UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Deborah K. Hendrix, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CIV-08-605-M
	)	
Wallace Coffey, et al,	)	
	)	
Defendants.	)	
_____	)	

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

William R. Norman, OK Bar # 14919
James M. Burson, OK Bar # 20037
HOBBS, STRAUS, DEAN & WALKER, LLP
117 Park Avenue, 2nd Floor
Oklahoma City, OK 73102
Phone: (405) 602-9425
Fax: (405) 602-9426
wnorman@hobbsstraus.com
jburson@hobbsstraus.com
ATTORNEYS FOR DEFENDANTS
TRIBAL OFFICIALS

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Deborah K. Hendrix, et al, Plaintiffs, v. Wallace Coffey, et al, Defendants.	)	Case No. CIV-08-605-M

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

Come now Wallace Coffey, Ronald Redelk, Eddie Mahseet, Lanny Asepermy, Jenice Bigbee (collectively Comanche Business Committee members), Donna Wahnee, Comanche Enrollment Director (hereinafter collectively referred to as "**Tribal Officials**") and Kirke Kickingbird and Hobbs, Straus, Dean & Walker, LLP, (attorneys for Comanche Nation), by and through undersigned counsel, and respectfully move under Federal Rules of Civil Procedure, Rule 12, to dismiss the above captioned case on the following grounds:

1. This court does not have subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), because there is neither diversity, nor a federal question: the facts and allegations in Plaintiffs' Amended Complaint belie averment of federal question jurisdiction based on alleged violations of federal civil rights or references to other federal law, and this court does not have jurisdiction over the alleged claims raised under the Indian Civil Rights Act.

2. This Court does not have jurisdiction because the requested relief, if granted, would be retroactive and runs against the Comanche Nation which is protected by sovereign immunity along with the Tribal Officials.
3. The complaint fails to state a claim against Tribal Officials or attorneys for Comanche Nation upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6).

In support whereof, see the attached Brief in Support of Motion to Dismiss.

Respectfully submitted,

/s/ James M. Burson
William R. Norman, OK Bar # 14919
James M. Burson, OK Bar # 20037
HOBBS, STRAUS, DEAN & WALKER, LLP
117 Park Avenue, 2nd Floor
Oklahoma City, OK 73102
Phone: (405) 602-9425
Fax: (405) 602-9426
wnorman@hobbsstraus.com
jburson@hobbsstraus.com
ATTORNEYS FOR DEFENDANTS

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

All Defendants move to dismiss Plaintiffs' suit as this Court does not have subject matter jurisdiction over the complaint, Fed.R.Civ.P. 12(b)(1), and Plaintiffs fail to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6). First, there is no basis for Federal Court jurisdiction: there is neither diversity, nor a federal question, over which the Court has jurisdiction in this matter. Plaintiffs allege that Defendants violated their federally guaranteed civil rights, however, their facts and allegations belie their averment. The Federal civil rights Plaintiffs allege were violated do not apply in a tribal context (see discussion below), particularly as regards to tribal membership, and other internal matters of the Comanche Nation. While the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq., (hereafter "ICRA") makes many of the provisions of the United States' Bill of Rights applicable to tribes, the ICRA provides no recourse to the federal courts for any cause other than habeas corpus. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978). However, Plaintiffs are not in custody of the Comanche Nation and make no allegations that invoke the habeas corpus jurisdiction of the Court. Additionally, the Comanche Nation retains sovereign immunity from suit as an attribute of its inherent sovereignty. See Id. at 58–59. This immunity extends to the Tribal Officials acting in the scope of their official capacities. Id. at 71–72. Second, Plaintiffs' complaint does not state a claim upon which relief can be granted. There is no legal premise for the relief

sought by the Plaintiffs under any of the federal acts referred to by Plaintiffs that can be considered in this Court, and no set of facts the Plaintiffs could prove would entitle them to the relief they seek under those laws. As such, Plaintiffs' Amended Complaint does not state a claim upon which relief can be granted.

PROCEDURAL POSTURE

Plaintiffs filed a "Complaint" on June 11, 2008, and filed an "Amended Complaint" on June 23, 2008, accompanied by a "Motion for T.R.O." The Court held a hearing on June 25, 2008, to take testimony and receive exhibits related to Plaintiffs' requested injunctive relief.[1] Plaintiffs ask this Court to construe the Comanche Nation Constitution (Def. Ex. 13) and other Comanche law, overturn the findings of fact of a tribal forum, and declare Ms. Hendrix and her children are lawful members of the Comanche Nation and that they are entitled to material and monetary tribal benefits. (Am. Compl. Generally). Moreover, Plaintiffs request the Court to compel the Tribal Officials to conduct another tribal election, which is already completed, in order allow Ms. Hendrix's participation. (Am. Compl. at 15).

