

No. 07-5024

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FOR DISTRICT OF COLUMBIA CIRCUIT

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DISTRICT OF COLUMBIA CIRCUIT

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FOR DISTRICT OF COLUMBIA CIRCUIT

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MARILYN VANN, et al.,  
Appellees,

v.

DIRK KEMPTHORNE, Secretary of the United States Department of the  
Interior, et al.,  
Appellees,

CHEROKEE NATION,  
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

FINAL REPLY BRIEF OF APPELLANT CHEROKEE NATION

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## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

Pursuant to Circuit Rules of Appellate Procedure 27(a)(4) and 28(a)(1), Appellant Cherokee Nation files this Certificate as to Parties, Rulings and Related Cases as follows:

### **A. Parties and Amici**

#### **1. District Court Parties**

The Parties to the District Court action are: Plaintiffs Marilyn Vann, Ronald Moon, Donald Moon, Hattie Cullers, Charlene White, Ralph Threat, Faith Russell, Angela Sanders, and The Freedmen Band of the Cherokee Nation of Oklahoma; Defendants Dirk Kempthorne, Secretary of the United States Department of the Interior, and the United States Department of the Interior; and Defendants/Intervenors Cherokee Nation, Principal Chief Chadwick Smith of the Cherokee Nation, and unnamed officials of the Cherokee Nation.

#### **2. Parties in the Court of Appeals**

The parties to this appeal are: the Cherokee Nation, on its own behalf and on behalf of Principal Chief Smith of the Cherokee Nation and John Doe Tribal officials, Appellants; Marilyn Vann, Ronald Moon, Donald Moon, Hattie Cullers, Charlene White and Ralph Threat, Appellees; Dirk Kempthorne, Secretary of the Interior, and the United States Department of the Interior, Appellees. There are no known *amici* participating in this appeal.

**B. Rulings Under Review**

The Order appealed from is the Order of the United States District Court for the District of Columbia, *Vann v. Kempthorne*, No. 03-01711 (D.D.C. Dec. 19, 2006) (JA-90).

**C. Related Cases**

There are no pending related cases of which counsel is aware. There are several pending related cases in the District Court of the Cherokee Nation captioned *Raymond Nash v. Cherokee Nation* (Nos. CV-07-40, CV-07-41, CV-07-42, CV-07-43, CV-07-44, CV-07-45, CV-07-46, CV-07-47, CV-07-48, CV-07-49, CV-07-50, CV-07-56, CV-07-65 and CV-07-66) (D. Cherokee Nation 2007).

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Circuit Rules of Appellate Procedure 27(a)(4) and 26.1,

Appellant Cherokee Nation states as follows:

1. The Cherokee Nation and Principal Chief Chad Smith are not incorporated entities.
2. The Cherokee Nation and Principal Chief Chad Smith do not have any parent companies.
3. No company owns any stock in the Cherokee Nation or Principal Chief Chad Smith.

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## GLOSSARY

Nation	Cherokee Nation
1866 Treaty	Treaty between the United States and the Cherokee Nation of 1866, July 19, 1866, 14 Stat. 799
ICRA	Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq.
Act of 1890	An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes, 26 Stat. 636 (1890)
Civil Rights Act of 1866	An act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, 14 Stat. 27 (1866)

## **SUMMARY OF ARGUMENT**

A long line of Supreme Court and lower court precedent holds that a statute or treaty may abrogate tribal sovereign immunity only if it does so expressly and unequivocally in plain text. As Appellant Cherokee Nation (the “Nation”) set forth in its Initial Brief (“Nation’s Initial Br.”), this is a standard Plaintiffs cannot meet. Thus confronted with this existing precedent, Plaintiffs ask this Court to thrice create new law.

First, Plaintiffs argue that this historical standard for finding abrogation does not apply because “[t]ribal sovereign immunity . . . did not exist in 1866.” (Initial Brief of Appellees (“Pls.’ Br.”) at 3.) In fact, however, tribal sovereign immunity has been “the settled doctrine of the government from the beginning.” *Adams v. Murphy*, 165 F. 304, 308 (8th Cir. 1908). Indeed, as the Eighth Circuit recognized as early as 1895, “no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case.” *Thebo v. Choctaw Tribe*, 66 F. 372, 374 (8th Cir. 1895). Even the District Court’s opinion, despite its other faults, did not dispute this bedrock principle.

Second, Plaintiffs argue that the unequivocal abrogation standard does not apply because sovereign immunity in this case “conflicts with the overriding interest of the United States.” (Pls.’ Br. at 3.) However, no court has ever found

an implicit waiver of tribal sovereign immunity because of a conflict with an “overriding interest of the United States.” Indeed, the Nation’s sovereign immunity does not even affect the U.S. Government, much less conflict with its sovereignty such that it would create an overriding interest.

Third, Plaintiffs ask this Court to find that the Thirteenth Amendment to the U.S. Constitution abrogates the Nation’s sovereign immunity. As discussed below, however, the Thirteenth Amendment does not apply because (1) this case is not about slavery or involuntary servitude, (2) the 1866 Treaty is not enforcement legislation, and (3) this Court may not define conduct as a badge or incident of slavery when Congress has not done so. Moreover, even if the Nation’s alleged breach of the 1866 Treaty were a badge of slavery, the 1866 Treaty alone would still govern abrogation, and it does not abrogate the Nation’s immunity from Plaintiffs’ claims.

