IN THE SUPREME COURT OF THE CHEROKEE NATION

CARA COWAN-WATTS,	)	
In her Official Capacity as Council Member	)	
District 7 and as an Individual,	)	
And	)	
DON GARVIN,	)	
In his Official Capacity as Council Member	)	
District 4,	)	
Appellant,	)	**Appeal No.: SC-2010-05**
	)	
vs.	)	
	)	
PRINCIPAL CHIEF CHADWICK SMITH,	)	
In his Official Capacity, and	)	
CHEROKEE NATION TRIBAL COUNCIL,	)	
Respondents.	)	

REPLY BRIEF OF CHEROKEE NATION TRIBAL COUNCIL RESPONDENTS/APPELLEE

Appeal from District Court of the Cherokee Nation
CV-2009-65

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ATTORNEY FOR CHEROKEE NATION TRIBAL COUNCIL/RESPONDENT/APPELLEE

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COMES NOW, the Cherokee Nation Tribal Council, by and through its attorney, Todd Hembree and hereby submits its Reply Brief to Appellant's Appeal. In support of its position, the Appellee's submit the following argument and authorities.

STATEMENT OF THE CASE

This matter was commenced on November 19, 2008, when Principal Chief Chadwick Smith filed suit against the Cherokee Nation Election Commission for Petition for Declaratory Relief in the Supreme Court, Case Number SC-2008-05 requesting the Supreme Court to make declarations as to a number of issues.

The first issue was to declare Legislative Act 14-08 unconstitutional. This Legislative Act was to create fifteen (15) individual districts within the jurisdictional boundaries of the Cherokee Nation. Legislative Act 14-08 was passed by the Cherokee Nation Tribal Council in

July of 2008, was vetoed by the Principal Chief and on August 11, 2008, that veto was overridden by the Tribal Council.

Secondly, the Principal Chief sought to have a declaratory judgment as to whether the plain language of the Cherokee Nation Constitution called for fifteen (15) districts with one (1) representative per district.

Third, the Principal Chief sought a declaration on whether the elected officials who took office in August of 2007 were in their first term under the 2003 Constitution of the Cherokee Nation.

And lastly, whether the six (6) year terms created for council members under Legislative Act 7-07 in order to implement staggered terms were constitutional.

Although not sued directly, the Cherokee Nation Tribal Council moved to intervene in the case as the Real Party In Interest. This matter was remanded to the District Court in March of 2009 and given the Case Number CV-2009-65. The District Court granted the Cherokee Nation Tribal Council's Motion to Intervene. On May 20, 2009, the District Court ruled that Legislative Act 7-07, providing for certain six (6) year terms was constitutional under the 2003 Cherokee Nation Constitution and that elected officials currently seated were serving their first term under the 2003 Cherokee Nation Constitution. The Court reserved the ruling on Legislative Act 14-08 concerning the fifteen (15) separate districts for evidentiary hearing. Thereafter the Cherokee Nation Tribal Council filed its Petition in Error concerning the District Court's ruling on the issue of term limits and the procedure for staggered terms for council members. On February 4, 2010, the Cherokee Nation Supreme Court affirmed the District Court's ruling that elected officials were serving in their first term of office under the 2003 Constitution and that Legislative Act 7-07, which established staggered terms, was constitutional.

On February 1, 2010, the District Court ruled that Legislative Act 14-08, which created fifteen (15) separate districts, was not in effect due to the finding that the Tribal Council did not follow the procedures outlined in Legislative Act 39-05 requiring the Election Commission to conduct apportionment. Therefore, the number of districts reverted back to nine (9) districts within the jurisdictional boundaries of the Cherokee Nation.