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1 For clarification purposes, we will only be making reference to *pro se* Plaintiffs' "**Amended Complaint**" filed June 23, 2008, as this document superseded the original "Complaint." (Mink v. Suthers, 482 F.3d 1244, 1254 (10th Cir. 2007)) Because Plaintiffs did not number the paragraphs of either complaint in accordance with Fed.R.Civ.P. Rule 10(b), we are only able to generally reference **page numbers of the Amended Complaint**. In addition, because Plaintiffs did not resubmit with their Amended Complaint exhibits previously submitted with their Complaint and to alleviate any confusion, we will reference all **exhibits** by the numbering scheme assigned to all "**jointly admitted exhibits**" (including the "Hearing Notebook") at the hearing held on June 25, 2008. Additionally, service of the Amended Complaint upon attorneys for the Comanche Nation was in derogation of Fed.R.Civ.P. Rule 4(c)(2) because Ms. Hendrix delivered it personally.

STATEMENT OF FACTS

This case is an internal tribal dispute over tribal membership matters. While difficult to make out the exact nature of this *pro se* claim, Plaintiffs' "Amended Complaint" appears to center around the official governmental action of the Comanche Business Committee (hereinafter "CBC") taken on April 17, 2008. (Pl. Ex. 6) Three (3) Plaintiffs (Deborah Hendrix, Angie Revell, and Philip Hendrix III) allege they were improperly disenrolled as tribal members from the Comanche Nation. (Am. Compl. at 1 and 11). Additionally, these three Plaintiffs appear to claim that their disenrollment compares equally to banishment or amounts to a constructive banishment. (Am. Compl. at 10). The fourth Plaintiff (Ms. Attocknie), also a member of the Comanche Nation (Am. Compl. at 1), appears to seek relief related to, and in sympathy with, the claim of the other three (3), although no adverse action has been alleged or taken regarding her tribal membership. (Am. Compl. at 10 and generally).

The Comanche Business Committee is the duly elected body politic that conducts official governmental business on behalf of the Comanche Nation. (Def. Ex. 13, art. I, IV, and VI) The Comanche Nation, a federally recognized Indian tribe (73 Fed.Reg.18, 553 (April 14, 2008)), has its governmental headquarters located in Comanche County, Oklahoma, a few miles north of Lawton.

The Plaintiffs are attempting to sue for damages and to enjoin the Comanche Nation Enrollment Director and five (5) of the seven (7) members of the Comanche

Business Committee[2] for taking official actions prescribed and authorized by Comanche law occurring on or before April 17, 2008, and subsequent thereto. (Am. Compl. 10 & 14). Plaintiffs added the Comanche Nation's legal counsel, Kirke Kickingbird and Hobbs, Straus, Dean and Walker LLP, to the "caption" of their "Amended Complaint" but failed to properly serve them and made no allegations regarding these persons.[3]

Plaintiffs appear to assert that Tribal Officials' actions during the course of performing their official duties and as a result of duly approving tribal resolutions revoking recognition of their Comanche Nation membership constituted a conspiracy. (Am. Compl. at 10). Plaintiffs allege there was a scheme to deny them rights to investigate tribal government mismanagement (Am. Compl. at 11), run or vote in the recently completed tribal election process and to receive tribal benefits. (Am. Compl. at 15).

Plaintiffs allege deprivation of tribal right to petition for the removal of one of the Tribal Officials from office (Am. Compl. at 12) by asserting that another of the Tribal Officials (Ms. Wahnee), in the performance of her official duties under Comanche law, investigated and verified whether petition signers actually signed the petition submitted by Plaintiffs. (Am. Compl. at 12-13). Subsequent to this official investigation, Chairman Coffey published notice to tribal members of his official determination that the petition

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2 Not named as defendants are two other Comanche Business Committee members who participated in the official tribal actions, Clyde Narcomey and Edward Tahhahwah, Jr.

3 Apparently legal counsel was added for the privileged and protected activity of generally providing legal advice to the Tribal Officials and, in particular, for advocating to the Bureau of Indian Affairs ("BIA") on the Nation's behalf regarding a similar complaint of Plaintiffs with that federal agency. (Pl. Ex. 13).

was unacceptable, pursuant to Comanche law (Def. Ex. 13, art. VIII § 2(a)), because of the unlawful and fraudulent conduct of Plaintiffs during the course of circulating and gathering signatures for the petition. Plaintiffs contend that such Tribal Official actions violated a right to privacy. (Am. Compl. at 12). In addition, Plaintiffs claim dissatisfaction with the tribal process provided them because they were not permitted to submit contrary evidence prior to Tribal Officials' action or permitted an appeal hearing in a tribal forum of their preference. (Am. Compl. at 11-12).

The Comanche Enrollment Department, upon obliging a request made by Ms. Hendrix, Ms. Attocknie and other tribal members to perform a review of the Comanche membership files, found evidence that eleven (11) persons were unlawfully enrolled. (Def. Ex. 1, ¶¶ 3, 5, 6, 8, 9, 10, and 11) Coincidently, three of the illegally enrolled tribal members were Deborah K. Hendrix (nee Wells) (f/k/a Deborah K. Roberts), Angie Revell (f/k/a Hendrix) and Philip Hendrix III. (Def. Ex. 1, ¶¶ 10 and 11) The Enrollment Director, as apart of her official duties, brought these findings to the CBC. (Def Ex. 1, ¶ 12) During a duly convened meeting at which all seven (7) CBC members were present, the CBC, acting within its constitutional authority to maintain the Comanche Nation membership rolls (Def. Ex. 13, art. VI § 7(a)) approved three resolutions which had the effect of revoking Comanche Nation membership from those eleven (11) individuals.[4]