Resting their case on emotion rather than law, Plaintiffs repeatedly refer to the “ugly chapter of slavery” and distort the Nation’s arguments. (Pls.’ Br. at 1.) Contrary to Plaintiffs’ protestations, the Nation does not assert that it has a right to breach the 1866 Treaty nor that it has a right to avoid the consequences if it does. Rather, the Nation has simply asserted its sovereign immunity from Plaintiffs’ claims in federal court. This is a right that the 1866 Treaty – a negotiated agreement, not a unilateral congressional edict – reserved to the Nation and that

Congress never abrogated. Significantly, while the Nation's tribal courts are the exclusive judicial venue for Plaintiffs' claims, the 1866 Treaty did nothing to prevent the United States from enforcing the treaty should it ever deem it appropriate to do so.

In sum, the law and the facts evidence the Nation's immunity from the instant suit. Accordingly, this Court should reverse the District Court.

### **ARGUMENT**

#### **I. Abrogation of Tribal Sovereign Immunity Must Be Unequivocal on the Face of a Treaty or Statute. There Is No Such Abrogation in the 1866 Treaty or Any Statute.**

As detailed in the Nation's Initial Brief, the Supreme Court and lower federal courts have established an extremely high bar for finding congressional abrogation of sovereign immunity. Specifically, courts will find abrogation only when Congress has unequivocally expressed it on the face of a statute or treaty. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1498 (D.C. Cir. 1997); *Nero v. The Cherokee Nation*, 892 F.2d 1457, 1459 (10th Cir. 1989). Neither the Supreme Court nor any other federal court has ever held or even suggested any exception to this legal rule.

Accordingly, the Nation's Initial Brief analyzed the 1866 Treaty and demonstrated that it has *no* provision that unequivocally abrogated the Nation's sovereign immunity. Nowhere do Plaintiffs explain why the Nation's analysis of

the 1866 Treaty is incorrect or point to any treaty provision that even comes close to unequivocally abrogating the Nation's immunity. Rather, Plaintiffs simply reference Articles 6, 9, and 12 of the 1866 Treaty in conclusory fashion without addressing the Nation's analysis detailing why those same Articles do not abrogate the Nation's sovereign immunity. (Pls.' Br. at 20.)

Lacking unequivocal abrogation, Plaintiffs ask this Court to do what no court has ever done and infer abrogation of tribal sovereign immunity based on unprecedented exceptions to the unequivocal-abrogation standard. As discussed below, Plaintiffs' proposed exceptions lack any legal basis and would constitute bad legal policy.

## **II. Tribal Sovereign Immunity and the Unequivocal Abrogation Standard Existed in 1866.**

Plaintiffs assert that tribal sovereign immunity is a "modern judicial concept" that was first announced 50 years after the 1866 Treaty, and that Congress could not have considered it in 1866, much less realized the need for abrogation. (Pls.' Br. at 15.) As explained below, however, federal courts expressly recognized and protected tribal sovereign immunity from private suit well before 1919 and, most importantly, *did so requiring a clear statement of abrogation in statutory text*. (See Section A below.) Moreover, Congress itself evidenced its recognition of tribal sovereign immunity on several occasions in the nineteenth century, enacting statutes for the sole purpose of granting private

litigants the right to sue Indian tribes in federal court. (*See* Section B below.)

Indeed, it was the U.S. Government's general policy in the nineteenth century not to subject Indian tribes to private claims in U.S. courts. (*See* Section C below.)

Tellingly, Plaintiffs cite no case in the 230 years since the United States declared its independence in which a federal court asserted jurisdiction over an Indian nation absent unequivocal congressional authorization. The reason is simple – U.S. law and policy have always prevented it. (*See* Sections D and E below.)

**A. Tribal Sovereign Immunity Existed From the Beginning.**

From the founding, federal courts have recognized tribal sovereign immunity and refused to assert jurisdiction over Indian nations absent Congress's unequivocal mandate. As the Eighth Circuit in *Thebo v. Choctaw Tribe* explained when affirming dismissal of an action against the Choctaw tribe:

The constitutional competency of congress to pass [jurisdictional] acts has never been questioned, but no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress *expressly conferring the jurisdiction in the particular case*. The political departments of the United States government, by treaties, by acts of congress, and by executive action, have always recognized the Choctaw Nation "as a state, and as a distinct political society, separate from others, and capable of managing its own affairs and governing itself"; and the courts are bound by these acts of the political departments of the government.



66 F. 372, 374 (8th Cir. 1895) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831)) (emphasis added). Thus, Indian nations have always been regarded as far more than “pseudo-sovereign entities.” (Pls.’ Br. at 9.) Indeed, the court explained:

It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. “It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission . . .”

*Id.* at 375 (citing *Beers v. Arkansas*, 61 U.S. 527, 529 (1858)).

Critically, the *Thebo* court addressed the *historical* standard for finding congressional abrogation:

As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. ***The intention of congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms.***

*Id.* at 376 (emphasis added).

Significantly, the *Thebo* court did not describe itself as applying a novel principle. To the contrary, it explained that it was applying well-settled law. The Eighth Circuit again followed this well-settled principle in 1908 in *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908), recognizing its early origin:

[T]he Creek Nation is exempt from civil suit to compel performance of its contracts or to recover damages for violation . . . Upon considerations of public policy such Indian tribes are exempt from civil suit. *That has been the settled doctrine of the government from the beginning.*

*Id.* at 308 (emphasis added). Notably, that Indian nations were immune from civil suit was sufficiently grounded that, in *Adams*, “[t]he complainant throughout [the] litigation [had] conceded the exemption of the Creek Nation from civil suit,” *id.* at 309, which explains the plaintiff’s ultimately unsuccessful suit against the tribal chief.

