UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON, DONALD MOON, CHARLENE WHITE, RALPH THREAT, FAITH RUSSELL, ANGELA SANDERS, SAMUEL E. FORD, and THE FREEDMEN BAND OF THE CHEROKEE NATION OF OKLAHOMA, **Plaintiffs,** **v.** **KEN SALAZAR, Secretary of the United States Department of the Interior;** **UNITED STATES DEPARTMENT OF THE INTERIOR;** **CHADWICK SMITH, Individually and in His Official Capacity;** **S. JOE CRITTENDEN, Individually and in His Official Capacity; and** **John Does, Individually and in Their Official Capacity,** **Defendants.**	**Case No: 1:03cv01711 (HHK)** **Judge: Henry H. Kennedy** **Docket Type: Civil Rights (non-employment)**

FREEDMEN PLAINTIFFS' MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR A PRELIMINARY INJUNCTION

The Cherokee Nation was one of the few Indian tribes to own slaves and fight with the Confederacy during the Civil War. After the Civil War ended, the Cherokee Nation agreed, in connection with restoring its relations with the United States Government in the Treaty of 1866, to free its slaves and guarantee them and their descendents "all the rights of native Cherokees" – including full citizenship rights.

Certain Freedmen, until recently (and with a couple of exceptions), had been permitted to exercise their Cherokee citizenship rights. The Cherokee Nation Constitution, in accordance with the Treaty of 1866, until 2007 granted full Cherokee citizenship rights to the Freedmen. In March 2007, however, the Cherokee Nation amended its Constitution to strip its Freedmen of their citizenship rights. On May 14, 2007, the Cherokee Nation District Court issued a temporary injunction restoring the Freedmens' citizenship rights. On January 14, 2011, the Cherokee Nation District Court held that the constitutional amendment was invalid because it violated the Treaty of 1866. The Cherokee Nation, observing the District Court's temporary injunction and later its final ruling, permitted certain Freedmen to exercise their citizenship rights, including their right to vote in the election for Principal Chief held on June 25, 2011.

Yet the Freedmen's citizenship rights will now be taken away permanently – unless this Court acts to preserve them. On August 22, 2011, the Cherokee Supreme Court ruled that the March 2007 constitutional amendment is valid and that the Cherokee Nation may deny citizenship rights to the Freedmen. The Cherokee Nation is now stripping the Freedmen of their citizenship rights. Freedmen who had been registered to vote in Cherokee elections – and who voted in the election for Principal Chief held on June 25, 2011 – are being removed from the Cherokee voter rolls and will be prevented from voting in the special election for Principal Chief to be held on September 24, 2011. In addition, Freedmen will be denied crucial benefits afforded to all Cherokee citizens, including health care, employment in the Tribe or its many companies, education assistance, and many other benefits.

The Freedmen now turn to this Court to seek a preliminary injunction against the Cherokee Nation Defendants and the Federal Defendants to prevent the Cherokee Nation from

taking away their most fundamental rights until this Court makes its final ruling on the merits of the Freedmen's claims.

BACKGROUND AND PROCEDURAL HISTORY

Historical Background

Prior to the Civil War, slaves of Cherokees, as well as free intermarried Blacks or children of mixed racial families, lived in the Cherokee Nation. Complaint ("Compl.") ¶ 24.[1] In 1861, the Cherokee Nation entered into a treaty with the Confederate States of America, thereby severing its relationship with the United States. The Cherokee Nation received seats in the Confederate House of Representatives and Senate and rank in its military. As part of the Confederate Army, the Cherokee Nation waged war against the United States in defense of the institution of slavery. The Cherokee Nation passed legislation enacting slave codes, regulating slavery within its borders.

In 1863, slavery was abolished through the Emancipation Proclamation, and in 1865 the Thirteenth Amendment of the United States Constitution was ratified. *Id*. ¶ 25. Following the Civil War, the United States and the Cherokee Nation entered into the Treaty of 1866, July 19, 1866, 14 Stat. L. 799 ("Treaty of 1866"), which, among other things, granted the freed Cherokee slaves (the "Freedmen"[2]) citizenship in the Cherokee Nation. *Id*. ¶ 26. After the Cherokee

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[1] All citations to the Complaint refer to the Freedmen Plaintiffs' Fourth Amended Complaint, filed December 19, 2008. D.C. Action Doc. No. 115. The Freedmen Plaintiffs have filed a motion for leave to file their Fifth Amended Complaint on March 14, 2009, which is still awaiting decision. *See* D.C. Action Doc. No. 127.