4 Both of the CBC members not being sued were present at the meeting on April 17, 2008, and participated in the action taken on Resolution Nos. 55-08, 56-08, and 57-08. Mr. Narcomey "abstained" on Resolution No. 55-08 to withdraw membership from eight (8) individuals, voted "no" on Resolution No. 56-08 to withdraw membership from Ms. Hendrix, and "abstained" on Resolution No. 57-08 to withdraw membership from

(Def. Exs. 6, 7, and 8). Tribal Officials notified Plaintiffs and all other adversely affected individuals of the adverse tribal membership action and right to appeal by letter dated April 18, 2008. (Def. Ex. 11). Tribal Officials held a hearing on May 29, 2008, in order to provide all persons affected by revocation of tribal membership to present evidence and arguments to rebut the Tribal Officials' initial findings. (Def. Ex. 12). A decision from that proper tribal forum is still pending.

Article III of the Comanche Constitution controls membership determinations for Comanche Nation. (Def. Ex. 1, ¶ 7) The Comanche Constitution presumes a person is a member of the Comanche Nation when such person is qualified under Article III, Section 1. However, the Constitution mandates that such Comanche membership shall not be recognized because of an *automatic permanent withdrawal of membership* if a person was enrolled with another tribe prior to 1967 and did not renounce within 90 days of ratification (Section 3(b)), or after the adoption of the Constitution enrolls with another tribe (Section 3(c)), or receives material or monetary benefits from another tribe (Section 3(d)). (Def. Ex. 1, ¶¶ 8, 10, 11, and 14).

Specifically, the Constitution provides for the automatic permanent withdrawal of membership and the Comanche Enrollment Director found that Ms. Hendrix, her two children, and eight (8) others were enrolled with Comanche Nation in derogation of one or more sections of its Constitution. (Def. Ex. 1, ¶¶ 8, 10 and 11) The CBC's official action on April 17, 2008, merely recognized the *automatic permanent withdrawal of*

Hendrix's two children. Curiously, even though Mr. Tahhahwah voted "yes" on all three resolutions, he was not named in this action. (Pl. Ex. 6)

membership from the Comanche Nation (as mandated by the Constitution) which happened to Ms. Hendrix prior to 1976 (Def. Ex. 2) and to her children prior to 1994 (Def. Ex. 3 and 4). The Constitution requires no specific process concerning such matters because a person enrolled with another tribe or taking benefits from another tribe was *never* capable of lawfully being a member of the Comanche Nation from that point forward.

ARGUMENT OF POINTS AND AUTHORITIES

I. The Plaintiffs' Case Should be Dismissed Because This Court Does Not Have Subject Matter Jurisdiction

"Federal Courts are courts of limited jurisdiction and they may exercise jurisdiction only when specifically authorized to do so." Sac and Fox Nation of Missouri v. La Faver, 979 F.Supp. 1350, 1352 (D.C. Kan. 1997) (internal citation omitted). "The party seeking to invoke a federal court's jurisdiction sustains the burden of establishing that such jurisdiction is proper." Id. Federal Court jurisdiction is based on either diversity of parties or the presence of a federal question. Diversity is not alleged and does not exist in this case. And while Plaintiffs assert violation of their federal civil rights in this matter and reference other federal laws, their assertion of federal jurisdiction is without a legal basis, and thus, there is no federal question jurisdiction over this matter.

In order for a federal court to have federal question jurisdiction "[a] right or immunity *created* by the laws of the United States must be an *essential element* of the plaintiff's cause of action." Martinez v. Southern Ute Tribe, 273 F.2d 731, 734 (10th Cir. 1960) (internal citations and notes omitted) (emphasis added). The law is settled that

> "a *mere statement* that a construction of certain federal statutes is involved in a case is not sufficient to bestow such jurisdiction. The dispute must involve a *substantial question* as to construction of the *federal statutes*, and not a colorless or frivolous one, . . . or a mere make-shift, for the purpose of securing such jurisdiction."

Id. at 734 (emphasis added). Plaintiffs' contention that federal civil rights laws should be read "*in pari materia*" with each other is insufficient to bestow jurisdiction on this Court. Plaintiffs also appear to claim that being Indian gives them a right to be in federal court. "An Indian, because he is an Indian, has no greater right to sue in Federal Court than any other litigant." Id.

Plaintiffs complain and asks this Court to intervene in internal tribal matters: membership in the Comanche Nation, the tribal right vote, the tribal privilege to run for tribal office, and the tribal right to recall a tribal official. In affirming the dismissal of a similar tribal membership controversy, the Tenth Circuit has said, "a tribe has the complete authority to determine all questions of its own membership, as a political entity. Plaintiff's statement of her claim plainly discloses that it is one entirely between plaintiff and the tribe. . . ." Id.

Plaintiffs do not allege that their right to membership in the Comanche Nation was *created by federal law*. Indeed, the right could **not** have been because it is only *created by Comanche tribal law*. Because the right to be a member of the Comanche Nation, just like the right run or vote in tribal elections, or petition for recall of tribal officials, does not *arise under any federal law*, there is no federal question jurisdiction over this matter.

