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CHEROKEE NATION
SUPREME COURT
KENDALL BIRD, COURT CL

No. SC-2011-02

**IN THE SUPREME COURT OF THE CHEROKEE NATION**

Cherokee Nation Registrar, Appellant
vs
Raymond Nash, et al., Appellees

# REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF CHEROKEE NATION
HONORABLE JOHN CRIPPS, JUDGE
DISTRICT COURT CASE NO. CV-07-40

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## *INTRODUCTION*

Appellees both misconstrue the nature of the Appellant's arguments, and argue that the Treaty of 1866 gave them greater rights than "native Cherokees." Appellant has never argued that the Treaty of 1866 was not binding upon the Nation; rather Appellant points out and explains exactly what the Treaty-guaranteed "rights of native Cherokees" meant to Freedmen and their descendants, both at the time of the Treaty, and now, almost a century and a half later. The Treaty guarantees that those qualifying Freedmen and their descendants ***only*** had the rights *of native Cherokees* – nothing more nor less. Any native Cherokee can face disenrollment at any time, by a change to our Constitution. Undersigned counsel would be disenrolled if a blood quantum of ½ was established, for example.

Appellant will address the arguments from the Appellees' brief by combining their first and second arguments (federal supremacy/Five Tribes Act) into the first argument, addressing the effect of the Allen decision separately in the second argument, and combining Appellees' 13th Amendment and Equal Protection claims into the third and final argument.

## *ARGUMENTS AND AUTHORITIES*

### I. THOSE FREEDMEN AND THEIR DESCENDANTS ADDRESSED BY THE TREATY PROVISIONS ARE NOT ENTITLED TO ETERNAL CHEROKEE CITIZENSHIP – THEY ARE ONLY ENTITLED TO THE 'RIGHTS OF NATIVE CHEROKEES', WHICH DOES NOT PROHIBIT DISENROLLMENT.

Appellees, like Appellant, do not dispute that the Cherokee people have the ultimate authority to determine tribal citizenship. Appellant, like Appellees, do not dispute federal legal supremacy, or the legal weight of treaties. The disagreement arises over interpretation of a

provision of the 1866 Treaty, and its effect. Fortunately for modern lawyers looking at the matter, the United States has already interpreted the meaning of that provision, and clearly enunciated its effect. However, the courts in the District of Columbia in Vann v. Kempthorne, 534 R.3d 741 (D.C.Cir.2008), have not made that interpretation, nor addressed the issue, despite Appellees' arguments to the contrary. The matter was settled at the beginning of the twentieth century, not the twenty-first.

It is Appellees, not Appellant, who engage in subterfuge to this Court. They assert that the Treaty of 1866 guarantees them a present right to citizenship in the Cherokee Nation, and that there is nothing the Cherokee people can do about it, ever. When Appellant points out that the Treaty did ***not*** say that, and that in fact it only guaranteed "rights of native Cherokees" to those individuals and their descendants who were geographically located in the Nation in a set period of time following the Civil War, Appellees can point to nothing else to support their arguments, and accuse Appellant of unethical advocacy. It was the Cherokee Constitution that endowed citizenship upon Appellees' ancestors, not any Treaty provision. The Cherokee Constitution has now been changed, upon initiative of the Cherokee people.

Further, Appellees have misrepresented the facts to this Court. There has been no "mass disenrollment," nor denial of "tribal services and rights."[1] No one has yet suffered the consequences of disenrollment. Every member of the class who became a citizen prior to the passage of the Constitutional Amendment is still a citizen, and enjoys all the rights and responsibilities that any Cherokee citizen does. Judge Cripps entered a stay in the District Court to that effect in May, 2007, and he recently[2] continued that stay, pending the outcome of this appeal.

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[1] Appellees' Answer Brief, pp. 10 – 11.
[2] February 2, 2011, *Nash v. Cherokee Nation Registrar,* CV-07-40, et al.

The suggestion that the D.C. Circuit Court of Appeals in the Vann case somehow determined that descendents of Freedmen today have an unalterable, eternal right to Cherokee citizenship is patently false, as a reading of that opinion demonstrates. At the outset, a clear view of the issue on appeal is essential to understand what is not determined. The Vann appeal focused on sovereign immunity, and then, only in the narrow procedural context of indispensible party under the joinder rules.

The D.C. Circuit began its opinion with the following statement:

> The issue on appeal is the extent to which sovereign immunity protects a federally recognized Indian Tribe and its officers against suit. We hold that suit may proceed against the tribe's officers but not against the tribe itself.

Vann, 534 F.3d at 744. In exploring the error committed by the District Court in finding that the 13th Amendment and the 1866 Treaty abrogate sovereign immunity, the D.C. Circuit Court further explained:

> Because nothing in the 13th Amendment or the 1866 Treaty amounts to an express and unequivocal abrogation of tribal sovereign immunity, the Cherokee Nation cannot be joined in the Freedmen's federal court suit without the tribe's consent. We reverse the district court's determination to the contrary.