*Thebo* and *Adams* are not obscure cases lost to judicial history. Federal courts have cited these cases as precedent for tribal sovereign immunity, beginning with the Supreme Court. In *United States v. United States Fidelity & Guaranty*, 309 U.S. 506, 512 n. 11 (1940), the Supreme Court relied in part on *Thebo* and *Adams* in reaffirming tribal sovereign immunity.<sup>1</sup> See also, *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957) (holding, citing *Thebo* and *Adams*, that “[t]he rule

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<sup>1</sup> In a case involving dram shop liability, the Oklahoma Supreme Court recently stated, without analysis or explanation, that the dissent in *Kiowa* discredited *USF&G* as authority for the doctrine of tribal sovereign immunity. *Bittle v. Bahe*, No. 103716, 2008 Okla. LEXIS 10 at \*\* 30 (Okla. Feb. 5, 2008). The court failed to explain how language in a dissenting opinion can discredit the authority of a case that the majority opinion in the same case cited to affirm the doctrine. In addition, the court was careful to point out the cause of action in *Bittle* “does [not] affect the Tribe’s membership or the Tribe’s right to govern its members,” and “does not interfere with the Tribe’s internal affairs or tribal government that barred the exercise of adjudicatory power in *Williams v. Lee* and *Santa Clara Pueblo v. Martinez*.” *Id.* at \*\* 35.

that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument”), *cert denied*, 355 U.S. 893 (1957); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 133 n. 2 (10th Cir. 1959) (citing *Thebo* and *Adams* as adhering to the description of Indian tribes as semi-independent nations with power of regulating internal relations).

*Thebo* and *Adams* evidence that tribal nations enjoyed sovereign immunity from this nation’s beginning, and that courts have always required that Congress express abrogation clearly in a statute’s text. Indeed, as *Thebo* and *Adams* explain, it was the U.S. Government’s (including Congress’s) *own* general policy not to subject tribes to U.S. court. Thus, contrary to Plaintiffs’ assertion, the 1866 Treaty’s lack of an unequivocal abrogation evidences both the Nation’s sovereign immunity and the U.S. Government’s intent not to except the 1866 Treaty from that policy.

These cases also importantly instruct that the public policy underpinning the unequivocal abrogation standard is not to give Congress advance notice of how to abrogate sovereign immunity but rather to protect the retained sovereignty of Indian nations. What was critical was not that Congress necessarily understood the standard courts would apply – though that standard was clear at the time – but that

the courts would not sacrifice this reserved right of Indian sovereignty unless they were confident from plain language that Congress intended to take that right away.

**B. Congressional Policy and Acts Evidence Congress's Understanding in 1866 of the Requirement to Express Abrogation Unequivocally.**

As the Eighth Circuit stated in *Thebo*, “[i]t has been the settled policy of congress not to sanction suits generally against these Indian Nations, or subject them to suits upon contracts or other causes of actions at the instance of private parties . . . .” *Thebo v. Choctaw Tribe*, 66 F. 372, 376 (8th Cir. 1895). In limited instances, however, Congress did abrogate tribal sovereign immunity, and those instances underscore that Congress understood in 1866 that Indian nations had sovereign immunity from private claims unless it expressly abrogated it.

The Nation’s Initial Brief provided one example, the Act of 1890, which one Senator justified by explaining that “[h]ere is a large body of freedmen who have been kept out of a large sum of money because there is no place for them to go to assert their claim.” CONG. RECORD, Vol. XXI, at 10360 (1890); JA-224. Other examples include a series of acts providing railroad companies with rights of way through Indian Territory that expressly provided for suits against Indian tribes for

“controversies arising” from the railways’ construction and operation.<sup>2</sup> There would have been no need for these and other jurisdictional grants but for Congress’s understanding that Indian nations were otherwise immune from private claims in U.S. courts.

Similarly, an omnibus bill from 1908 contains several such grants, which state, for example, that “the Court of claims is hereby authorized” to “hear and adjudicate the claims against the Choctaw Nation of Samuel Garland.”<sup>3</sup> Congress’s authorization of Garland’s suit against the Choctaw Nation is particularly instructive as the Supreme Court considered it in *Heirs of Garland v. Choctaw Nation*, 256 U.S. 439 (1921), implicitly acknowledging tribal sovereign immunity:

The estate, having no power to sue the Nation, could not do so until authorized by an act of Congress . . . . And these views must have impressed Congress, and induced its enactment authorizing suit against the Choctaw Nation.

*Id.* at 442, 445.

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<sup>2</sup> See, e.g., An act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, 23 Stat. 73 (1884); An act to authorize the Kansas and Arkansas Valley Railway to construct a railway through the Indian Territory, 24 Stat. 73 (1886); An act to authorize the Denison and Washita Valley Railway Company to construct and operate a railway through the Indian Territory, 24 Stat. 117 (1886).

<sup>3</sup> An Act To authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, 35 Stat. 444 (1908).

In sum, contrary to Plaintiffs' unsupported assertions, the foregoing historical record evidences Congress's intent to safeguard tribal sovereign immunity and its knowledge that it had to expressly abrogate sovereign immunity for private citizens to sue tribes in U.S. courts.