On June 18, 2010, the District Court ruled that the nine (9) districts that were created under Legislative Act 39-05 did not constitutionally have an equal number of citizens apportioned by the districts. The Court ordered the Election Commission to apportion representatives per the nine (9) districts using information from the registrar of the Cherokee Nation based upon the zip code method. The Court ordered that this be done no later than June 30, 2010. (This date was later stayed until July 13th 2010). The District Court retained the authority to reapportion the nine (9) districts by court order if the parties were unable to come to a decision on apportionment. Thereafter, the Tribal Council met in its Rules Committee on the 12th day of July 2010, and using the best available citizenship information, passed Legislative Act 22-10, which created five (5) districts within the jurisdictional boundaries of the Cherokee Nation, with three (3) council members per district. (Appendix A). The Act was approved at full Council by a vote of 11 in favor, 4 opposed with 2 abstentions. The Act was signed by the Principal Chief and became law. After the passage of Legislative Act 22-10, Councilpersons Cara Cowan-Watts and Don Garvin, who were Plaintiffs in District Court Case CV-2010-53, which had been consolidated with District Court Case CV-2009-65, filed a Motion for Hearing for the District Court to determine if Legislative Act 22-10 was unconstitutional. The District Court ordered any interested party to file briefs concerning the subject of the constitutionality of Legislative Act 22-10 on or before July 23, 2010. After considering the Briefs filed by the

interested parties, the District Court issued an Order of Dismissal on July 27, 2010. That Order was rescinded and a final judgment declaring Legislative Act 22-10 was constitutional was filed on August 17, 2010, it is from this Order that Councilperson Cara Cowan-Watts now appeals.(Appendix B)

STANDARD OF REVIEW
(Abuse of Discretion)

The Cherokee Nation District Court made the determination that Legislative Act 22-10 was constitutional based on issues of fact and law. In the lower Court, Judge Fite made his determination based on the admissibility and credibility of evidence and legal arguments presented at various hearings. In matters pertaining to the admission and exclusion of evidence, the standard for review on both issues of fact and law, is a clear abuse of discretion standard. Christian v. Gray, 65 p. 3rd 591 (OK 2003). Therefore a judgment will not be reversed based on the District Court's ruling unless there exists a clear abuse of discretion. In order to reverse the District Court's decision in this case the Appellate Court must find that there is no rational basis for the District Court's ruling. Further, where two possible interpretations of a Council enactment exist, one which would render it unconstitutional or the other which affirms the Act's constitutionality, this Court will adopt the alternative construction which upholds the enactment. Phillips v. Eagle, JAT 98-09.

I. THE CHEROKEE NATION DISTRICT COURT DID NOT ERROR IN UPHOLDING LEGISLATIVE ACT 22-10

On August 17, 2010 the Cherokee Nation District Court ruled that Legislative Act 22-10 was constitutionally permissible. This Act was the ultimate product of four years of work, over 300 hundred maps of proposed district lines and thousands of employee hours. The creation of

Legislative Act 22-10 utilized the most accurate and best information concerning the population of Cherokee citizens.

Appellant contends that the Tribal Council failed to consider accurate population figures. This is not the case. There were numerous methods purposed during the process as to how to count the citizens within the Nation and the districts. The method of counting citizens promoted by the Appellant was the "Zip Code" method and it is the most inaccurate. The "Zip Code" method, counts all of the Cherokee citizens that live within a zip code to be counted within the jurisdiction even if the smallest portion of the zip code lies within the Cherokee Nation. This would have required the inclusion of certain citizens within the Cherokee Nation when it was objectively known that these citizens did not live within the boundaries of the Cherokee Nation. For instance, Zip Code 74354 is partially within the boundaries of the Cherokee Nation. The Cherokee Nation registrar acknowledges 2,463 Cherokee Citizens within this zip code. The Cherokee Nation government, using 911 addresses knows that only 266 of those citizens actually live within the boundaries of the Cherokee Nation. Under Appellant's "Zip Code" method all 2,463 citizens are counted within the jurisdiction for apportionment purposes. This method is not only highly inaccurate, it is also unconstitutional. Article VI Section 3 of the Cherokee Nation Constitution states that the seats "shall be apportioned to afford a reasonable equal division of citizenship among the districts". The "Zip Code method, by knowingly including citizens that live outside of the district or boundaries is clearly unconstitutional.

The method proposed by the Appellants was rejected by the Cherokee Nation Tribal Council, the Cherokee Nation Administration and the District Court. The Tribal Council used the best information to create districts based on keeping communities with similar social,

economic and developmental interests together. The Tribal Council also kept district lines along clearly identifiable political boundaries and did this while having a reasonable division of citizens among the districts.

A. The Cherokee Tribal Council has the constitutional duty to establish representative districts within the boundaries of the Cherokee Nation.

The Cherokee Nation Constitution was approved by the citizens of the Cherokee Nation and became effective July 26, 2003. In re: Status and Implementation of 1999 Constitution of the Cherokee Nation JAT-05-04 (June 7, 2006). Article VI Section 3 of the Cherokee Nation Constitution states that the Tribal Council shall consist of seventeen (17) members and that the districts shall be established by the Tribal Council.