A. Tribal Membership is an Internal Matter and Federal Courts Do Not Have Jurisdiction

This Court does not have subject matter jurisdiction over a tribal membership dispute. Fundamental federal law recognizes that Indian tribes have the right to make their own rules and be governed by them. See Williams v. Lee, 358 U.S. 217, 220 (1958). This includes the right to determine membership in the tribe. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897); Smith v. Babbit, 100 F.3d 556, 558 (8th Cir. 1996).

A tribe may determine who are to be considered its members "by written law, custom, intertribal agreement, or treaty with the United States." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, p. 212, Section 4.01[2][b] (2005 ed.)5 The right of tribes to determine their own membership stems from their inherent sovereignty. Logan v. Andrus, 457 F. Supp. 1318, 1321 (N.D.Okla. 1978) (citing a previous edition of COHEN). The U.S. Supreme Court has stated that a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Santa Clara Pueblo, 436 U.S. at 72 n.32 (1978); see also Montana v. United States, 450 U.S. 544, 564 (1981). And, "Indian tribes are separate sovereigns with the power to regulate their internal and social relations, including their form of government and tribal membership." Fletcher v. United States, 116 F.3d 1315, 1326-27

5 Unlike the Indian tribes who came to Oklahoma from the Southeastern U.S., Comanche nation did not side with the Confederacy in the Civil War or have black slaves. Consequently, the Nation has no treaty with the U.S. regarding membership freed former slaves like that of the Cherokee Nation near Tulsa, Oklahoma.

(10th Cir. 1997).

"[C]ourts have consistently recognized that in absence of express legislation by Congress to the contrary, a tribe has the *complete authority to determine all questions of its own membership*, as a political entity." Martinez v. S. Ute Tribe, 249 F.2d 915, 920 (10th Cir. 1957) (affirming dismissal of the tribal membership action for lack of federal question jurisdiction) (emphasis added). In agreeing with Tenth Circuit's conclusion in Martinez, the Ninth Circuit also found "that a dispute involving membership in a tribe does not present a federal question." Fondahn v. Native Village of Tyonek, 450 F.2d 520, 522 (9th Cir. 1971). In Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996), the court, citing and affirming the opinion below, Smith v. Babbitt, 875 F. Supp. 1353, 1360-61 (D. Minn. 1995), stated:

> The great weight of authority holds that tribes have exclusive authority to determine membership issues. A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations.

Clear and consistent court precedent, prior to and subsequent to the Indian Civil Rights Act of 1968, establishes that tribal membership cases, like this one, have no place in federal court because it has no subject matter jurisdiction over such case. The federal government plays no role in a tribe's membership decisions, except where membership is governed by specific treaty or statutory provision, or where a tribal constitution authorizes federal review of enrollment. See Santa Clara Pueblo, 436 U.S. at 66, n.22. None of these situations have been alleged by Plaintiffs, nor do they exist. Accordingly,

the Court has no basis to assume federal jurisdiction over this tribal membership dispute. Thus, the Court should dismiss this case.

B. The alleged violations of ICRA cannot be challenged in Federal Court.

Plaintiffs allege a violation of 25 U.S.C. § 1302(8) of the Indian Civil Rights Act ("ICRA") (guaranteeing equal protection and due process to tribal members) affords the Court jurisdiction to hear their claims. Plaintiffs' allegations of jurisdiction are contrary to time-honored law. ICRA does **not** create a federal cause of action either in its own right or in conjunction with other federal law. See Santa Clara Pueblo, 436 U.S. at 52; accord Ordinance 59 Ass'n v. United States Department of Interior Secretary, 163 F.3d 1150, 1155 (10th Cir. 1998).

In See Santa Clara Pueblo, the Court reviewed the claims of female tribal members against their tribal government officials regarding the denial of tribal membership under tribal law to children born of mothers who had married outside the tribe. In reversing the Tenth Circuit, the Supreme Court determined that, save the exception of a habeas corpus petition, the ICRA does not authorize federal civil actions against either a tribe or its officers. Santa Clara Pueblo, 436 U.S. at 59 and 72 (holding that § 1302 does not authorize actions against a tribe or its officials who are protected by sovereign immunity). The Court observed that "the structure of the statutory scheme and the legislative history of [25 U.S.C. § 1302] suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one." Id. at 61. "Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it

might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government." Id. at 64. "Thus, the Supreme Court effectively closed the doors of the federal courts to § 1302 claims for declaratory, injunctive or compensatory relief." Sahmaunt v. Horse, 593 F. Supp. 162, 164 (W.D. Okla. 1984) (Russell, J.).