**C. The Unequivocal Abrogation Standard Is a General Historical Standard That Congress Understood.**

Even if *Thebo*, *Adams*, and Congress's numerous jurisdictional acts did not exist, case law explaining the standard for abrogating the United States's own sovereign immunity would sufficiently evidence that Congress knew in 1866 that the Nation was immune from private suit absent unequivocal abrogation. As the Supreme Court stated in 1869, "the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress *expressly authorizing* it to be done." *The Davis*, 77 U.S. 15, 19 (1869) (emphasis added). *See also Am. Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (discussing the "ancient pedigree" of the concept that sovereign immunity can be surrendered only by express waiver and citing *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)).

Indeed, sovereigns' immunity from private suit was so entrenched at our country's founding that Alexander Hamilton expressed it in Federalist 81 in the context of States' immunity, explaining that "[i]t is inherent in the nature of

sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT. This is the general sense, and the general practice of mankind . . . .” The FEDERALIST No. 81 (Alexander Hamilton) (emphasis in original). Given Indian nations’ quasi-sovereign status from the moment the United States formed, there can be no doubt that Congress was aware of the necessity for clear statutory abrogation as a prerequisite for suits against Indian tribes.

**D. The Court of Appeals for the Tenth Circuit Applied the Unequivocal Abrogation Standard to the 1866 Treaty and Found No Abrogation.**

As the Nation explained in its Initial Brief, the Tenth Circuit applied the unequivocal abrogation standard to the 1866 Treaty and concluded that there was no abrogation of immunity. *Nero v. Cherokee Nation*, 892 F.2d 1457, 1461 (10th Cir. 1989). Similarly, in *Davis v. United States*, 343 F.3d 1282, 1293-94 (10th Cir. 2003), the Tenth Circuit affirmed dismissal of claims by Seminole Freedmen descendants against the U.S. Government because the nation was immune from suit and was an indispensable party that could not be joined. Significantly, the Freedmen descendants’ claims were based in part on rights asserted under the 1866 treaty between the Seminole nation and the U.S. Government. *Id.* at 1286-87. Contrary to Plaintiffs’ assertions, the District Court’s errant finding that the Thirteenth Amendment abrogated the Nation’s sovereign immunity does not undermine these precedents’ holding that the 1866 Treaty itself does not do so.

**E. Plaintiffs' Exception Would Be Bad Legal Policy.**

From a policy perspective, the most charitable interpretation of Plaintiffs' proposed exception is that, if either tribal sovereign immunity itself or the unequivocal abrogation standard did not exist in 1866, this Court would be free to infer abrogation based on the "surrounding circumstances." Such a precedent would be a disaster for all Indian tribes. If tribal immunity did not exist before 1919, how could a court ever find an intent to preserve it? Every Indian nation would lack immunity from claims based on any Indian treaty (they were all executed before 1871), and on any applicable statute enacted before some uncertain date.

Additionally, if tribal immunity did then exist but the unequivocal abrogation standard did not, courts would routinely have to try to deduce the applicable intent a century or two after the treaty or legislation. While the legislative history and surrounding circumstances are clear here, that would not always be the case.

**F. Plaintiffs' Reliance on *Kiowa* Is Misplaced.**

In support of their assertion that tribal sovereign immunity is a modern concept, Plaintiffs cite dicta in *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998), in which Justice Kennedy opined that tribal immunity developed "almost by accident." However, Justice Kennedy's dicta did not address: (1)



*Thebo* and *Adams*; (2) the Act of 1890 and its legislative history evidencing Congress's belief that the Freedmen could not sue the Nation in U.S. court; (3) the U.S. Government's historic policy not to subject tribes to U.S. courts; (4) *Garland*, evidencing not just Congress's recognition of tribal sovereign immunity, but the Supreme Court's as well (*see* page 10, *supra*); and (5) the other nineteenth century statutes that Congress enacted to abrogate tribal sovereign immunity.

Moreover, Justice Kennedy's focus on *Turner v. United States*, 248 U.S. 354 (1919), is misplaced. Justice Kennedy described *USF&G*, a key case recognizing sovereign immunity, as relying on *Turner*, but noticeably overlooked the fact that the Supreme Court in *USF&G* also explicitly relied on *Thebo* and *Adams*. *See United States v. United States Fidelity & Guaranty*, 309 U.S. 506, 512 n. 11 (1940). In any event, this Court has before it ample jurisprudence and other evidence demonstrating the historical roots of tribal immunity.

**G. Plaintiffs Misread *Santa Clara Pueblo*.**

As the foregoing shows, the standard set forth in *Santa Clara Pueblo* and its progeny clearly governs this case. *Santa Clara Pueblo* did not announce new law, but merely reaffirmed long-standing precedent and policy. Lacking support in federal jurisprudence for their proposed exception, Plaintiffs misrepresent the Supreme Court's analysis in *Santa Clara Pueblo*. Specifically, Plaintiffs refer to several passages in which the Supreme Court looked at legislative history, and

assert that “[t]he fact that Congress considered abrogation of tribal sovereign immunity and eventually rejected it in the final bill heavily influenced the Supreme Court’s decision.” (Pls.’ Br. at 17.) This is patently false. *None* of Plaintiffs’ cited passages have anything to do with the court’s decision upholding *tribal* sovereign immunity.

