109.) Moreover, Plaintiffs admit that any citizenship denials have allegedly been made by the Citizenship Board, not Principal Chief Floyd. (Pls.' Opp. at 5.) The Principal Chief simply has no authority to confer citizenship on an applicant and cannot order the Citizenship Board to grant or deny an application.

Finally, despite Plaintiffs' reliance on *Vann v. United States Department of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012), the Cherokee Nation did not argue that, and the court therefore did not decide whether, a different official or administrative body should have been sued, rather than the principal chief. The Court in *Vann* thus did not reach the exact issue raised here. This Court should find that, in accordance with the law of nearly every other Circuit, general enforcement powers are insufficient, and Principal Chief Floyd does not have the requisite enforcement connection necessary to overcome the Nation's sovereign immunity. The claims against him should be dismissed pursuant to Rule 12(b)(1).

IV. Plaintiffs Must Exhaust All Available Tribal Remedies Before Seeking Redress in Federal Court.

Plaintiffs unconvincingly argue that exhaustion of tribal remedies is either not required or is excused by an exception to the tribal exhaustion rule. Plaintiffs first argue that they are not required to seek tribal remedies in any manner because the Nation's court would not have jurisdiction over the claims against the federal defendants named in this suit. (Pls.' Opp. at 19.) While it is true that tribal courts will not always have jurisdiction over a particular claim or defendant, Principal Chief Floyd does not propose that this suit be dismissed from federal court so that the exact suit may then be brought in tribal court. Instead, Principal Chief Floyd simply asserts that, under the doctrine of tribal exhaustion, Plaintiffs must first seek administrative and judicial remedies in tribal forums for redress of their underlying alleged injury—denial of citizenship—*before* this suit can be properly brought in federal court against anyone.

In addition, both cases upon which Plaintiffs rely, *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 73 (D.D.C. 2006) and *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), are distinguishable from the case at bar because both cases involved only federal defendants, jurisdiction over whom was plainly foreclosed in the tribal court. See *Vann*, 467 F. Supp. 2d at 59, 73 (involving claims against Department of the Interior under Administrative Procedure Act).[7] The *Vann* case is distinguishable on this issue because plaintiffs there initially brought suit *only* against federal defendants, challenging the federal government's recognition of a recent tribal election. The issue raised in the context of tribal exhaustion was therefore not whether those

[7] It appears that the court in *Vann* ruled on the issue of tribal exhaustion when the only defendants in the suit were the federal defendants and only claims brought under the Administrative Procedure Act were before the court. Had claims against the tribe or tribal officials relating to denial of alleged citizenship rights been properly before the court at that point in the case, and thus exhaustion raised in a different context, the court may have ruled differently on the exhaustion issue.

plaintiffs had received any determination on citizenship from the requisite tribal forums, but whether they should be required to seek review of the legality of the recent tribal election in tribal court.

Plaintiffs wrongly interpret *Vann* and *Yakima* to mean that any time federal defendants and federal claims are involved, issues of tribal law and governance do not need to first be brought to tribal forums. That interpretation would mean that a plaintiff could avoid tribal remedies entirely, simply by naming federal defendants and causes of action, as Plaintiffs have done here. Such a result would run afoul of the important policy considerations in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985), which strongly favor exhaustion of tribal remedies, particularly where, as here, issues of tribal self-governance are concerned. (Opening Br. at 20-25.)