[2] In July 2010, the related action *The Cherokee Nation v. Nash*, Civil Case No. 1:10-cv-1169 (HHK), was transferred to this Court from the United States District Court for the Northern District of Oklahoma. Except where necessary for procedural reasons to distinguish between the Freedmen Plaintiffs here and the Freedmen Defendants in the transferred action, both groups will be referred to herein collectively as "the Freedmen." Both groups are represented

Nation entered into the Treaty of 1866, the Cherokee National Council amended its constitution, implementing the Treaty's requirement that the Cherokee Nation guarantee the Cherokee Freedmen full rights as citizens.

In 1893, the United States government established the Dawes Commission for the purpose of creating authoritative membership rolls for all of the Native American tribes in Oklahoma, including the Cherokees. *Id*. ¶ 33. Although not required or authorized to do so, the Dawes Commission created separate categories of Cherokee citizens, including one for Cherokees "by Blood," also known as the "Blood Roll," and the "Freedmen Roll" for the Black Cherokees. *Id.* Persons on the Freedman Roll were typically former Cherokee slaves and descendants of Cherokee slaves, but it also included any other member of the Cherokee Nation having any Black ancestry, regardless of that individual's Cherokee ancestry "by Blood." *Id.* Although the quantum of Native American ancestry was recorded for each individual on the "Blood Roll," no effort was made to record the percentage of Native American ancestry of those persons listed on the "Freedmen Roll." *Id.* In 1907, the Dawes Commission completed its rolls of citizens of the Cherokee Nation. *Id*. ¶ 37.

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by the same legal counsel and, as Judge Kern recognized in his Transfer Order, although the five individual Freedmen named as defendants in the transferred action differ from the named plaintiffs in this action, "[f]or purposes of deciding the questions presented in both lawsuits, it makes little difference which individual Freedmen are parties. [The] D.C. Individual Plaintiffs are simply other Freedmen asserting rights contrary to the declaratory relief sought by the Cherokee Nation in this case, and they could be readily substituted as defendants in this case without effecting any substantive change in the declaratory action. In addition, the presence of Freedmen Band as a plaintiff in the D.C. Action renders the parties in the two suits even more similar because all Freedmen Defendants are members of this political organization…[.]" Transfer Order at 16-17.

Previous Actions by the Federal Defendants To Protect the Citizenship Rights of the Cherokee Freedmen and the Freedmen of Other Tribes

In 1970, Congress enacted The Principal Chiefs Act, which permitted the Cherokee Nation and other tribes to elect their principal chiefs but required that the procedures established for any such election "shall be subject to approval by the Secretary of the Interior." Pub. L. No. 91-495, 84 Stat. 1091 (1970). The Department of the Interior determined immediately that any such election procedures must permit the Freedmen to vote. *See* Letter from Harrison Loesch dated March 29, 1971 ("Voter qualifications of the Choctaw, Seminole, Cherokee and Creek people must be broad enough to include the enrolled freedmen citizens of the respective nations.") (attached as Exhibit 1).

Over ten years ago, the Seminole Nation sought to deny citizenship rights to its Freedmen. The Federal Defendants, as they were obligated to do under the Thirteenth Amendment, the Seminole Treaty of 1866 (identical in substance to the Cherokee Treaty of 1866), and the Principal Chiefs Act, acted to protect the citizenship rights of the Seminole Freedmen. In particular, the Federal Defendants made clear to the Seminole Nation that the Seminole Freedmen were citizens of the Seminole Nation and were entitled to full citizenship rights.[3]

In response, the Seminole Nation sued the Federal Defendants in this Court, but the Federal Defendants prevailed. *Seminole Nation of Okla. v. Norton*, No. 00-2384, 2001 WL

[3] *See* Letter from the Assistant Secretary of Indian Affairs to Chief Jerry Haney (dated September 29, 2000) (stating that the Freedmen became citizens of the Tribe pursuant to the Treaty of 1866; proposed constitutional amendments to remove the Freedmen from membership would violate the Treaty and the Indian Civil Rights Act; the Tribe did not submit the proposed revisions of removing the Freedmen to the United States for approval, as required; and the amendment to the Constitution removing the Freedmen from membership are "deemed disapproved and invalid") (attached as Exhibit 2).