Persons seeking to challenge alleged ICRA violations by tribal governments can do so only in tribal court or other internal tribal forums that decide appeals (like that already provided to Plaintiffs), **not** in federal or state courts. See Santa Clara Pueblo, 436 U.S. at 65; accord Ordinance 59 Ass'n, 163 F.3d at 1155 (observing that "nonjudicial tribal institutions have also been recognized as competent law-applying bodies"); see also Apodaca v. Silvas, 19 F.3d 1015, 1016 (5th Cir. 1994) (concluding that tribes "have the right to control their membership roster, and any federal litigation on that subject would disrupt the conduct of intratribal affairs, an area that the federal government has left to the tribe itself"). Because there is no federal forum created by ICRA for Plaintiffs' due process and equal protection claims concerning tribal membership eligibility, election participation, and petitioning privileges, the Court should dismiss this case.

C. The Indian Civil Rights Act Habeas Corpus Relief Does Not Apply Here Because Plaintiffs Do Not Suffer Qualifying Restraints On Their Liberty.

The ICRA's only private right of action in federal court arises when an Indian is *detained* in violation of their rights and seeks a writ of habeas corpus. See 25 U.S.C. §

1303. However, the ICRA habeas corpus provision was not intended to provide broader rights to Indians than to non-Indians detained by States or the Federal government. See Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 879-80 (2d Cir. 1996). Rather, "one seeking to invoke jurisdiction of a federal court under § 1303 must demonstrate . . . a severe actual or potential restraint on liberty." Id. (citations omitted). The privilege of the writ of habeas corpus is not limited to those who are in actual, physical custody of a government. See Jones v. Cunningham, 371 U.S. 236, 239 (1963) (holding that parole conditions significantly confined and restrained plaintiff's freedom to invoke the protections of the habeas corpus statute). The privilege of the habeas corpus writ **is limited**, however, to plaintiffs who suffer a restraint on liberty "not shared by the public generally." Lehman v. Lycoming Cty. Children's Services Agency, 458 U.S. 502, 510 (1982). An alleged "deprivation" warranting habeas corpus must be the result of a conviction for criminal acts subjecting the person to punitive criminal sanction. See Poodry, Quair, and Colebut (cited in footnote 6). As shown below, there has been no qualifying "restraint on liberty" alleged or suffered by Plaintiffs.

Plaintiffs allege that disenrollment amounts to banishment, but this claim has no merit. "Banishment" (or "exile," see BLACK'S LAW DICTIONARY, 139 (7th ed.1999)) is "expulsion from a country, esp[ecially] from the country of one's origin or longtime residence." BLACK'S LAW DICTIONARY, 595 (7th ed.1999). Poodry held that "banishment" from entering tribal lands was a punitive sanction, and could, therefore, properly give rise to a habeas corpus petition under ICRA, because it is such a harsh and

severe punishment. Poodry, 85 F.3d at 889.[6] The nature of "banishment" (the physical expulsion or exclusion from a geographical area) as a burden on the constitutional "right to travel" (see Saenz v. Roe, 526 U.S. 489 (1999); Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986); Jones v. Helms, 452 U.S. 412 (1981); and Bigelow v. Va., 421 U.S. 809 (1975)) is just one reason why banishment as a punishment is rightly considered severe. However, where the *right to travel* is **not** implicated, banishment has not occurred (see supra BLACK'S LAW DICTIONARY; cf. Cases at fn. 6). Here, Plaintiffs do not allege nor have they been physically expelled from or prohibited from physically entering Comanche tribal lands. Ergo, Plaintiffs have not been "banished." Id.

The finding by the CBC that Ms. Hendrix and her children rendered themselves ineligible for Comanche tribal membership by having been a member of another tribe prior to applying for membership with Comanche Nation does **not** amount to *a restraint on any liberties not shared by the general public*, nor is it *banishment*. The membership revocation was not as a result of a conviction for any criminal acts which is required in order to make it a punitive criminal sanction subject to federal habeas corpus review. See, e.g., Poodry, Quair,and Colebut, supra (where banishment was punishment for crimes). On the contrary, Tribal Officials simply found that Plaintiffs were unlawfully

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6 The cases that follow Poodry reflect a similar concern with the severity of "banishment." See Shenandoah v. Halbritter, 366 F.3d 89, 92 (2d Cir. 2004) (distinguishing tribal enforcement of ejection remedy under a housing ordinance from Poodry's banishment); Quair v. Sisco, 359 F.Supp.2d 948, 969 (E.D. Cal. 2004) (noting that banishment constitutes detention under Poodry); and Colebut v. Mashantucket Pequot Tribal Nation Tribal Elders Council, No. 305CV00247DJS, 2007 WL 174384, at 3 (D.Conn. Jan. 19, 2007) (noting Poodry's holding that "permanent" banishment from an Indian tribe "may" amount to a sanction triggering habeas corpus rights under ICRA).

enrolled because they were ineligible based on previously existing tribal law (Cf. Shenendoah, 366 F.3d at 92) as applied to their respective circumstances.

Every member or potential member of the Comanche Nation lives under these same civil rules, and these tribal rules limit membership in the Comanche Nation for *everybody*. Thus, a finding of ineligibility for membership does **not** impose "a restraint of a liberty *not shared by the general public*." Moreover, Plaintiffs have not alleged, nor suffered, a burden on their right to travel because Tribal Officials did not expel Plaintiffs from Comanche tribal lands. Plaintiffs were merely found to be disqualified for tribal material or monetary benefits, which is **not** a restraint of a liberty not shared by the general public. Accordingly, Plaintiffs have not suffered either a qualifying "severe, actual or potential restraint on [their] liberty" not shared by the general public or actual banishment entitling them to receive habeas corpus relief under ICRA. Therefore, this Court does **not** have habeas corpus jurisdiction over this case and must dismiss.