The cases cited by Principal Chief Floyd in his Opening Brief make clear that even when federal defendants are sued in addition to tribal defendants, plaintiffs must first exhaust their tribal remedies before bringing suit in federal court. In *Smith v. Moffett*, 947 F.2d 442, 443 (10th Cir. 1991), the plaintiff sued federal officials, tribal officials, and private individuals for alleged violations of his civil rights. Although the case involved a mix of claims and defendants, the court held that because some of the plaintiff's claims may have arisen on-reservation, those claims were remanded to the district court to determine whether the claims must first be heard by the tribal courts. *Id.* at 445-46. Contrary to Plaintiffs' assertion, the court did not find that the federal defendants were subject to tribal jurisdiction—it held that jurisdiction over claims arising on the reservation presumptively lies with the tribal court, and the tribal court must first be given the opportunity to exercise its jurisdiction. *Id.*

Middlemist v. Secretary of United States Department of Interior, 824 F. Supp. 940, 946-47 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994), is also squarely on point. There, the plaintiffs sued both tribal officials and federal officials in federal court challenging the tribe's jurisdiction pursuant to regulations approved by the Secretary of Interior. *Id.* at 942-43. Plaintiffs argued that they were not required to exhaust their tribal remedies because, due to the presence of the federal defendants, they could not bring their exact case in tribal court. *Id.* at 946. The court disagreed, holding that *National Farmers* requires plaintiffs to "seek such relief in [t]ribal [c]ourt as is possible under the law and, once that is accomplished, [they] may seek further relief in this court." *Id.*; *see also Hall v. Babbitt*, 208 F.3d 218 (8th Cir. 2000) (requiring plaintiffs to exhaust tribal remedies where many parties were tribal parties and the issue involved tribal membership, notwithstanding the fact that the Secretary of Interior was alleged to have participated in misappropriation of funds and was named in the suit). That is exactly what Plaintiffs should be required to do here. As previously stated, Principal Chief Floyd does not suggest that Plaintiffs sue the Federal Defendants in tribal court. (Opening Br. at 24 n.10.) Rather, they must first pursue <u>all relief that is possible in tribal court</u>, namely, application for,[8] and appeal of any denial of citizenship in the Nation, as is prescribed in Title 7 of the Code. (Opening Br., Ex. 3.) If they are unsatisfied after that, they may bring suit in federal court. *See, e.g.*, *Tillett v. Lujan*, 931 F.2d 636, 641 (10th Cir. 1991) (recognizing that tribal exhaustion does not preclude a plaintiff from subsequently bringing suit in federal court, and affirming dismissal

---

[8] Plaintiffs now baldly assert that they have, in fact, applied for citizenship in the Nation. (Pls.' Opp. at 5.) Even if Plaintiffs were permitted to amend their complaint in opposition to a motion to dismiss—which they are not, *see Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 165 n.10 (D.D.C. 2014) ("It is well settled law that a plaintiff cannot amend his or her complaint by the briefs in opposition to a motion to dismiss.")—mere application for citizenship does not come close to exhausting the tribal remedies set forth in Title 7 of the Code. *See Burlington N. R. Co.*, *v. Crow Tribal Council*, 940 F.2d 1239, 1247 (9th Cir. 1991).

of federal case brought against tribal and federal officials for failure to exhaust tribal remedies); *Middlemist*, 824 F. Supp. at 946.

Requiring exhaustion in this case would also "promote the orderly administration of justice," *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856, because the tribal forums are uniquely tasked with and adept at handling issues of tribal self-governance, including membership determinations, whereas the federal courts are not. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (recognizing that "tribal courts are best qualified to interpret and apply tribal law"); *Burlington N. R. Co.*, 940 F.2d at 1245-46 (analyzing the tribal exhaustion rule in light of the Supreme Court's policies of supporting tribal self-government and promoting the orderly administration of justice, finding it improper for a federal court to retain jurisdiction over a case involving an "uninterpreted tribal ordinance and an obscure factual background," and holding that the "[t]ribe must itself first interpret its own laws and define its own jurisdiction," as an exercise of its sovereignty, before suit could be properly brought in federal court).