36228153 (D.D.C. Sept. 27, 2001) (memorandum opinion granting summary judgment in part to the Federal Defendants) ("*Seminole I*"). In *Seminole I*, this Court held that the Federal Defendants had acted properly to protect the citizenship rights of the Seminole Freedmen. In particular, this Court held that the Seminole Treaty of 1866 has not been abrogated and "continues to bind the United States and Seminole governments" *Id.* at *16.

While *Seminole I* was pending, the Seminole Nation held an election for Principal Chief and did not permit the Seminole Freedmen to vote. The Federal Defendants again acted to protect the citizenship rights of the Seminole Freedmen, the Seminole Nation again brought suit in this Court, and the Federal Defendants again prevailed. *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122 (D.D.C. 2002) ("*Seminole II*"). In holding that the Federal Defendants properly acted to protect the citizenship rights of the Seminole Freedmen, this Court stated as follows:

> The Court acknowledges and appreciates the importance of the Nation's right, as a sovereign body, to self-determination and self-government. However, as a sovereign, the Nation has the duty and the responsibility to respect the rights of all of its members, including the rights of its minority members, as guaranteed by the Nation's Constitution. *See* Seminole Constitution Art. II ("The membership of this body shall consist of all Seminole citizens whose names appear on the final rolls of the Seminole Nation of Oklahoma approved pursuant to section 2 of the Act of April 26, 1906 ...). And, where the Nation evidences that it does not intend to respect those rights, the government, as part of "the distinctive obligation of trust incumbent upon [it] in its dealings with these dependent and sometimes exploited people," *Seminole Nation*, 316 U.S. at 296, 62 S. Ct. 1049, (citations omitted), has a duty to ensure that its minority members are protected against the will of the majority that is being imposed in violation of its own Constitution. The United States has itself dealt with many of these same issues, where, if the will of the majority had prevailed, many minority members of this society would not have been able to enjoy the same privileges and benefits as other citizens. Where the Nation will not protect the Constitutional rights of its minority members, the BIA has the responsibility and indeed, the duty, to intervene and attempt to protect those rights through appropriate remedies. *Id.* at 296-97, 62 S. Ct. 1049.

Id. at 146-147.

Initial Actions of the Cherokee Nation to Deny Citizenship Rights to the Cherokee Freedmen

Nearly ten years ago, the Cherokee Nation, like the Seminole Nation before it, took steps to deny citizenship rights to its Freedmen. The Cherokee Nation Constitution provided that any amendment to the Constitution required the approval of the President of the United States or his authorized representative. The Cherokee Nation proposed amending its Constitution to remove that approval requirement. The Federal Defendants did not object to the removal of the approval right, *so long as the citizenship rights of the Freedmen were protected*:

> We have no objection to the referendum as proposed and I am prepared to approve the amendment deleting the requirement for Federal approval of future amendments subject to certain understandings. First, all members of the Cherokee nation, including the Freedmen descendants who are otherwise qualified, must be provide an equal opportunity to vote in the election. Second, under the current law, no amendment of the Nation's Constitution can eliminate the Freedmen from membership in the Nation absent Congressional authorization. And lastly, notwithstanding any amendment of the Nation's Constitution, the Act of October 22, 1970 (94 Stat. 1091) until it is repealed or amended will still require Secretarial approval of the procedures for the election of the leaders of the Cherokee Nation and the other of the Five Civilized Tribes.