The Supreme Court’s analysis of tribal sovereign immunity in *Santa Clara Pueblo* constituted Part III of the opinion and comprised just two paragraphs. The first paragraph explained that tribal sovereign immunity was long-settled but that Congress had plenary authority over it. *Santa Clara Pueblo*, 436 U.S. 49, 58 (1978). In the second paragraph, the Supreme Court explained the following:

It is settled that a waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief . . . . In the absence here of any unequivocal expression of legislative intent, we conclude that suits against the tribe under ICRA are barred by its sovereign immunity from suit.

*Id.* at 58-59 (citations omitted). Thus, the Supreme Court looked solely to ICRA’s text in concluding that ICRA did not abrogate tribal sovereign immunity.

In Part IV of its opinion, the Supreme Court first quickly concluded that the tribe’s Governor did not share the tribe’s immunity and then examined at length whether ICRA contained an implicit right of action against the Governor. *Id.* at 59. Thus, all of the passages that Plaintiffs reference are from the Supreme Court’s

analysis of the factors used “in determining whether a cause of action is implicit in a statute not expressly providing one,” *id.* at 60, a much different issue with a much different standard.<sup>4</sup>

### **III. There Is No Overriding Interest Exception to the Unequivocal Abrogation Standard.**

Citing *United States v. Wheeler*, 435 U.S. 313 (1978), *Washington v. Confederated Tribes*, 447 U.S. 134 (1980), and a few other cases, Plaintiffs disingenuously claim that the “Supreme Court has recognized that tribal sovereign immunity can be abrogated ‘by implication as a necessary result of their dependent status,’” and that such abrogation occurs “when exercise of tribal sovereignty would be ‘inconsistent with the overriding interests of the National Government.’” (Pls.’ Br. at 9-10) (citations omitted). That is simply false. The Supreme Court has not so recognized, and there are reasons why the cases Plaintiffs cite are inapposite.

First, all of Plaintiffs’ cited cases solely address limited divestitures of tribal *sovereignty* based on tribes’ dependent status and the resulting conflict with U.S.

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<sup>4</sup> Plaintiffs argue that *Florida Paraplegic Ass’n v. Miccosukee Tribe*, 166 F.3d 1126 (11th Cir. 1999) relied on Congress’s advance knowledge of the unequivocal abrogation standard. (Pls.’ Br. at 18.) As the Nation has shown, Congress had such knowledge in 1866. Moreover, *Florida Paraplegic*’s import is not its affirmation of the unequivocal abrogation standard, which was well settled, but rather its explanation that such standard has historically meant that Congress can abrogate sovereign immunity “*only by making its intention unmistakably clear in the language of the statute.*” *Id.* at 1131 (emphasis added).

sovereignty. The cases do not come close to addressing tribal *sovereign immunity*, which never affects, much less conflicts with, the sovereignty of the “National Government.” Indeed, there can be no such conflict because tribes are not immune from U.S. claims; the U.S. Government is always free to sue tribes in federal court. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][a] (2005) (citing *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987)). Indeed, Plaintiffs originally filed this case solely against the U.S. Government because the U.S. Government had not taken any of the enforcement actions available to it if it deemed them appropriate.

Second, as the Supreme Court explained in *Wheeler*:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . . [and] rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations.

*United States v. Wheeler*, 435 U.S. 313, 326 (1978) (emphasis added). This case, of course, has nothing to do with the Nation’s external relations and everything to do with its internal affairs. As the Supreme Court explained:

[T]he powers of self-government . . . are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe’s dependent status. “[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its

independence -- its right to self government, by associating with a stronger, and taking its protection.'

*Id.* (quoting *Worcester v. Georgia*, 31 U.S. 515, 560-561 (1832)).

Third, Plaintiffs' cases, including *Wheeler* and *Washington v. Confederated Tribes*, all examine the structural divestitures that implicitly occurred at the formation of United States and applied to all tribes. The Supreme Court has never applied this principle on a tribe-by-tribe basis. Nothing in those cases suggests that courts have free license to identify overriding U.S. interests unmoored to those structural considerations applicable to all Indian tribes.

Given the foregoing, Plaintiffs' proposed "overriding interest" exception is a thinly veiled request for this Court to re-write history – or, more specifically, to include in the 1866 Treaty something the parties to that treaty did not agree to and for which the U.S. Government did not bargain. Were this Court to insert provisions within an Indian treaty based on what it divines as an overwhelming U.S. interest, it would establish a dangerous precedent that could not be confined to this case, to tribal sovereign immunity, or even to tribal treaties.

**IV. Even If This Court Could Disregard the Unequivocal Abrogation Standard and Examine the Surrounding Circumstances, It Is Clear That the Parties to the 1866 Treaty Did Not Intend to Abrogate the Nation's Sovereign Immunity From Plaintiffs' Claims.**

As the foregoing analysis and the Nation's Initial Brief evinces, this Court must look only at the face of the 1866 Treaty to determine if there has been

unequivocal abrogation. Plaintiffs, however, urge this Court to contravene precedent, by-pass the unequivocal abrogation standard, and look beyond the 1866 Treaty's text. They then argue that "[t]he circumstances surrounding the ratification of the Thirteenth Amendment and the Treaty of 1866" show Congress's intent to abrogate the Nation's immunity from Plaintiffs' claims. (Pls.' Br. at 13.) To the contrary, even if it were proper for this Court to consider extraneous circumstances, the Nation's Initial Brief details why those circumstances further evidence the Nation's sovereign immunity. (Nation's Initial Br. at 31-35.)