Moreover, should the Plaintiffs bring suit in federal court after exhausting their tribal remedies, the court will benefit from a factually developed record and the expertise of the tribal administrative and judicial bodies on this issue of tribal self-governance. (*See* Opening Br. at 24-25.) Without such a record, it is impossible to tell whether Plaintiffs have actually applied for and been denied membership, and if so, on what grounds. That Plaintiffs allege to have been denied treaty-guaranteed rights of citizenship does not diminish the propriety of tribal forums being permitted the opportunity to follow their own process for tribal citizenship determinations in the first instance. For all of the policy reasons espoused in *National Farmers*, the Nation's administrative and judicial bodies should be permitted to first make the determination of whether these Plaintiffs are eligible for enrollment in the Nation. (*See* Opening Br. at 20.)

Plaintiffs also argue that exhaustion would be futile because other "Creek Freedmen" pursued membership and were denied. (Pls.' Opp. at 21-22.) Plaintiffs' argument is unpersuasive. Futility is a narrow exception to the tribal exhaustion rule that appears to apply in only two contexts: (1) where tribal remedies "do not exist, are merely hypothetical, or are informal," *Aguilar v. Rodriguez*, No. 17-cv-1264, 2018 WL 4466025, at *2 (D.N.M. Sept. 18, 2018); and (2) where the plaintiffs have themselves pursued tribal remedies, but have been denied access to such remedies, *see Rosebud Sioux Tribe of S.D. v. Driving Hawk*, 407 F. Supp. 1191, 1195-96 (D.S.D. 1976), *aff'd*, 534 F.2d 98 (8th Cir. 1976). Neither situation applies here.

First, formal procedures regarding application for membership and administrative and judicial appeal of adverse membership determinations are available to Plaintiffs. (Opening Br., Ex. 2, art III, §§ 1-3; Ex. 3, tit. 7.) *Aguilar v. Rodriguez*, No. 17-cv-1264, 2018 WL 4466025, (D.N.M Sept. 18, 2018), cited by Plaintiffs, actually strongly supports Principal Chief Floyd's position. In *Aguilar*, the plaintiff argued that tribal exhaustion would be futile on the grounds that tribal court remedies for appealing his conviction and sentencing were "illusory." *Id.* at *7. The court found that because there was a written tribal procedure for appealing convictions and sentencing, and plaintiff provided "no failed attempt or other evidence to corroborate his self-serving testimony that the appeal process is illusory," the futility exception did not apply. *Id.* Plaintiffs here do not cite a single case where, in the face of formal written procedures, a plaintiff was nonetheless not required to exhaust tribal remedies because such procedures were "merely hypothetical" or "illusory."

Second, Plaintiffs contend that based on the Graham-Johnson case (which did not involve any of these Plaintiffs), it is clear that the "written tribal code outlining the process for obtaining review was sidestepped by the MCN judiciary," and therefore the procedures are "merely

hypothetical." (Pls.' Opp. at 22.) Again, Plaintiffs do not point to a single case where remedies pursued *by other people* provide evidence that pursuit of *these Plaintiffs'* tribal remedies would be futile. Simply alleging that others have pursued a remedy and received an unfavorable result cannot operate as a workaround of the tribal exhaustion doctrine.

Principal Chief Floyd is not aware of any case supporting Plaintiffs' contention. In all cases, including the one cited by Plaintiffs, the named plaintiff *himself* attempted to pursue tribal remedies and was denied access to such remedies, such that invoking the futility exception was proper. *See Rosebud Sioux Tribe of S.D.*, 407 F. Supp. at 1195-97; *Aguilar*, 2018 WL 4466025, at *7 (citing *Toya v. Toledo*, No. 17-0258, 2017 WL 3995554 (D.N.M. Sept. 9, 2017) (*further* exhaustion would be futile because tribal code expressly prohibited appeals of convictions)); *Wounded Knee v. Andera*, 416 F. Supp. 1236 (D.S.D. 1976) (*further* exhaustion excused as futile because plaintiff timely appealed conviction but tribal courts took no action for six months); *Garcia v. Rivas*, No. 15-cv-377, 2016 WL 10538197 (D.N.M Mar 11, 2016) (*further* exhaustion would be futile because plaintiff requested recalculation of his sentence three times and was denied each time).