Letter from Neal McCaleb to Chief Smith (dated March 15, 2002) (attached as Exhibit 3). The Federal Defendants also made clear to the Cherokee Nation that the Principal Chiefs Act, requiring that the Secretary of the Interior approve the Cherokee Nations election procedures, remains in effect. Letter from Dennis Springwater to Chief Smith (dated May 8, 2002) (attached as Exhibit 4).

On May 24, 2003, the Cherokee Nation held a special election to elect its Principal Chief, to elect other tribal officials, and to amend its constitution to remove the provision requiring

approval by the Federal Defendants of future constitutional amendments. Compl. ¶ 1. The Cherokee Nation did not permit the Cherokee Freedmen to vote in this election. On July 26, 2003, the Cherokee Nation held a run-off election for certain tribal officials and an election to consider further constitutional amendments. The Cherokee Nation did not permit the Cherokee Freedmen to vote in this election either. *Id*. ¶¶ 1, 46; *Vann v. Kempthorne,* 534 F.3d 741, 744 (D.C. Cir. 2008).

As of the election held on May 24, 2003, and as of the election held on July 26, 2003, the Federal Defendants had made clear that they would not approve the election procedures or the election results unless the Cherokee Nation protected the citizenship rights of the Cherokee Freedmen and permitted them to vote in the elections. However, on August 6, 2003, the Federal Defendants reversed their position and recognized the election of Chief Smith as Principal Chief – even though the Cherokee Freedmen had been denied the right to vote in the elections held on May 24, 2003, and July 26, 2003. Letter from Jeanette Hanna to Chief Smith (dated Aug. 6, 2003) (attached as Exhibit 5). The Federal Defendants stated that they were continuing to review the amendment to the Cherokee Constitution approved on May 24, 2003, an election in which the Cherokee Freedmen were not permitted to vote.

The D.C. Action

On August 11, 2003, a group of six individual Cherokee Freedmen filed this action against Gale Norton, then Secretary of the Interior, and the United States Department of Interior (the "Federal Defendants"), Civil Case No. 1:03-cv-01711 (HHK) (the "D.C. Action"), seeking declaratory and injunctive relief requiring the Federal Defendants to protect the citizenship rights of the Freedmen. On January 14, 2005, the Cherokee Nation of Oklahoma filed a Limited Motion to Intervene for the purpose of moving to dismiss the D.C. Action. D.C. Action Doc.

No. 17. On September 8, 2005, this Court granted the Cherokee Nation's motion to intervene and deemed as filed on that date the Cherokee Nation's Motion to Dismiss. D.C. Action Doc. Nos. 22 and 23. In response, Plaintiffs moved to amend their complaint to add the Cherokee Nation and the Cherokee Principal Chief (the "Cherokee Nation Defendants") as party defendants. D.C. Action Doc. No. 38.

On December 19, 2006, this Court denied the Cherokee Nation's motion and granted Plaintiffs leave to add the Cherokee Nation Defendants as parties. *Vann v. Kempthorne*, 467 F. Supp. 2d 56 (D.D.C. 2006) ("*Vann I*") (D.C. Action Doc. No. 41). In addition, this Court held that (1) the Thirteenth Amendment applies to the Cherokee Nation, (2) the Civil Rights Act of 1866 was intended to enforce the Thirteenth Amendment against all persons and entities under the jurisdiction of the United States, and (3) the Treaty of 1866 (which guarantees Cherokee citizenship to Cherokee Freedmen) incorporated the principles of the Thirteenth Amendment and the Civil Rights Act of 1866 and makes adherence to such principles a condition of the Cherokee Nation's existence within the United States. *Id.* at 67-69. This Court also held that the Federal Defendants have a fiduciary obligation to protect the rights of Plaintiffs and other Cherokee Freedmen and, under the Principal Chiefs Act of 1970, are obligated to review and approve the procedures by which the Cherokee Nation elects its principal chief. *Id.* at 71-72 and n.12.