For example, not only does the 1866 Treaty omit any unequivocal abrogation, but it affirmatively indicates that the Nation and the U.S. Government intended to preserve the Nation's sovereign immunity. Specifically, the 1866 Treaty provided for private actions only in Article 7, which, by its terms, is inapplicable here.<sup>5</sup> Moreover, Article 13 reserved all other disputes arising in Nation territory to the tribal courts. (Nation's Initial Br. at 24-25.) Were there any

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<sup>5</sup> Plaintiffs argue that the canons of treaty construction do not require this Court to interpret any ambiguities in the 1866 Treaty in the Nation's favor. Plaintiffs, however, cite no cases supporting this point. As the Nation's Initial Brief explained, the 1866 Treaty was a negotiation among three parties – two competing factions of the Nation and the United States. (Nation's Initial Br. at 26-28.) At issue is whether the Nation ceded its sovereign right to immunity from Plaintiffs' claims during the course of negotiations in which the United States necessarily used whatever leverage it had against its dependent. Were this Court to find abrogation, it would be the sovereign Nation – which the canons protect – that would suffer. Thus, the policy reasons underlying the special canons of construction apply.

doubt as to the treaty parties' intent, the Supreme Court settled the issue when it analyzed the 1866 Treaty in *In re Mayfield*, 141 U.S. 107 (1891):

As the seventh article of the treaty limited the power of the court proposed to be created, and of the district courts already existing, to cases of which this was not one, it would seem to follow that offenses not there described were intended to be cognizable in the Indian courts, and that the thirteenth article was inserted as a further declaration or recognition of that fact.

*Id.* at 114-115.

Thus, for good reason, Plaintiffs have now abandoned their argument, made before the District Court, that Article 7 of the 1866 Treaty provided the District Court with jurisdiction. In its place, Plaintiffs discuss the undisputed fact that the 1866 Treaty intrudes on some aspects of the Nation's sovereignty, recount selected parts of the history leading up to the 1866 Treaty without any discussion of the hard-fought negotiations over it, and argue, without citing any case or explaining why, that such intrusion and limited history necessarily mean an intent to infringe on sovereign immunity. This argument fails for two principal reasons that the Nation explained in its Initial Brief and that Plaintiffs failed to address.

First, the 1866 Treaty's text, the Civil Rights Act of 1866, and later congressional acts contradict it. Though contemporaneous with the 1866 Treaty, the Civil Rights Act of 1866 expressly authorized federal court jurisdiction for claims arising under it while the 1866 Treaty did not. While both relied on the

1866 Civil Rights Act, the District Court and Plaintiffs never addressed this glaring difference.<sup>6</sup>

Second, federal courts have always recognized a significant difference between intrusion into sovereignty and abrogation of sovereign immunity. For example, the Supreme Court reaffirmed in *Santa Clara Pueblo* that Congress could impose substantive constraints on a tribe (intruding on its sovereignty) without abrogating its sovereign immunity. Indeed, *Nero* made this precise distinction with respect to the 1866 Treaty itself, finding that, while Article 9 imposed a substantive constraint on the Nation, it did not abrogate its sovereign immunity. Plaintiffs do not offer any principled basis why this Court may now abandon this distinction. Indeed, in their discussion of the surrounding circumstances, Plaintiffs noticeably omit the U.S. Government's historical policy *not* to subject tribes to private suits in U.S. court.

Mysteriously, Plaintiffs cite to *Krystal Energy v. Navajo Nation*, 357 F.3d 1055, 1058 (9th Cir. 2004), for its statement that Congress "need not make its intent to abrogate 'unmistakably clear' in a single section of a statute," apparently suggesting that the Ninth Circuit held that congressional abrogation need not be unequivocal. To the contrary, the Ninth Circuit expressly reaffirmed the

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<sup>6</sup> Cf. *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 195 (1999) (finding no abrogation of rights not addressed in treaty where contemporaneous treaties evidenced that abrogation of such rights required express language).



unequivocal abrogation standard in *Krystal Energy*, finding abrogation within the applicable statute's plain text and not from any surrounding circumstances. *Id.* at 1057. The Ninth Circuit just looked at more than one section within the same statute.<sup>7</sup>

Not surprisingly given the foregoing, Plaintiffs do not cite any case in which the Freedmen or their descendants were able to sue the Nation in federal court without a specific congressional grant. Nor do Plaintiffs cite to any case in which *any* of the Five Civilized Tribes were subject to private plaintiffs' suits in federal court without congressional action. It is a weighty point that no court has ever held that the treaty parties intended any of the 1866 treaties to abrogate the sovereign immunity of any of the Five Civilized Tribes.

**V. The Thirteenth Amendment Does Not Abrogate the Nation's Sovereign Immunity From Plaintiffs' Claims.**

Plaintiffs argue that the Thirteenth Amendment protects their participation rights in the Nation and abrogates the Nation's sovereign immunity from their claims. Yet, Plaintiffs, like the District Court, never cited to even one case addressing the Thirteenth Amendment that supports this argument. Consequently, faced with no support in Thirteenth Amendment jurisprudence, Plaintiffs turn to inapposite Fourteenth and Fifteenth Amendment cases. Plaintiffs' arguments fail.

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<sup>7</sup> Also mystifying is the Plaintiffs' citation to *Decoteau v. District County Court*, 420 U.S. 425 (1975). That case has nothing to do with sovereign immunity.