D. The Indian Citizenship Act Of 1924 (8 U.S.C. § 1401(B)) Does Not Create Federal Jurisdiction Or Cause Of Action For Protection Of Tribal Rights.

Indians uniquely enjoy a sort of treble citizenship; citizenship to their respective tribe, citizenship to the United States, and (by operation of the 14th Amendment) citizenship to their states of residence when they become citizens of the United States. This, however, was not always the case, as the judicial and legislative background to 8 U.S.C. § 1401(b) reflects. For a long period in American history, Indian naturalization was "conditioned on the severing of tribal ties, renouncing tribal citizenship, and the removal of federal protection." COHEN'S, p. 900, Sec. 14.01[3]. Not surprisingly,

Indians' concern over the effects of U.S. naturalization caused great resistance. Id. at 901. Following the naturalization of Indians who served in the armed forces during WWI, Congress passed a statute in 1924 that categorically naturalized all remaining Indians. The Act of June 2, 1924, 43 Stat. 253, states:

> The following shall be nationals and citizens of the United States at birth: **…**(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property*;

(codified as 8 U.S.C. § 1401(b)) (emphasis added). By including the *proviso* language, the Act "lessened the controversy among Indians by severing United States citizenship from questions of tribal citizenship and cultural assimilation." COHEN'S at 901. Rather than creating a *federal* right in tribal property that, as Plaintiffs contend, warrants an extension of federal jurisdiction, Section 1401(b) merely recognizes that the naturalization of Indians will **not** otherwise *impinge* on existing tribal citizenship or tribal rights enjoyed by Indians. It does **not** enlarge federal jurisdiction, nor diminish tribal sovereignty or jurisdiction. See, e.g., Tom v. Sutton, 533 F.2d 1101, 1103, n.1 (9th Cir. 1976) (**"**Even though Congress enacted legislation in 1924 making persons born to a member of an Indian tribe nationals and citizens of the Unites States (8 U.S.C. § 1401), that Act did not destroy the existence or sovereignty of the Indian tribes or their jurisdiction over their members."). Consequently, the Indian citizenship act does not create a federal cause of action or provide this Court with jurisdiction over this intra-tribal matter.

E. The General Civil Rights Laws Plaintiffs Claim Were Violated Do Not Apply to Tribes.

Plaintiffs allege violations of the Bill of Rights, the Civil Rights amendments, and various federal civil rights statutes, but present no set of facts to support the invocation of those laws. Indeed, they cannot, as the Supreme Court has declared "it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." Nevada v. Hicks, 533 U.S. 353, 383 (2001); see also, Talton v. Mayes, 163 U.S. 376, 382-385 (1896) (addressing non-applicability of the Fifth Amendment to Indian Tribes). "In the Indian relationship with the tribe the Fourteenth Amendment provides no rights. It is directed at the *states* and an Indian *tribe is not a state*." Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, City of Browning, 301 F. Supp. 85, 88 (D.C. Mont. 1969) (emphasis added).

As for the various Civil Rights Acts that Plaintiffs cite, these too do not relate to the internal relations of tribes. A claim under the Civil Rights Act of 1871 (codified as 42 U.S.C. § 1983) must embody two (2) elements which are necessary for recovery. As stated by the Supreme Court in Adickes v. Kress & Co., 398 U.S. 144, 150 (1970):

> First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."

Here, the right to membership in the Comanche Nation is secured by tribal law, not federal law, and Tribal Officials were alleged to have acted in derogation of tribal law, not state law. "[N]o action under 42 U.S.C. § 1983 can be maintained in federal court for

persons alleging deprivation of constitutional rights under color of *tribal* law. Indian tribes are separate and distinct sovereignties and are not constrained by the provisions of the fourteenth amendment." R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 982 (9th Cir. 1983) (internal quotations and citations omitted) citing , Santa Clara Pueblo, 436 U.S. at 56; and United States v. Wheeler, 435 U.S. 313, 337 (1978) (emphasis added). "A cause of action under § 1983 requires that a *state*, not a private party, act to deprive one of constitutionally protected rights." Berrios v. Inter Am. University, 535 F.2d 1330, 1331-1332 (1st Cir. 1976) (citing Civil Rights Cases, 109 U.S. 3 (1883) (emphasis added). Plaintiffs' allegations of deprivation of equal protection and due process rights are not cognizable in federal court under 42 U.S.C. § 1983, but only under the ICRA, and as discussed above, the Supreme Court foreclosed that opportunity in Santa Clara Pueblo.