The 2007 Elections and the Freedmen Plaintiffs' Previous Motions for Preliminary Injunction

Following this Court's decision on December 19, 2006, the Cherokee Nation announced its intention to hold a special election on March 3, 2007, to decide the following ballot initiative to amend the Cherokee constitution in order to remove the Cherokee Freedmen from the Cherokee Nation of Oklahoma:

> This measure amends the Cherokee Nation Constitution section which deals with who can be a citizen of the Cherokee Nation. A vote "yes" for this amendment would mean that citizenship would be limited to those who are original enrollees or descendents of Cherokees by blood, Delawares by blood, or Shawnees by blood as listed on the Final Rolls of the Cherokee Nation, commonly referred to as the Dawes Commission Rolls closed in 1906. *This amendment would take away citizenship of current citizens and deny citizenship to future applicants who are solely descendants of those on either the Dawes Intermarried Whites or Freedmen Rolls.* A vote 'no' would mean that Intermarried Whites and Freedmen original enrollees and their descendants would continue to be eligible for citizenship. Neither 'yes' or a 'no' vote will affect the citizenship rights of those individuals who are original enrollees or descendents of Cherokees by blood, Delaware by blood, or Shawnees by blood as listed on the Final Rolls of the Dawes Commission Rolls closed in 1906.

Cherokee Nation Special Election Ballot (March 3, 2007) (emphasis added) (attached as Exhibit 6).

On February 1, 2007, the Freedmen Plaintiffs asked this Court to issue a preliminary injunction preventing the Cherokee Nation Defendants from holding the election on the proposed constitutional amendment. This Court denied the motion because, among other reasons, it concluded that Plaintiffs failed to demonstrate that they would suffer irreparable harm in that they failed to show that the election itself – as opposed to the results of the election – would cause them harm. That is, the possibility existed that the proposed constitutional amendment would not pass, in which case the Freedmen Plaintiffs would not be stripped of their citizenship right under the Cherokee Constitution. This Court noted, however, that "[e]ven assuming arguendo that the outcome they fear come[s] to pass, the Freedmen have a remedy if the election results in the deprivation of their constitutional rights." Transcript of Preliminary Injunction Hearing at 41:2-4 (Feb. 21, 2007).

The outcome the Freedmen feared did come to pass. On March 3, 2007, the Cherokee Nation approved the constitutional amendment stripping the Freedmen of their Cherokee

citizenship (the "March 2007 amendment"). Compl. ¶ 67. On March 21, 2007, the Cherokee Nation sent letters to Freedmen informing them that their citizenship status had been terminated. *Id*. On March 28, 2007, the Cherokee Nation sent letters to Plaintiffs and other Freedmen informing them that the Cherokee Nation was terminating their medical benefits. *Id*.

On May 8, 2007, the Freedmen Plaintiffs filed a second motion for preliminary injunction in order to enjoin the Cherokee Nation from preventing the Freedmen from participating in an election for Principal Chief, Vice-Chief, and seventeen National Council members scheduled for June 23, 2007. D.C. Action Doc. No. 69.

Shortly after the Freedmen Plaintiffs filed their second motion for preliminary injunction, the Cherokee Nation District Court, on May 14, 2007, issued a temporary injunction staying implementation of the March 2007 Amendment, allowing those Freedmen who were citizens on or before March 3, 2007, to retain their citizenship rights and participate in the June 23, 2007, election. Compl. ¶ 69. This injunction was the result of a process initiated by the Cherokee Nation itself, which had provided to Cherokee Freedmen citizens who previously had been notified that their citizenship status had been terminated a document those Freedmen could use to challenge the termination of their citizenship rights. Individuals who submitted this challenge document were automatically determined to be members of the plaintiff class in an action in the Cherokee Nation District Court ("Tribal Court Action").[4]

On May 21, 2007, Assistant Secretary of the Department of Interior Carl J. Artman sent a letter to Cherokee Nation Principal Chief Chadwick Smith stating that the Department of Interior disapproved the 2003 amendment to the Cherokee constitution that would have removed "the

[4] *Raymond Nash v. Cherokee Nation Registrar*, Case Nos. CV-07-40, CV-07-41, CV-07-42, CV-07-43, CV-07-44, CV-07-45, CV-07-46, CV-07-47, CV-07-48, CV-07-49, CV-07-50, CV-07-53, CV-07-56, CV-07-65, CV-07-66, CV-07-72, CV-07-78, CV-07-85, CV-07-86, CV-07-99, CV-07-100, CV-07-112, and CV-07-116 (D. Ch. Nat. 2007).

requirement that the Secretary approve all constitutional amendments for them to be effective." *See* Exhibit 7. Mr. Artman explained that he was

> concerned that approval by the Department of the 2003 amendment at this time would be used by some as a validation or evidence of legitimacy of the Cherokee Nation's removal or its Freedmen members from the tribe in apparent violation of the 1866 treaty. Therefore, I cannot approve the 2003 amendment *knowing it may provide the basis for violating the terms and intent of the 1866 treaty*.