**A. The Thirteenth Amendment Does Not Protect Plaintiffs' Purported Participation Rights in the Nation.**

The Thirteenth Amendment has no relevance to this case. This case is not about slavery or involuntary servitude. The 1866 Treaty was not Thirteenth Amendment enforcement legislation, and this Court may not on its own deem the purported breach a badge of slavery.<sup>8</sup>

The Nation explained the reasons why the 1866 Treaty is not Thirteenth Amendment enforcement legislation in its Initial Brief. Plaintiffs failed to address the primary reason – the 1866 Treaty was entered into pursuant to the U.S. Constitution's Treaty Clause with the participation of just one House of Congress.<sup>9</sup> Nor did Plaintiffs present any case or historical evidence indicating why, contrary to the evidence the Nation submitted, Congress in 1866 would have understood the Thirteenth Amendment to encompass voting rights in an Indian tribe.<sup>10</sup>

Instead, Plaintiffs state the wholly unsupported conclusion that “[t]he Treaty of 1866 was Congress’s chosen means of enforcing the Thirteenth Amendment’s prohibition on badges and incidents of slavery . . . .” (Pls.’ Br. at 32.) But,

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<sup>8</sup> Moreover, the Nation is not engaged in “discriminatory conduct . . . aimed solely at the descendants of former slaves.” (Pls.’ Br. at 29.) The Nation’s desire to define itself as an Indian tribe comprised of Indians has nothing to do with skin color and everything to do with who is, and who is not, an Indian.

<sup>9</sup> The Thirteenth Amendment provides that “Congress,” not the Senate alone, “shall have power to enforce this article by appropriate legislation.” U.S. Const. amend. XIII, § 2.

<sup>10</sup> See Nation’s Initial Brief at 42-44.

Plaintiffs fail to cite anything supportive in the 1866 Treaty's legislative history, much less in the 1866 Treaty itself.<sup>11</sup>

Similarly, though the Nation set forth the extensive case law recognizing that Congress, and not the courts, has the exclusive authority to determine what constitutes a badge of slavery, Plaintiffs did not address any of those cases. Instead, Plaintiffs cite Fourteenth and Fifteenth Amendment voting rights cases for the proposition that this Court may look directly to the Thirteenth Amendment to protect Plaintiffs' purported rights. Apart from disregarding the on-point jurisprudence, Plaintiffs miss a crucial difference between those cases and this one.

In Plaintiffs' cited cases, *Smith v. Allwright*, 321 U.S. 649 (1944), *Nixon v. Condon*, 286 U.S. 73 (1932), and *Nixon v. Herndon*, 273 U.S. 536 (1927), the plaintiffs alleged a violation of an *express* constitutional right – challenging state action that denied “equal protection of the laws.” By contrast, Plaintiffs do not allege that the Nation is holding them as slaves or involuntary servants – the

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<sup>11</sup> Plaintiffs simply note that Congress's primary involvement in Indian issues was through Senate consent to treaties until Congress passed a law ending the practice of Indian treaty-making in 1871. Congress, of course, always had the power to pass legislation governing Indian affairs when it desired to do so. *See, e.g.*, An Act to regulate trade and intercourse with the Indian tribes, 1 Stat. 137 (1790); An act to provide for the organization of the department of Indian Affairs, 4 Stat. 735 (1834). The 1871 statute was simply the result of a political turf war by the U.S. House of Representatives, which was envious of the Senate's role in helping control Indian land. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[9] (2005).

equivalent Thirteenth Amendment claim. Instead, Plaintiffs assert harm by a judicially determined “badge or incident” of slavery, which is a very different matter. As the Nation’s Initial Brief explains, no court has ever inferred a private right of action in that context.

Remarkably, Plaintiffs argue that this Court should deem the denial of their alleged rights a badge of slavery precisely because they cannot cite to any source identifying this right in the Thirteenth Amendment itself, in congressional enforcement legislation, or elsewhere in the Constitution. This is not legal argument; it is not even logic. Were this Court to agree, nothing would prevent future plaintiffs from claiming other rights purportedly contained in, and protected by, the Thirteenth Amendment.<sup>12</sup> While Plaintiffs assert that their claims are unique and would create no slippery slope, nothing distinguishes Plaintiffs’ purported federal right from many other federal statutory rights. (Nation’s Initial Br. at 20.)

Nevertheless, Plaintiffs label “bizarre” the Nation’s position that voting rights could not constitute a badge or incident of slavery absent congressional enforcement legislation. In support, Plaintiffs make the genuinely bizarre assertion that the Thirteenth Amendment must protect their voting rights because the

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<sup>12</sup> Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B.C. L. REV. 307, 372 (2004) (arguing that the Thirteenth Amendment protects the right to marry the partner of one’s choice).

Fourteenth and Fifteenth Amendments do not. Notably, Plaintiffs disregard the Nation's citation to Professor Amar's authoritative work explaining the historical reasons why the Thirteenth Amendment would not protect voting rights absent congressional action. *See* Akhil Reed Amar, *America's Constitution* 382 (2005).

**B. Even if the Nation's Alleged Breach of the 1866 Treaty Were a Badge or Incident of Slavery, the 1866 Treaty Would Still Govern Abrogation.**

As the Nation explained in its Initial Brief, were this Court to find the 1866 Treaty Thirteenth Amendment enforcement legislation, then (as such enforcement legislation) the 1866 Treaty alone would govern the issue. The Nation cited many cases so holding, but Plaintiffs presented no case contravening that precedent.<sup>13</sup> Rather, Plaintiffs confusingly assert that the governing precedents do not apply to this case because those cases dealt with claims for private damages and this case deals with purported participation rights in the Nation. This is a distinction without a difference.