Vann, 534 F. 3d at 749.

Contrary to the Appellees' claim here, the D.C. Circuit Court did not hold, in Vann, that Freedmen descendents have standing to seek relief against tribal officers under the 13th Amendment or the 1866 Treaty, an issue currently pending before the United States District Court on both the federal defendants' and Chief Smith's motions to dismiss. Rather, the Vann opinion merely applied the *Ex parte Young* doctrine to recognize that, as in the case of state officers, sovereign immunity does not bar injunctive claims against tribal officers. Even then,

the D.C. Circuit Court did not authorize the case to go forward on the merits. Instead, the opinion remanded the case for more procedural wrangling. Placing yet another road block before the plaintiffs, the opinion stated:

> The district court determined that the Cherokee Nation was a required party under Federal Rule of Civil Procedure 19(a). Having concluded that the district court erred in holding that the Cherokee Nation was amenable to suit, we reverse the judgment in part. On remand, the district court must determine whether "in equity and good conscience" the suit can proceed with the Cherokee Nation's officers but without the Cherokee Nation itself.[3]

Vann, 534 F.3d at 756.

Significantly, the procedural appellate opinion in Vann did not address, much less resolve, the Nation's principle argument here as to the impact of subsequent Congressional action on the 1866 Treaty, along with court decisions, including the U.S. Supreme Court decision, that a Freedmen descendant must have lived within the geographical confines of the Nation at a designated time to have rights. Nowhere did the D.C. District Court hold, in Vann, that the Constitutional Amendment was a badge of slavery, as Appellees' failure to quote any such express language confirms. In the end of its reading, Vann provides no legal support for invalidating the Constitution and Amendment adopted here.

While the Vann Court did note, *in dicta*, that the 13th Amendment and the 1866 Treaty left the tribe powerless to discriminate against Freedmen on the basis of stature as former slaves, that opinion did not address the fact that the Constitutional Amendment at issue is not premised on status as a descendent of a former slave, but instead on a particular requirement of Indian blood. Not surprisingly, descendents of former slaves that meet the Indian blood requirement are

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[3] Likewise, in ruling on the procedural issue of joinder, the District Court did not adjudicate the issue of whether the Cherokee Constitutional Amendment requiring particular proof of Indian blood to be a badge of slavery.

Cherokee citizens.

The Cherokee people have determined that some degree of Cherokee blood, as reflected by the Cherokee Indian rolls of the Dawes Commission, is a necessary condition precedent to registration for voting. Freedmen are given the "rights of native Cherokees" but this does not deprive the Cherokees of the capacity to determine who may vote in their elections. Suppose the Cherokee Tribal Council enacted an ordinance, or the tribe adopted a constitutional amendment, requiring that a minimum degree of one-quarter blood be a condition to voting or holding office. That would disenfranchise thousands of present voters but all authority indicates that the condition would be upheld. Not all native Cherokees are permitted to vote, and never were. Those who refrained from enrollment with the Dawes Commission by reason of being out of the country, or hiding in the hills, or returning to the East, or fear, or even out of pure ignorance, are all native Cherokees but have no degree of blood, as determined by the definition adopted by the Cherokee people in the Cherokee Constitution.

Indians may arbitrarily determine their own membership, their tribal organizations, and who may hold office or vote. Women have been excluded from holding office. Jacobson v. Forest County Pottawatomie Community, 389 F. Supp. 994 (ED Wisc. 1974). Requirements of one-half degree of blood have been upheld. Daley v. U.S., 483 F. 2d 700 (8th Cir. 1973). New enrollment can be proscribed. Shortbull v. Looking Elk, 677 F. 2d 645 (8th Cir. 1982).

The contested line in the 1866 Treaty was not changed by implication of Congress, but by express amendment. The U.S. Supreme Court decided that question, in holding that, Section 3 of the Five Tribes Act "constitutes a legislative interpretation of, and supersedes *pro tanto*, the prior treaty." Garfield v. United States ex rel. Lowe, 34 App. D.C. 70, 1909 WL 21538 at *4 (App. D.C. 1909), aff'd. sub nom, United States ex rel. Lowe v. Fisher, 223 U.S. 95 (1912). The

Garfield court stated that all doubts as to the construction of Article IX of the 1866 treaty were resolved by Section 3 of the Five Tribes Act. This line of cases dispositively answered the question of who could be on the Dawes rolls. The Dawes rolls were not citizenship rolls, but a census of those in the Cherokee Nation who would be entitled to allotted lands, and were completed anticipating the end of the Cherokee Nation.