Id. (emphasis added).

On May 22, 2007, the Cherokee Nation, at the request of the Federal Defendants, submitted proposed election procedures for the June 23, 2007, election to the Federal Defendants for review and approval. The Federal Defendants approved these election procedures on May 25, 2007. *See* Memorandum in Support of Federal Defendants' Partial Motion to Dismiss, D.C. Action Doc. No. 118-2 at 5-6.

On June 13, 2007, citing the temporary injunction issued by the Cherokee Nation District Court, which permitted the Plaintiffs and similarly situated Freedmen to vote in the June 23, 2007, election and the Federal Defendants' subsequent approval of the Cherokee election procedures, this Court denied the Freedmen Plaintiffs' second motion for preliminary injunction. D.C. Action Doc. No. 83. At the election held on June 23, 2007,[5] the Cherokee Nation voters passed a constitutional amendment identical in substance to the 2003 amendment (removing the requirement for approval by the Secretary of the Interior of future constitutional amendments)

[5] Approximately 1,000 Freedmen of the 2,800 Freedmen with Cherokee citizenship were able to register to vote. Compl. ¶ 69. Although their right to vote in the June 2007 election was nominally protected under the Cherokee District Court's May 14, 2007, temporary injunction, the Freedmen voters were not treated equally with other registered voters. The Freedmen voters were notified by letter that they would only be permitted to vote in the "at large" districts, which restrict voting to absentee ballots only. *Id.* at ¶ 72. Freedmen ballots were segregated from other ballots and left on desks with no protection of the ballots; Freedmen voters were verbally abused by precinct workers; and other Freedmen voters were simply turned away from the polls. *Id.* at ¶ 73.

and re-elected Chadwick Smith as Principal Chief. On August 9, 2007, the Federal Defendants approved without comment the constitutional amendment approved at the June 23, 2007, election. *See* Exhibit 8.

Partial Reversal and Remand by the United States Court of Appeals for the District of Columbia Circuit

The Cherokee Nation appealed this Court's ruling dated December 19, 2006. On July 29, 2008, the United States Court of Appeals for the District of Columbia Circuit determined that although the Cherokee Nation is a required party under Fed. R. Civ. P. 19(a), the Cherokee Nation could not be joined in this action because of its sovereign immunity. *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008) ("*Vann II*"). At the same time, the Court of Appeals determined that Defendant Chadwick Smith was not protected by the tribe's sovereign immunity under *Ex parte Young* and therefore could remain a party to this suit. *Id.* at 750. The Court of Appeals remanded this action to this Court to "determine whether 'in equity and good conscience' the suit can proceed with the Cherokee Nation's officers but without the Cherokee Nation itself." *Id.* at 756.

On December 19, 2008, following remand of the D.C. Action to this Court, the Freedmen Plaintiffs moved for leave to file their Fourth Amended Complaint, which dropped the Cherokee Nation as a party in light of the Court of Appeals decision. D.C. Action Doc No. 115. This Court granted the Freedmen Plaintiffs' motion on January 7, 2009.

On January 30, 2009, Chief Smith filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 19(b), in the Alternative to Fed. R. Civ. P. 12(b)(6), and in the Further Alternative Pursuant to Fed. R. Civ. P. 12(b)(3). D.C. Action Doc. No. 119. Chief Smith argued that the Cherokee Nation is an indispensable party to this action, and because, as a sovereign entity, it could not be

joined to the action against its will, the case must be dismissed under Federal Rule of Civil Procedure 19(b).[6] The Freedmen Plaintiffs opposed Chief Smith's motion, which remains pending.