> "The Council shall establish representative districts which shall be within the boundaries of the Cherokee Nation. Fifteen of these seats shall be apportioned to afford a reasonably equal division of citizenship among the districts, and the remaining two shall be elected at-large by those registered voters residing outside the boundaries of the Cherokee Nation voting at-large in accordance with this section."
>
> Article VI. Section 3, Cherokee Nation Constitution

Legislative Act 22-10 is the constitutional manifestation of Article VI, Section 3. The Cherokee Nation Constitution gives the sole power of establishment of districts within the boundaries of the Cherokee Nation to the Tribal Council. Legislative Act 22-10 is the product of the Tribal council establishing those districts. The Cherokee Nation Constitution states that these districts "shall be apportioned to afford a reasonably equal division of citizenship among the districts." The Tribal Council used the most accurate information available of ensuring a "reasonably equal" division of citizens.

On July 12, 2010, the Cherokee Nation Tribal Council convened a special meeting of its Rules Committee to consider districting and reapportionment. This was, in part, a response to this Court's order setting a June 30, 2010 deadline for the resolution of the districting issue. (The deadline was later stayed until July 13 2010). At said Rules Committee meeting concepts were discussed concerning nine (9) districts, fifteen (15) districts and five (5) district plans. Although no official vote was taken, the consensus of the Council was that the most accurate number of citizens residing within the jurisdictional boundaries of the Cherokee Nation was approximately 110,000. Much debate was made about the commonality of communities in the various districts. After much consideration and debate, the Rules Committee passed an Act creating five (5) representative districts with three (3) councilors per district. Counsel for the Appellant contends that at this meeting very little was said about the like nature of the communities and the social and economic background of the citizens in the area. It is obvious that he did not attend the meeting or watch the proceedings. Throughout this meeting and throughout this entire process an overriding concern of the Tribal Council was to put like communities together. Attached are the minutes of the July 12, 2010 Rules meeting which further demonstrates the Council's consideration (Minutes of July 12, 2010 Rules meeting, Appendix C). All parties in this suit are in agreement that the Cherokee Nation Tribal Council has the sole constitutional duty to establish representative districts in accordance with Article VI Section 3 of the Cherokee Nation Constitution.

First, it must be noted that Legislative Act 22-10 is constitutionally valid on its face. This Act has been through the complete legislative process, being considered and debated fully in committee and again being debated and considered by the entire Tribal Council. It has been signed by the Principal Chief, who acknowledges his agreement with the Act. Cherokee Nation

Courts have given great deference to Legislative Acts of the Tribal Council. In Phillips v. Eagle, JAT 98-09, the Judicial Appeals Tribunal (now Supreme Court) stated:

> "Where two (2) possible interpretations of a Council enactment exists, one which would render it unconstitutional, or the other which affirms the Acts constitutionality, if at all possible, will adopt the alternative construction, which upholds the enactment."

Also, it is important to point out that courts will avoid wading into redistricting battles out of respect and deference to the separation of powers, realizing that the Legislative Branch plays the primary role in redistricting. League of Latin American Citizens v. Perry, 548 US 399 (2006). Therefore, unless it can be clearly shown by an interested party that Legislative Act 22-10 is unconstitutional, this Court will make all efforts and interpretation to uphold the constitutionality of this Act.

II. ANY VARIANCES BETWEEN THE POPULATIONS OF THE DISTRICTS ARE JUSTIFIED TO UPHOLD LEGITIMATE INTERESTS OF THE CHEROKEE NATION AS A WHOLE