It was, and is, the Cherokee Constitution that determines who is a citizen of the Cherokee Nation.

Appellant cited a number of cases from the 19th and 20th centuries which emphasized this precept in its initial brief[4]. The Treaty did not grant citizenship, the Constitution did. As the Court of Claims has recognized, "[T]he constitution of the Cherokee Nation then came into the case and defined what citizenship was, and in express terms ranked 'freedmen' with 'native-born Cherokees' . . . . " Whitmire v. United States, 30 Ct. Cl., 130, 138, 1895 WL 708, *11, 12. What the Constitution gave, the Constitution can take away.

Indian tribes retain their power to determine tribal membership. Cossey v. Cherokee Nation Enterprises, 212 P.3d 447, 456 (Okla. 2009). Appellees can only point to the holding of the trial court below that the Treaty of 1866 trumps the Cherokee Constitution's ability to define citizenship. The federal cases cited in Appellant's brief hold exactly to the contrary, including the twentieth century case of Nero v. Cherokee Nation, 892 F.2d 1457, 1463 (10th Cir. 1989), which denied the same claims from the same class here and reiterated that "[N]o right is more integral to a tribe's self-governance than its ability to establish its membership. . ."

[4] Brief of Appellant, pp. 16 – 19.

The Treaty gave certain Freedmen and their ancestors the rights of native Cherokees, nothing more. Native Cherokees may lose their right to citizenship through an amendment to the Cherokee Constitution at any time.

## II. THIS COURT MUST GIVE PRECEDENTIAL VALUE TO ITS EARLIER RECITATIONS IN THE ALLEN CASE.

Appellees would have this Court ignore a portion of its holding in the Allen[5] decision, on the same legal question, involving the same parties (Ms. Allen is a member of Appellee class). The Cherokee people followed this Court's instructions from the Allen case in instigating an initiative drive, getting the issue put on the ballot for an election, and ultimately amending their own Constitution. It would be against the law of the case, short-sighted, and patently unfair for this Court to now say, effectively, "never mind, we didn't really mean it."

In Allen this Court explicitly held "***If the Cherokee people want to change the legal definition of Cherokee citizenship, they must do so expressly.***" Allen., *p. 10.* The decision began with a recitation that "[***t]he Cherokee citizenry has the ultimate authority to define tribal citizenship.***" *Id., p. 1.*

"The law of the case 'doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " United States v. Monsisvais, 946 F.2d 114, 115 (10th Cir.1991) (quoting Arizona v. California, 460 U.S. 605, 618, (1983)). It applies to all issues that were previously decided, whether explicitly or by implication. Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1183 (10th Cir.1995). As the United States Supreme Court has stated: "the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also their explications of the governing rules of law." Sheet Metal Workers v. EEOC, 478 U.S. 421, 490 (1986)(O'Connor, J.,

[5] Allen v. Cherokee Nation, 2006 WL 5940403, JAT-04-09 (March 7, 2006)

concurring in part and dissenting in part). . *See, e.g.* Terrell v. Cherokee Nation Election Commission, 1999 WL 33589136, JAT-99-06 (April 15, 1999), "citizens of this Nation must have confidence that they may rely upon the finality of Orders of this Court."

Although the Allen decision is not the same case as the one here, it involved the same Treaty provision, the same arguments, and a member of the same class (a Freedmen descendant). This Court should abide by its decision in Allen, and its instructions there to the Cherokee people should be upheld.

## III. APPELLEE HAS NOT CROSS-APPEALED, SO THE 13TH AMENDMENT AND EQUAL PROTECTION CLAIMS SHOULD NOT BE CONSIDERED; IF THEY ARE, THEY PRESENT NO BASIS FOR RELIEF.

Appellees seek, in their claims based on the 13th Amendment and Equal Protection Clauses of the United States Constitution, to bring new issues to the appeal that were not raised by the Appellant, and which were not the basis for the district court's ruling.

Appellees did not file a petition in error of their own, nor did they assert a counter appeal in their brief. The Oklahoma Supreme Court has held that "A certiorari party who brings no counter-petition of its own stands in a posture restricted to defending against loss of relief secured on appeal. See, e.g. King v. King, 107 P.3d 570 (Okla. 2005).[6]

However, even should this Court decide to consider these claims which were not adjudicated by the district court, they provide no basis for relief.

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[6] Other Oklahoma cases hold similarly. The law has never permitted one who has not timely appealed, counter-or cross-appealed, to advance for review any reversible error. State v. County Beverage License No. ABL-78-145, 1982 OK 114, ¶¶ 12-13, 652 P.2d 292, 294-95; May v. May, 1979 OK 82, ¶ 12, 596 P.2d 536, 540; Woolfolk v. Semrod, 1960 OK 98, ¶ 12, 351 P.2d 742, 745 (a successful party may, without a counter- or cross-appeal, argue before an appellate court only those errors which, if rectified, would support the correctness of the trial court's judgment);Holshouser v. Holshouser, 1933 OK 554, ¶ 0 syl.2, 166 Okl. 45, 26 P.2d 189 (parties who fail to appeal "can demand no relief from the appellate tribunal"); Sharum v. City of Muskogee, 1914 OK 191, ¶ 0 syl.1, 43 Okl. 22, 141 P. 22..