Also on January 30, 2009, the Federal Defendants filed a partial motion to dismiss arguing, among other things, failure to state a claim and lack of jurisdiction. D.C. Action Doc. No. 118. The Freedmen Plaintiffs opposed Federal Defendants' motion, which remains pending.

The Oklahoma Action (now the Transferred Action)

On February 3, 2009, two business days after Chief Smith filed his motion to dismiss in the D.C. Action, the Cherokee Nation filed suit in the United States District Court for the Northern District of Oklahoma requesting a judgment declaring "that the Five Tribes Act and federal statutes modified the Treaty of 1866 thereby resulting in non-Indian Freedmen descendants, including the individual defendants, no longer, as a matter of federal law, having rights to citizenship of the Cherokee nation and benefits derived from such citizenship." *The Cherokee Nation v. Nash*, Civil Docket No. 4:09-cv-00052-TCK-PJC ("Oklahoma Action"). The Cherokee Nation in the Oklahoma action did not sue any of the individual Freedmen who are plaintiffs in this action. Instead, the Cherokee Nation sued five different Freedmen, as well as the Federal Defendants. On February 6, 2008, Chief Smith filed a Supplement to his Memorandum in Support of his Motion to Dismiss, informing this Court of the Oklahoma Action and asserting that the Oklahoma Action constituted a "procedurally appropriate avenue … for Plaintiffs to judicially resolve their asserted and disputed claim that the Treaty of 1866 between

[6] Chief Smith also argued for dismissal on other grounds, including failure to state a cause of action upon which relief can be granted and failure to allege facts establishing venue as to Chief Smith.

the Cherokee Nation and the United States currently entitles them to rights of Cherokee Nation citizens." D.C. Action Doc. No. 120 at 2.

On March 14, 2009, the Freedmen Plaintiffs in the D.C. Action filed a motion for leave to file a fifth amended complaint, which seeks to add the Cherokee Nation of Oklahoma as a Defendant in the D.C. Action and to add the five individual Freedmen sued by the Cherokee Nation in the Oklahoma Action as additional Plaintiffs. (D.C. Action Doc. No. 127). The Freedmen in that motion argue that the Cherokee Nation, by filing the Oklahoma Action, waived its sovereign immunity and may now be added as a Defendant in the D.C. Action. The Cherokee Nation opposed that motion, and the Federal Defendants did not take a position on the motion, which remains pending.

On May 29, 2009, the Freedmen Defendants and the Federal Defendants in the Oklahoma Action filed separate motions to transfer that action to the District of Columbia. *See* Oklahoma Action Doc. Nos. 18 and 20. On June 18, 2009, the Freedmen Defendants filed their Amended Answer, their Counterclaims Against the Cherokee Nation of Oklahoma, and their Cross-Claims Against Federal Defendants in the Oklahoma Action. *See* Oklahoma Action Doc. Nos. 31, 32, and 33. The Freedmen Defendants' Counterclaims and Cross-Claims in the Oklahoma Action mirror the claims made in the Freedmen Plaintiffs' fourth amended complaint and proposed fifth amended complaint in the D.C. Action.

On July 2, 2010, Judge Terence Kern of the United States District Court for the Northern District of Oklahoma entered an order transferring the Oklahoma Action to this Court ("Transfer Order"). Judge Kern, having found that the parties and issues in the Oklahoma Action were sufficiently similar to those in the D.C. Action, held that under the "first-to-file rule," this Court should ultimately determine whether the Oklahoma Action should be heard in the District of

Columbia, where a parallel suit has been pending since 2003, or whether, based on the Cherokee Nation's claims of forum immunity, the Oklahoma Action must be transferred back to the Northern District of Oklahoma. Oklahoma Action Doc. No. 48, at 21. On July 12, 2010, the transferred action was initiated in this Court as Civil Case No. 1:10-cv-01169 (HHK) ("Transferred Action").[7] The Freedmen Plaintiffs in the D.C. Action and the Freedmen Defendants in the Transferred Action each subsequently filed motions to consolidate the two actions on October 15, 2010. Chief Smith and the Cherokee Nation, respectively, opposed those motions; the Federal Defendants in each action, although they did not join in the motions, indicated that they supported consolidation, subject to the relief sought in their motions to dismiss filed in both cases. The motions to consolidate remain pending.