Every precedent the Nation cited involved a claim of a federal right, just as in this case. Every precedent the Nation cited involved a claim that the defendant discriminated against the plaintiff based on the plaintiff's race, just as in this case. Every precedent the Nation cited involved a claim based on an alleged badge and incident of slavery, just as in this case. And every precedent the Nation cited

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<sup>13</sup> *See* Nation's Initial Br. at 38.

involved a claim related to a congressional act (such as a statute or treaty), just as in this case.

Even if this Court were to find that the 1866 Treaty is not enforcement legislation, but that this Court on its own may deem the Nation's alleged breach of the 1866 Treaty a badge or incident of slavery, the 1866 Treaty itself (as the origin of Plaintiffs' purported rights) would still govern abrogation for two reasons: the law and the facts.

First, with respect to the law, a court is not free to choose a different remedial scheme than that to which the President and the Senate agreed. As the Supreme Court has explained, "[w]hether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required . . ." *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) (refusing to create new remedies even when constitutional rights are at issue).<sup>14</sup> Here, Plaintiffs' complaint reduces to an objection to the 1866 Treaty's (and, therefore, the U.S. Government's) choice to limit Plaintiffs' judicial forum to tribal court rather than federal court. While Plaintiffs think that "simply absurd," the

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<sup>14</sup> See also, e.g., *Chappell v. Wallace*, 462 U.S. 296 (1983) (refusing to create a remedy to address alleged constitutional violations by the military in its treatment of a soldier, deferring to the military justice system Congress created); *Bush v. Lucas*, 462 U.S. 367 (1983) (refusing to create a *Bivens* action even though Court assumed a First Amendment violation and acknowledged that "existing remedies do not provide complete relief for the plaintiff").

U.S. Government and the Nation in 1866 did not, and that is what governs. (Pls.' Br. at 28.)

Second, with respect to the facts, the right to be treated as native Cherokee cannot be separated from the 1866 Treaty's implicit requirement to bring any claim about a deprivation of that right in tribal court. Each element of the 1866 Treaty was a negotiated *quid pro quo* for the other. Both facets are thus inseparably welded together; a court cannot divide them without re-writing the 1866 Treaty.

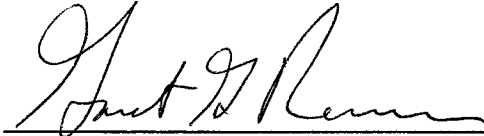
### **CONCLUSION**

Confronted with the facts regarding the 1866 Treaty and the law protecting the Nation's sovereign immunity, Plaintiffs ask this Court to rewind history and record a new agreement that the parties never struck. The law is plain; this Court may not do so, and equity equally demands that it refrain.

In 1866, two Nation factions and the Commissioner of Indian Affairs sat down and negotiated a bargain comprising the 1866 Treaty. The Nation conceded many things in the 1866 Treaty, but it did not cede its sovereign right to immunity from private claims. "Treaties are not a grant of property or sovereignty to Indian tribes, but a cession of those rights to the United States with a reservation of those rights not abandoned." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01[2] (2005) (citing *United States v. Winans*, 198 U.S. 371, 381 (1905)).

Plaintiffs' frustration is not with the law, but rather solely with the parties in 1866 who did not give Plaintiffs the right to sue in federal court.

Respectfully submitted this 27th day of March, 2008.



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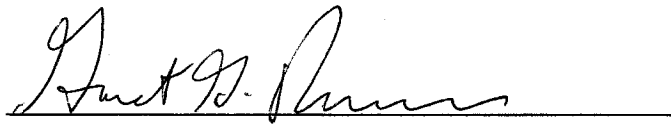
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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point, Times New Roman font.

A handwritten signature in black ink, appearing to read "D. G. Smith", is written over a horizontal line.

Attorney for the Cherokee Nation, on its own  
behalf and on behalf of Principal Chief Smith of  
the Cherokee Nation and John Doe Tribal officials,  
Appellant

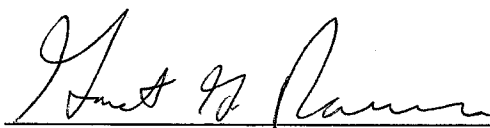
Dated:        March 27, 2008

## CERTIFICATE OF SERVICE

I hereby certify that two copies of the Final Reply Brief of Appellant Cherokee Nation were served as indicated, to the counsel listed below, on this 27th day of March, 2008:

<p>Alvin Bertram Dunn Pillsbury Winthrop Shaw Pittman LLP 2300 N Street, NW Washington, DC 20037 (via U.S. Mail)</p> <p>R. Craig Lawrence Assistant U.S. Attorney U.S. Attorney's Office, Civil Appellate 555 4th Street, NW Washington, DC 20530 (via U.S. Mail)</p>	<p>Jonathan Velie Velie &amp; Velie 210 East Main Street Suite 222 Norman, OK 73069 (via U.S. Mail)</p> <p>Aaron P. Avila United States Department of Justice ENRD, Appellate Section PHB Mail Room 2121 601 D Street, N.W. Washington, DC 20004 (via U.S. Mail)</p>
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I further certify that, on this 27th day of March, 2008, I have caused fourteen copies of the Final Reply Brief of Appellant Cherokee Nation to be delivered by hand to the Clerk of the Court.

  
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