The difficulties in ascertaining the precise number of citizens that live within the jurisdictional boundaries of the Cherokee Nation are nearly impossible. The District Court has heard testimony from the Cherokee Nation Governmental Information Service (GIS) that these figures may range between 102,000 to 110,000 Cherokee citizens. On November 7, 2007 the GIS department reported that there were 107,430 citizens within the boundaries. On October 29th 2009 the GIS department reported that as of May 22nd 2009, there were 109,081 citizens within the boundaries. This figure was submitted to the Election Commission and was reported to the District Court. (See remand report of Cherokee Nation Election Commission Nov. 2nd 2009 Appendix D). On February 5th 2010, the GIS department sent a letter to the Election Commission stating that the previous figure of 109,081 was in error. The correct number of

citizens within the boundaries of the Cherokee Nation was 102, 836. (See letter of from David Justice Administrator of GIS dated Feb. 5th 2010 Appendix E). The Election Commission, after receiving this information, submitted an amended remand report to the District Court stating that the number of citizens within the boundaries of the Cherokee Nation as of May 22nd 2009 was 102,836. (See amended report of the Cherokee Nation Election Commission Feb. 11 2010 Appendix F). On February 25th 2010, the Tribal Council Rules Committee, relying on the Election Commission's amended remand report and the GIS February 5th letter, adopted the figure of 102,836 citizens within the jurisdiction of the Cherokee Nation as of May 22, 2009. The very next day the GIS department issued another letter to the Election Commission stating that there was another error and that the true and correct figure of citizens within the Cherokee Nation was 110,892 as of May 22nd 2009. (See letter from David Justice Administrator of GIS dated Feb. 26th 2010 Appendix G). It is important to note that the Appellant contends that there are 122,427 citizens within the jurisdiction of the Cherokee Nation and that figure includes citizens that the GIS objectively knows are outside the Cherokee Nation.

Any citizen population number that is chosen by a party in this suit can be easily rebutted due to the inconsistencies of methodologies used and inconsistencies of data available to each of the fourteen (14) counties within our jurisdictional boundaries. To put it simply, we do not know exactly how many citizens reside within the Cherokee Nation jurisdictional boundaries. When asked if he knew the number citizens that live within the boundaries of the Cherokee Nation as of May 22nd of 2009, Mr. David Justice's answer was "no". (June 11, 2010 Trial to the Court Transcript p. 77-78 ln. 25-3 Appendix H). When asked if he had an estimate of the number of citizens that live within the boundaries of the Cherokee Nation as of May 22nd 2009, Mr. Justice's answer was "somewhere between 102 and 122,000. (June 11, 2010 Trial to the Court Transcript p.78-79 ln 24-1 Appendix H). With this being the back drop of information

being available to the Cherokee Nation Tribal Council, the Rules Committee, on July 12, 2010, came to a consensus that there were 110,892 Cherokee citizens within the jurisdictional boundaries of the Cherokee Nation. This is, in fact, the last known confirmed figure from the Cherokee Nation GIS department. Again, after considering different district variations of five (5), nine (9) and fifteen (15), the Council passed a five (5) district plan with three (3) councilors per district. Legislative Act 22-10 also states that redistricting shall occur in 2013 and that the Cherokee Nation will help develop 911 systems in those counties within its jurisdictions that are not complete. This Act also states that the Cherokee Nation will use all efforts to develop a comprehensive system to ascertain the number of citizens within its jurisdictional boundaries. In short, this Act requires a de-facto census of Cherokee citizens.

Appellant's counsel in his brief in chief would have the Cherokee Nation consider and apply United States constitutional requirements for redistricting.

The United States constitutional requirements and standards are not imposed on any government except with respect to federal Congressional redistricting. Those strict standards do not apply to state and local communities in legislative redistricting or apportioning within their own governments and certainly should not apply to Tribal governments. Rather, they are constrained solely by the Equal Protection Clause and federal statutory provisions, discussed below, implementing Equal Protection public policy interests.

> In assessing the applicability of the one person, one vote requirement to state and local apportionment plans, the Supreme Court held in 1973 in Mahan v. Howell, [410 U.S. 315, 323-35 (1973)] that states have more latitude to vary the population of their legislative and local districts than they have with their congressional districts. Additional deference to states is appropriate in the apportionment of state or local districts because of states' legitimate interest in preserving traditional political boundaries.

Adam Muller, The Implications of Legislative Power: State constitutions, State Legislatures, and Mid-Decade Redistricting, 48 B.C. L. Rev. 1343, 1357-58 (2007) (footnotes omitted). In Mahan, the Court held that while state and local entities must make a good-faith effort to comply with one person, one vote, deviations from strict population equality are permissible when justified by "legitimate considerations incident to the effectuation of a rational state policy." 410 U.S. at 325. It is important to note that the Supreme Court held constitutional a deviation of twenty-five percent (25%) in Virginia districting, which is less than the argued twenty two percent (22%) complained about by the Appellant.