As for the Civil Rights Act of 1870, codified at 42 U.S.C. §§ 1985-1986, the Supreme Court has agreed that *private actors* can be charged without state involvement, but the rights that are protected are the constitutionally guaranteed civil rights under the *federal* constitution and the cause of action must be based in some sort of *racial animus*. See United Broth. of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 829-835 (1983) quoting Griffin v. Breckenridge, 403 U.S. 88 (1971) (upholding the application of § 1985(3) to purely private conspiracies aimed at interfering with *federal* rights against private, as well as official, encroachment, such as the right to travel and Thirteenth Amendment Rights). Neither federal rights, nor racial animus exist

here because the right to Comanche Nation membership arises under tribal law and Plaintiffs' loss of membership was merely a failure to remain qualified for such political status. And as discussed previously, there has been no encroachment on Plaintiffs' right to travel or allegations of slavery or involuntary servitude.

Moreover, this law is limited to conspiracies among individual actors and does **not** generally apply to government officials acting in their official capacities. In this area of law, a government and its officials are considered a single entity that cannot conspire with itself. See Doherty v. Haverford Tp., 513 F. Supp. 2d 399, 409 (E.D. Pa. 2007) (explaining "intracorporate immunity doctrine"); Baines v. Masiello, 288 F. Supp. 2d 376 (W.D.N.Y. 2003) (holding intracorporate immunity doctrine barred voters' civil rights conspiracy claim against city council, mayor, and city clerk as conduct complained of was undertaken within scope of official duties). Like municipal officials and employees, Tribal Officials form a single governmental entity of the Comanche Nation. In the performance of their official duties, Tribal Officials cannot conspire among themselves. Accordingly, Plaintiffs cannot state a claim under 42 U.S.C. § 1985 because this doctrine and for lack of showing a racial animus motivated the deprivation of "federal" rights.

Because the U.S. Constitution, Bill of Rights, and the civil rights acts cited by Plaintiffs do **not** apply to internal relations of Indian Tribes and there is not a "racial" component to the allegations, nor a deprivation of federal rights, this Court has no subject matter jurisdiction over the claims of Plaintiffs. Therefore, the Court must dismiss Plaintiffs' Amended Complaint.

II. The Comanche Nation and Tribal Officials Are Immune from Suit.

Indian Tribes possess inherent sovereignty and are immune from suit. See Santa Clara Pueblo, 436 U.S. at 58 (noting that suits against Indian tribe under Indian Civil Rights Act are barred by tribe's sovereign immunity from suit); Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) (Indian tribes exercise inherent sovereign authority over their members and territories, and suits against tribes are thus barred by sovereign immunity absent clear waiver by tribe or congressional abrogation). Tribal Officials acting within their official capacity are also immune from suit. See Fletcher v. U.S., 116 F.3d at 1324. In Fletcher, the court considered similar claims to those raised by Plaintiffs. It held that an action by individuals of Osage ancestry, alleging that restrictions on their right to vote in tribal elections violated due process and equal protection, was barred by sovereign immunity as to tribal officials sued in their official capacities. Id. Similarly, members of the Kiowa tribal government who allegedly deprived the tribal vice-president of due process by ruling him ineligible to run for chairman were entitled to claim sovereign immunity of the tribe as a defense to the vice-president's action against them individually because they were acting in their official capacity in making their ruling. See Sahmaunt v. Horse, 593 F. Supp. at 166. Here, Tribal Officials also acted in their official capacities in finding the Plaintiffs unlawfully enrolled (Def. Ex 13, art. III § 3) and ruling that Ms. Hendrix was ineligible to run for tribal elective office under Comanche law. (Def. Ex 13, art. IX § 1)

To overcome the Nation's sovereign immunity, Plaintiffs must demonstrate that

the requested relief would **not** run against the Comanche Nation and that the Comanche Nation delegated *no authority* to Tribal Officials related to their conduct. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (holding that suit against a state officer for retroactive injunctive and declaratory relief constitutes a suit against the state, and that the officer had acted within the scope of his discretionary statutory authority). The United States Supreme Court has explained that allegations that an officer of a sovereign acted outside the scope of his authority are **not** sufficient to circumvent a sovereign's immunity from suit.

> **If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. . . . But . . . it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign**. . . . For the sovereign can act only through agents and when the agents' actions are restrained the sovereign itself may, through him, be restrained. . . . [T]his question . . . arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong, but, rather, the prevention or discontinuance, in rem, of the wrong. **In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court**, in the absence of consent **has no jurisdiction**.

Larson at 687-88 (emphasis added).

In the present case, the Tribal Officials acted wholly within the authority of Comanche Nation law. The Comanche Constitution authorizes the CBC to maintain the tribal membership rolls (Def. Ex. 13, art. VI § 7(a)), enforce Comanche laws (Def. Ex.

13, art. VI § 7(j) and art. XVI), and to determine qualifications of candidates for tribal office and conduct tribal elections (Def. Ex. 13, art. VI § 7(b)). The Constitution authorizes the Chairman to determine the acceptability of petitions for recalling a tribal official. (Def. Ex. 13, art. VIII § 2(a)).

Moreover, the relief requested by Plaintiffs constitutes relief against the Comanche Nation itself. Plaintiffs seek to overturn membership decisions of the CBC and mandate Nation to conduct another tribal election. The relief would be retroactive and coerce the Nation to provide tribal benefits to non-members and conduct another election. The doctrine of sovereign immunity protects the Nation from such claims and shields Tribal Officials as officers of the Nation. Because relief requested by Plaintiffs would run against Comanche Nation itself and be retroactive, and the Nation's immunity was not abrogated by Congress or unequivocally waived by the Nation, the Court lacks jurisdiction to grant Plaintiffs relief. The Court must dismiss this case.