The Appellees' reliance on the D.C.Circuit Court decision to argue that the Nation violated the 13th Amendment because the Constitution is a "badge or incident of slavery" is wholly without merit. The D.C. Circuit Court did not address that issue at all; it simply repeated plaintiffs' claims about the 13th Amendment and ruled that the Chief had no immunity from such claims. It obviously never reached the merits. However, Appellant believes that had the Court ever reached the legal merits, it would have found that plaintiffs can make no argument that the constitutional amendment violates the 13th Amendment.

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. 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. The 1866 Treaty was entered into pursuant to the U.S. Constitution's Treaty Clause with the participation of just one side of Congress – the Senate.

Further, the Thirteenth Amendment does not provide an independent cause of action for discrimination. Holland v. Bd. of Trustees of Univ. of D.C., 794 F.Supp. 420, 424 (D.D.C. 1992). An individual must assert a claim grounded in the Thirteenth Amendment via a statutorily provided remedy. Channer v. Hall, 112 F.3d 214, 217 (5th Cir. 1997). Courts have dismissed claims of discrimination brought under the Thirteenth Amendment, finding that the Thirteenth Amendment protects individuals from slavery or involuntary servitude; it does not protect individuals from various forms of racial discrimination such as racially-motivated harassment, employment discrimination, or being subject to a school district with racially segregated schools. *See* Palmer v. Thompson, 403 U.S. 217, 226-27 (1971); Wong v. Stripling, 881 F.2d 200, 203 (5th Cir. 1989).

There are no badges or incidents of slavery at issue here – first, because only Congress and not the courts can define them (and it must do so in legislation enforcing the 13th Amendment); second, because the Treaty does not constitute such enforcement legislation; and third, because Congress did not understand a denial of voting rights at the time to constitute a badge or incident of slavery (otherwise all females would have been suffering under the incidences of slavery until 1921).

Further, there is no Equal Protection violation. Equal Protection means "that similarly situated persons must receive similar treatment under the law." Reed v. Reed, 404 U.S. 71, 75 (1971). If any party could make an Equal Protection claim, it would be native Cherokees if the District Court's decision is upheld, because while native Cherokees can always suffer disenrollment, Freedmen descendants will not. It is Appellant that is arguing that native Cherokees and Freedmen descendants be treated equally; Appellees seek an unequal outcome – a super citizenship right that can never be abrogated.

Being an Indian is a political and not a racial affiliation. *See* United States v. Antelope, 430 U.S. 641, 646 (1977); United States v. Keys, 103 F.3d 758, 761 (9th Cir.1996). *See also* U.S. v. Male Juvenile, 280 F.3d 1008, 1016 (9th Cir.2002) (finding no equal protection violation to exist "because the difference in treatment [under the challenged statute] between an Indian and a non-Indian arises from his political membership in the tribe rather than from his race.") These decisions emphasize that membership, as opposed to race, is the critical matter of inquiry in such cases. The United States Supreme Court has already explicitly considered whether laws that distinguish based on tribal membership violate equal protection in Morton v. Mancari 417 U.S. 535 (1974).

The effect of the new Constitutional Amendment does not treat individuals of African

American heritage any differently than any other citizen or potential citizen of the Nation — some Cherokee (or Shawnee or Delaware) blood ancestry is required. There is no Equal Protection violation, either factually or legally, in that practice.

## *CONCLUSION*

Again, Appellees seek to twist the applicable provision of the 1866 Treaty to give them super-citizenship rights, something no native Cherokee can claim. The Honorable District Court was simply wrong in holding that the Treaty barred the Cherokee people from voting on the matter. The line of cases following the Treaty in the late 19th and early 20th century made clear what the Treaty language meant, and what it did not. Many of those cases reiterated that it was the Cherokee Constitution which actually granted citizenship status to the Freedmen and their descendants. The Cherokee people did what this Court instructed in Allen – they placed a Constitutional Amendment regarding the matter on the ballot. The Amendment passed, all in accordance with Cherokee law, and this Honorable Court should uphold its passage, by reversing the decision of the district court and finding that the Amendment was a valid exercise of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was emailed to counsel for Plaintiffs, Ralph F. Keen II, and also mailed to Mr. Keen at Keen Law Office, P.C., 205 West Division, Stilwell, OK 74960.

Diane Hammons