One of the major concerns that Federal courts consider in districting cases is racial discrimination. To combat racial discrimination, Congress passed the Voting Rights Act of 1965, 42 U.S.C. § 1973c (2000)(amended 2006). The Voting Rights Act provides that a state may not pass a law that provides for any "standard, practice or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." The Voting Rights Act has no applicability to the Cherokee Nation and racial discrimination within Cherokee voting districts is not an issue—all Cherokee voters are citizens by blood or treaty.

The United States Supreme Court has held that a government must justify any variances in population by providing legitimate government policies based upon non-racially discriminatory criteria. Karcher v. Daggett, 462 U.S. 725, 740 (1983). Governments may legitimately demonstrate policy interests of keeping compact districts, preserving local political boundaries, or by avoiding incumbent against incumbent races. Id. The Council readily demonstrates these policy interests here to justify the redistricting required by the Act. Therefore, even by using the strict federal standards Legislative Act 22-10 stands.

Another consideration of the Federal Courts is the Equal Protection Clause. The Fourteenth Amendment's Equal Protection Clause prohibits racial gerrymandering. Shaw v. Reno, 509 U.S. 630, 649 (1993). The Equal Protection Clause prohibits districts that are motivated predominantly by race to the exclusion of traditional criteria to create districts. In Shaw, the Court disallowed bizarrely shaped districts concluding that racial considerations were the only rational justification for the strangely shaped districts. 509 U.S. at 649-58. The Court remanded the case to consider whether narrowly tailored reasons existed that achieved a compelling governmental interest to justify the racially motivated districts. No racial issues exist within the Cherokee Nation as every voter is Cherokee by blood or by treaty. This is yet, another reason, Cherokee courts need not blindly adopt Federal standards as proposed by the Appellant.

No doubt redistricting is an intensely political undertaking. *See* League of Latin American Citizens v. Perry, 548 U.S. 399, 126 S. Ct. at 2607-08 (2006). Courts avoid wading into redistricting battles out of respect and deference to the separation of powers. Perry, 126 S. Ct. at 2607-08 (plurality opinion). The Supreme Court notes that because redistricting is meant to protect the ability of citizens to participate in the democratic process, courts prefer that that democratic branches of government control reapportionment. Id. at 2608. The Cherokee Courts should also avoid wading into this legislative, "political thicket" and instead should adhere to the separation of powers.[1]

Federalism concerns and separation of powers issues remain the focus of courts exhibiting great reluctance to intrude into the legislative process of reapportionment, even when Congressional districts and their accompanying strict standards, inapplicable here, are involved. *See* League of Latin American Citizens v. Perry, 548 U.S. 399, 126 S.Ct. at 2607-08

[1] *See* Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004).

(2006)(plurality opinion) (U.S. Constitution "leaves with the states the primary responsibility for apportionment of their federal congressional . . . districts." (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body.).

Elected Council members represent, by definition, their constituents. The contours of electoral districts should be appropriately stable and recognizable so that an individual voting citizen remains aware of who represents him or her and can vote to hold that Council member representative accountable. Redistricting based upon traditional tribal communities and identifiable boundary lines and other quantifiable data readily achieves this objective. This is precisely what the Tribal Council achieved under Legislative Act 22-10.

III. THE DISTRICTS CREATED UNDER LEGISLATIVE ACT 22-10 REMAIN CONSTITUTIONAL BECAUSE THE DISTRICTS AFFORD A "REASONABLY EQUAL" DIVISION AMONG CHEROKEE CITIZENS AND ANY VARIANCE IS BASED ON LEGITIMATE NATIONAL TRIBAL INTERESTS

Appellant alleges that the districts created by Legislative Act 22-10 are unconstitutional because the Act purportedly creates too great of a variance between a perfectly equal division of citizens per district and the actual number of citizens per district.

No one disputes the constitutional authority of the Council to create five (5) separate districts.