III. The Plaintiff's Case Should be Dismissed Because It Fails to State A Claim Upon Which Relief May Be Granted

In addition to failing to establish federal question jurisdiction, Plaintiffs' complaint does not state a claim upon which relief can be granted. The deficiencies of the complaint in regards to subject matter jurisdiction similarly hinder the legal sufficiency of Plaintiff's claim for relief. Plaintiffs bring a claim that is fatally flawed and destined to fail because the claim does not show the elements necessary to state a cognizable claim under 42 U.S.C. § 1983 or 42 U.S.C. §§ 1985-88. First, to withstand a motion to dismiss for failure to state a claim, a section 1983 claim must allege conduct causing alleged

deprivation that is fairly attributable to the state. Franco v. Marin County, 579 F. Supp. 1032, 1035 (D.C.Cal. 1984).

Plaintiffs assert that this Court should enjoin the Tribal Officials, not state officials, from carrying out their duties because of alleged violations of Federal civil rights law and the ICRA. However, as noted above, Federal civil rights laws do not in and of themselves apply to the internal matters of Indian tribes, such as membership or election disputes. While ICRA incorporated many of the provisions of the Bill of Rights, it did not provide a federal forum for disputes concerning the eligibility for tribal membership, the eligibility for tribal office or voting in tribal elections, or the petitioning of tribal government. See Santa Clara Pueblo, 436 U.S. at 55-58. And, Plaintiffs make no meritorious claim for habeas corpus relief. Second, to withstand a motion to dismiss for failure to state a claim, a section 1985 claim must contain specific rather than mere conclusory allegations of conspiracy. Id. Plaintiffs' claim contains no such specific allegations.

With regard to Kirke Kickingbird and Hobbs, Straus, Dean & Walker, LLP (as recently named additional defendants) the Amended Complaint contains absolutely no allegations. This is insufficient for stating a claim even under the relaxed standards of Fed. R. Civ. P. Rule 8. Further the actions of Kickingbird and the law firm are privileged and protected by the First Amendment of the U.S. Constitution, which grants parties the right to petition the federal government. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); Eaton v. Newport Bd. Of Educ., 975 F.2d 292, 297

(6th Cir. 1992); Zemenco, Inc. v. Developers Diversified Realty Corp., 2005 WL 2545303 (W.D. Pa. Oct. 7, 2005). All of the allegations against the attorney's stated at the hearing or in the Motion for TRO relate to the signing of a letter to the Bureau of Indian Affairs or representation of the Nation before the Court of Indian Offenses of the Comanche Business Committee. All of these representations are privileged and immune from liability.

There is no legal premise for the relief sought by the Plaintiffs that can be considered in this Court, and no set of facts the Plaintiffs could prove would entitle them to the relief they seek. As such, Plaintiff's complaint does not state a claim upon which relief can be granted, and should be dismissed.

CONCLUSION

This Court should grant the Tribal Officials' Motion to Dismiss. There is no federal law which provides the Court jurisdiction over the claims alleged by Plaintiffs. Plaintiffs' claim to a right to Comanche Nation membership arises under tribal law, not federal law. Plaintiffs' claim of dissatisfaction with their tribal due process and allegation of a deprivation of equal protection cannot be heard in this forum under the Indian Civil Rights Act (ICRA), or any other federal civil rights laws. Plaintiffs make no qualifying claim of a restraint on liberty not shared by the general public, or banishment as criminal sanction, in order to obtain review under ICRA's habeas corpus provision. The federal law making Indians citizens of the U.S. provides no basis for Plaintiffs' claim of relief. Plaintiffs make no claim of deprivation of a federal right motivated by racial animus or as

a result of slavery or involuntary servitude. Moreover, the Comanche Nation and its Tribal Officials are shielded from suit in this forum by sovereign immunity. Thus, the Court is obliged to grant Tribal Officials' request to dismiss this case.

Respectfully submitted,

/s/ James M. Burson
William R. Norman, OK Bar # 14919
James M. Burson, OK Bar # 20037
HOBBS, STRAUS, DEAN & WALKER, LLP
117 Park Avenue, 2nd Floor
Oklahoma City, OK 73102
Phone: (405) 602-9425
Fax: (405) 602-9426
wnorman@hobbsstraus.com
jburson@hobbsstraus.com
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Entry of Appearance was electronically transmitted to the Clerk of the District Court using the ECF System for filing and a hard copy mailed to these parties not currently registered on ECF, this date, June 30, 2008.

Deborah Hendrix, et. al
820 N.E. Cherry Rd.
Elgin, OK 73538

Phyllis A. Attocknie
Route 1, Box 4163
Apache, OK 73006

Philip J Hendrix, III
820 NE Cherry Rd
Elgin, OK 73538

Angie A Revell
1218 Irwin St
Lawton, OK 73502

/s/James M. Burson
Counsel for Defendants