In *Rosebud Sioux Tribe*, the court held that while tribal exhaustion is generally required in matters of tribal self-governance, it would have been futile in that instance because (1) under the constitution of the Rosebud Sioux Tribe, the tribal council had ultimate authority over the tribal courts and therefore had "supreme judicial authority"; (2) the tribal council had adopted a resolution, without notice or opportunity to be heard, proclaiming that the counterclaim plaintiff was guilty of election violations; (3) the tribal council had appointed a biased party to investigate those allegations; (4) the tribal council ignored tribal procedures on re-election decisions; and (5) the tribal council was the party that sued in federal court in the first instance and could not therefore

assert that tribal remedies must first be exhausted before suit was brought in federal court. 407 F. Supp. at 1195-97.

Based on these extraordinary facts, the court in *Rosebud Sioux* concluded that returning the counterclaim plaintiff to tribal forums "would create an irreparable injustice" and held that "[e]xhaustion is not required if the evidence conclusively . . . indicates that the outcome of the alternative proceedings has been prejudicially predetermined so as to make exhaustion futile and inappropriate." *Id.* at 1195, 1197. The same extraordinary facts cannot be found here. Because they have not actually availed themselves of the Nation's forums, Plaintiffs have not alleged a single fact demonstrating that the tribal forums have "prejudicially predetermined" the outcome of *these* Plaintiffs' membership pursuits. Pointing to the pursuits of others, which did not result in a decision on the merits of those individuals' claims, (Pls.' Opp. at 5-6), is simply insufficient to establish futility.[9]

Despite the existence of a clear tribal procedure for seeking citizenship and appealing any determinations, Plaintiffs have not even attempted to seek relief in tribal forums. They allege

---

[9] In a last ditch effort, Plaintiffs assert that because some cases cited by Principal Chief Floyd address tribal exhaustion and futility in the context of tribal sovereign immunity, and Principal Chief Floyd "has not invoked tribal sovereign immunity[,] . . . his adoption of its futility standard outside of the tribal immunity context is inappropriate." (Pls.' Opp. at 22-23.) Contrary to Plaintiffs' assertions, it is irrelevant that the tribal exhaustion rule often arises in federal court cases in the context of tribal sovereign immunity. As sovereigns, the doctrine of sovereign immunity generally bars suits against Indian tribes, and *Ex Parte Young* has only recently been applied by federal courts to tribal government action. But the reasons for tribal exhaustion cited by the courts in these and other cases, and the analyses therein, are not dependent on the fact that plaintiffs in those cases may have sued the tribe directly and as such, argued any exception to the doctrine of sovereign immunity. Whether it is the tribe that is sued or, as here, an officer of the tribe under *Ex Parte Young*, the tribal exhaustion rule and the principles requiring its adherence are the same. *See, e.g.*, *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1237-39 (10th Cir. 2014) (applying standard principles of tribal exhaustion and narrow interpretation of futility exception in *Ex Parte Young* action against tribal officials; rejecting plaintiff's futility argument where tribal remedies existed but had not been exhausted).

denial of citizenship *even as they fail to properly allege that they have even applied for citizenship*. Without actually applying for citizenship and at least *attempting* to exhaust tribal remedies, Plaintiffs' assertions that tribal exhaustion would be futile (or indeed that there has been any failure on the part of the tribe or its officers in this respect) is premature and therefore not legally actionable.

As Plaintiffs fail to meet their burden of demonstrating that any valid exception applies, this case should be dismissed and Plaintiffs should be required to pursue all available tribal remedies prior to bringing suit in federal court.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed.

Date: November 2, 2018

Respectfully submitted,

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

Kevin W. Dellinger (*admitted pro hac vice*)
Attorney General's Office
Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447

T: 918.295.9720
F: 918.756.2445

Counsel for Defendant Principal Chief James Floyd