Appellant also alleges that Legislative Act 22-10 is unconstitutional because the population between the districts in some instances varies above ten percent (10%). Counsel for the Appellant in his brief incorrectly states that all parties agreed to a ten percent (10%). (Appellants brief p. 3). He cites no record for this statement. This is totally false and misleading to this Court. A simple review of the record below will show that the Appellee, Tribal Council has continually argued that the so called ten percent (10%) standard was inapplicable in this

matter. However, *all* legal authorities cited by *all* the parties hold that variances can and will be justified if they are based on legitimate and rational policy. *See*, Gaffney v. Cummings, 412 U.S. 735 (1973) ("population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable"); and Mahan v. Howell, 410 U.S. 315, 325 (1973) (deviations from strict population equality are permissible when justified by "legitimate considerations incident to the effectuation of a rational state policy"). As stated earlier, the Court in Mahan justified a variance of twenty-five percent (25%) Id. at 336; and Brown v. Thomson, 462 U.S. 835 (1983) in which the Supreme Court upheld Wyoming redistricting in which the maximum deviation was eighty-nine percent (89%) Id. at 837-43. It is clear that Federal Courts have justified variances higher than those found in Legislative Act 22-10, based on the same principles that were considered and used by the Tribal Council. The Cherokee Nation courts give great deference to the legislative Acts of the Council, and will hold such acts constitutional "if at all possible." *See,* Phillips v. Eagle, JAT 98-09; and Lay v. Cherokee Nation, JAT 97-05.

Well-established jurisprudence from all jurisdictions hold that the legislative branch shall play the primary role in establishing districts by which the representatives will be chosen. Wise v. Linscomb, 437 U.S. 535 (1978); League of Latin American Citizens v. Perry, 548 U.S. 399 (2006).

This Court should uphold Legislative Act 22-10 if it is demonstrated that the district lines were drawn according to policies that have *any* rational basis. All parties agree that something more than simple mathematical certainty is needed to develop good district lines. The Council used factors that are considered by governments across the Nation: keeping districts in the same political sub-divisions, preserving community interests and easing voter confusion. These are all

legitimate policies that would justify any deviation from a strict ten percent (10%) standard, even if such a standard were to apply.

One case in particular stands out and provides guidance for the Court. Frank v. Forest County, 336 F.3d 570 (7th Cir. 2003), offers succinct analysis to guide Cherokee Courts to analyze the Council's redistricting plan. Frank involved an Indian tribe's challenge of a county's redistricting plan for its twenty-one supervisory districts. The Tribe alleged the plan deprived Native Americans of equal protection of the laws and violated the Voting Rights Act. The District Court granted summary judgment to the County and the Tribe appealed. Judge Posner, writing for a three judge panel of the U.S. Court of Appeals for the Seventh Circuit, held that deviations of sizes of districts did not violate equal protection. Much like many of the proposed Cherokee voting districts, the Frank court noted the districts involved a sparsely populated area in extreme northeastern corner of Wisconsin and that the population was unevenly distributed. 336 F.3d at 571. It was further noted that some districts exceeded the ten percent deviation. Id. The County argued, and the District Court agreed that the deviations were legitimate and defensible because redrawing the districts in such a way as to reduce the deviations to below ten percent would produce un-compacted districts and districts that would cross many local government boundaries, such as school districts, fire districts and the like. Id. at 572.

In noting that the "Ten Percent" rule was merely one of prima facie liability and is therefore rebuttable, Judge Posner wrote that:

> Redistricting is an intensely political process and there is no theoretical guidance to how to balance the various considerations that political science might deem relevant to conforming districted governments to the principles of democracy (themselves contested).
>
> Id. at 572-73.

Judge Posner also reasoned that while "[r]ules are attractive . . . a rule applied to circumstances remote from those contemplated when it was adopted can produce perverse results." Id. The ten percent rule was devised for "large electoral districts", not the twenty-one rural districts within the contested area. Id. (citing Voinovich v. Quilter, 507 U.S. 146, 149, 161-162 (1993) and Brown v. Thomson, 462 U.S. 835, 838-839 (1983)).

> The smaller and more scattered the population of the area to be redistricted and the more numerous the districts, making it harder to create districts of equal population without creating weird shapes that straddle the boundaries of the smaller government units, as recognized early on by the Supreme Court in *Abate v. Mundt*, 403 U.S. 182, 185 ... (1971), the more arbitrary the rule of **10 percent prima facie** liability becomes, until finally it becomes absurd.

Id. at 573 (emphasis original). The court went on to note that in other cases the voting districts were significantly larger in population and that in the case of small population and rural redistricted areas, such as the Cherokee districts at issue here, the greater the likelihood there will be unevenly distributed populations. Id. at 573-74. The Frank Court also cautioned against comparing select districts, noting that "[t]he more districts there are, the less meaningful a comparison between just two districts" and that "malapportionment created by two outliers is apt to be at once trivial and unavoidable." Id. at 574.

This Court should follow the lead of the Frank Court and avoid applying the ten percent rule. "[W]e are reluctant to impose upon the board a requirement of process that will burden the county government with expenses disproportionate to either its resources or its responsibilities." Id. So too, this Court should avoid imposing a burden by arbitrary application of the ten percent rule and defer to the Tribal Council and the Principal Chief, which exercised its discretion in this "intensely political process."

The Districts that were created by Legislative Act 22-10 reached the legislative goals the Council set out to achieve. The Districts follow clearly identifiable county lines. Second and most important, the Council grouped together areas of common interest.

> Although it is not necessary to do so, the Cherokee Nation Tribal Council can show good cause for variances between the populations of the districts in excess of ten percent (10%). Consistent with the equal protection clause of the 14th Amendment of the United States Constitution, Lay v. Cherokee Nation, JAT 97-05, our Court agreed with the United States Supreme Court, that the Cherokee Nation Constitution provides that districts should be reasonably equal: "Hence the concept of "One-Cherokee, One-Vote." Much has been said in this case concerning the "Ten Percent Rule". However, this is actually misleading, in that, there is no such rule at all, even in the only context where the rule applies -- which is for federal congressional redistricting. As to *tribal legislative redistricting*, the rule has no applicability at all.

Although Counsel for the Appellant stated that it was time to establish Cherokee Nation Law on this matter. (Appellant brief p. 8) He would have this Nation adopt the same rigid standards articulated by the federal courts. What may be good for the federal system and their set of circumstances may not be applicable to the circumstances of the Cherokee Nation. It may in fact be trying to fit a square peg into a round hole. This line of reasoning was articulated by the Judicial Appeals Tribunal, Ralph Keen, when he stated:

> "The government of the United States has been in operation under that Constitution since March 4, 1789, a vast amount of tradition, experience and law has been developed since that date regarding the operation of such a government and the proper roles to be formed by each branch. From this heritage a valuable guidance can be obtained and used for the benefit of the government of the Cherokee Nation in particular, and the Cherokee people in general (much can also be learned as to what should not be done)."
>
> Phillips v. Eagle, JAT-90-08 Pg. 19.

IV. THE DIVISION OF DISTRICTS WERE NOT ARBITRARY, BUT WERE DONE BY DELIBERATE ANALYSIS

As stated above, the "Ten Percent Rule" is, in actuality, no rule at all. If there appears to be a variance between the populations of districts that exceeds ten percent (10%), then a showing by the governmental entity that the variance is justified based on legitimate interest, then the districts will be held constitutional. Voinovich v. Quilter, 507 U.S. 146.

The Cherokee Nation Tribal Council has informed the Court of reasons that the Court may consider in finding that the governmental entity has used legitimate interest to justify any variance. The legitimate national interest that the Cherokee government has chosen to uphold is to keep like communities with similar social, economic and developmental interests together. In Legislative Act 22-10, the Cherokee government chose to place Washington County, Tulsa County and Rogers County in one particular district (District 5). The government also chose to place Nowata, Craig, Mayes and Ottawa Counties within a particular district (District 4). These two (2) areas represent substantially different segments of the Cherokee Nation population. Washington County, Tulsa County and Rogers County are highly urban areas, with substantial economic enterprises and major employment opportunities, such as the oil industry, the aeronautics industry, the gaming industry (Hard Rock Casino, Catoosa, Oklahoma) and vast other areas of economic employment. The counties represented in District 4, Nowata, Craig, Mayes and Ottawa, unfortunately, do not share the same interest or opportunities that the citizens of District 5 have. The citizens in District 4 comprise a very sparsely populated area. These economic opportunities pale in comparison to those of the more urban District 5. In short, District 5 is the most urban of areas of the Cherokee Nation, whereas District 4 represents the most sparsely and rural areas of the Cherokee Nation. Further, according to the 2000 U. S. Census the average income of citizens in District 5 is $47,664.80, whereas the average income

for the citizens in District 4 would be $36,536.21. Also, to highlight the differences between the two (2) districts is important to note that of the top ten (10) most populated cities within the jurisdiction of the Cherokee Nation four (4) of the top five (5): Tulsa, Bartlesville, Rogers and Owasso, are within the boundaries of District 5, while none of the top ten (10) most populated cities in the Cherokee Nation are within the boundaries of District 4. However, the most telling statements concerning the differences between the two districts come from the quotes of Dr. Bradley Cobb, who is a Cherokee Nation Tribal Council member from the Bartlesville area. Dr. Cobb argued eloquently in both the Rules Committee and at full council on the premise that the interests of Washington County lie hand in hand with the interests of Tulsa and Rogers Counties and that the interests of Washington County citizens were almost opposite of those interests of citizens residing in Craig, Nowata, Mayes and Ottawa Counties. Dr. Cobb stated:

> "I think that the lesser of the two evils is to put Washington, Rogers, and Northern Tulsa Counties together if you are going to stay with the five district map. I don't think it's good representation, I think as Councilor Hoskin probably pointed out in his letter that Councilor Fishinghawk read, it is entirely likely in my opinion that small towns and small communities are going to get left out of the representation table and Councilor Hoskin and I are at completely opposite ends of the spectrum on American politics and that ought to tell you something when the two of us are agreeing on this. So, I am really concerned that you are skewing the counties with the population here and you are not going to be represented in these small towns. So I will not be supporting this, if you are going to go with the five districts map I will support for Washington being with Northern Tulsa and Rogers County."..."I won't be supporting this new map primarily because I feel like the constituents that live inside the boundaries of Nowata and Craig County will not be represented fairly and I believe that Washington County interests and the things that are important to Washington County residents for the most part are different. An example of that is, as Mr. Buzzard has pointed out several times, they need roads. You have heard people need waterlines. You talk to constituents where I live; the number one thing that I get is scholarships. Those

> are about as far apart as you can get so I will not be supporting what I think you are doing is a disservice to the citizens that live in the boundaries of Craig and Nowata County."
>
> (July 12, 2010 Rules Committee of the Tribal Council)

It is self-evident from the information that has been put forward that the interest and needs of these two districts are drastically different. It is clearly of legitimate interest in keeping communities and constituencies together that share the same educational needs, economic needs, health needs and transportation needs. The three (3) councilors sharing the representation of District 5, which includes Washington County, Tulsa County and Rogers County, will hold constituencies interested in education and economic development. The three (3) councilors representing Mayes, Nowata, Craig and Ottawa Counties will be representing rural constituencies whose concerns are focused on acquiring basic needs, such as, transportation, roads, waterlines and other basic infrastructural needs. These basic needs are important for these rural communities to someday achieve what the urban communities already enjoy. The division of these districts was not arbitrary. They were thoroughly analyzed, deliberated and debated. What variances that exist are truly justified considering the interest that the communities in the respective districts share.

V. APPEALLANTS APPEAL SHOULD BE DISMISSED FOR FAILURE TO FOLLOW COURT RULES

On September 17th 2010 the Appellee's in this matter filed a motion to dismiss the Appellants appeal for failure to comply with the most basic of the Supreme Court rules. The Tribal Council restates and adopts into this brief all arguments and authorities cited in their motion previously filed.

CONCLUSION

Legislative Act 22-10 is the culmination of an intensely political process in which the Cherokee Nation Tribal Council and the office of Principal Chief were able to come together and create a set of districts that benefit the nation as a whole and keeps like-minded constituencies and communities together. The Tribal Council considered a variety of factors in the development of the five (5) districts that are before this Court today. Those factors include: Keeping political sub-divisions together; keeping district lines easily identifiable to avoid voter confusion: placing together counties with much higher urban areas and keeping together counties with predominately rural areas, each with their own distinct social and economic needs. Any variances upon the differences in populations between the districts are justified because of these compelling national interests. Further, the ten percent (10%) rule, as proclaimed by the Appellants, should not be applicable to the Cherokee Nation, and even if it were, the variances contained in Legislative Act 22-10 are justified under United States Supreme Case Law. In fact, the variances are, in some cases, far less than what the United States Supreme Court has approved in other state legislatures. Both the Executive and Legislative Branches of the Cherokee Nation find that Legislative Act 22-10 is best for the Cherokee Nation as a whole and it is our prayer that the Court uphold its constitutionality.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 25th day of October 2010, a true and correct copy of the above and foregoing Brief was mailed with proper postage prepaid thereon, to the following:

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