Recent Events Leading to Freedmen Plaintiffs' Current Motion for Preliminary Injunction

The temporary injunction issued by the Cherokee Nation District Court on May 14, 2007, preserved temporarily the citizenship rights of certain Freedmen. On January 14, 2011, the Cherokee Nation District Court issued a final order declaring that the March 2007 Amendment was "void as a matter of law" under the Treaty of 1866. Tribal Court Action (Jan. 14, 2011

[7] On July 13, 2010, the Cherokee Nation filed its motion to dismiss or transfer the Transferred Action. Transferred Action Doc. No. 51. On August 30, 2010, the Freedmen Defendants and the Federal Defendants each filed their briefs in opposition to the Cherokee Nation's motion. Transferred Action Doc. Nos. 55 (Federal Defendants) and 57 (Freedmen Defendants). The Cherokee Nation's motion remains pending. On August 31, 2010, the Federal Defendants filed their Motion to Dismiss Cross-Claims. Transferred Action Doc. No. 58. On September 30, 2010, the Freedmen Defendants filed their brief in opposition to the Federal Defendants' Motion. On November 15, 2010, the Cherokee Nation's claims against Federal Defendants in the Transferred Action were dismissed without prejudice. Transferred Action Doc. No. 71. However, the Federal Defendants' motion to dismiss the Freedmen Defendants' cross-claims, which were not dismissed, remains pending.

Order) (attached as Exhibit 10). This order preserved the citizenship rights of certain Freedmen, pending the Cherokee Nation's appeal of the order to the Cherokee Nation Supreme Court.

The Cherokee Nation held a general election on June 25, 2011, for, among other elected positions, the office of Principal Chief of the Cherokee Nation. Freedmen who were registered Cherokee citizens and who had registered to vote were permitted to vote in this election.

The initial unofficial election results from the Cherokee Election Commission showed that challenger Bill John Baker defeated the incumbent Principal Chief, Defendant Chadwick Smith, by eleven votes. Following a recount, the Cherokee Election Commission subsequently reversed those results and declared Smith the winner in its official election results issued on July 27, 2011 – by seven votes. Following calls from Baker for a hand recount of the ballots, the Election Commission conducted a second recount and, on June 30, issued a revised official result declaring Baker the winner by 266 votes. On July 5, Chief Smith asked the Cherokee Supreme Court to declare a new election. On July 21, the Cherokee Supreme Court issued an order declaring the June 25, 2011, election for Principal Chief invalid, finding that "after consideration of all the evidence … it is impossible to determine the election result with mathematical certainty or to certify a successful candidate for the Office of Principal Chief of the Cherokee Nation." *In the Matter of the 2011 General Election*, Case No. SC-2011-06 (Cherokee Nation Sup. Ct. July 21, 2011) (attached as Exhibit 10). Pursuant to Cherokee law, the Principal Chief is to set the date for a new election, should the result of an election be invalidated. Chief Smith set September 24, 2011, as the new election date. Chief Smith's term as Principal Chief came to an end on the previously-determined inauguration date of August 14, 2011, and duly elected Deputy Chief S. Joe Crittenden took office on that date as Acting Principal Chief of the Cherokee Nation.

On August 22, 2011, the Cherokee Nation Supreme Court, in a 4-1 decision, issued a ruling upholding the validity of the March 2007 Amendment and reversing and vacating the order of the Cherokee Nation District Court issued on January 14, 2011. The Cherokee Nation Supreme Court ruled that it lacked subject matter jurisdiction to determine the validity of an amendment to the Cherokee Constitution. *See Cherokee Nation Registrar v. Nash*, Case No. SC-2011-02 (Cherokee Nation Sup. Ct. Aug. 22, 2011) (attached as Exhibit 11). The Cherokee Nation Supreme Court ruled that the Treaty of 1866 did not grant citizenship rights to the Freedmen, but that such rights were granted only by the Cherokee Nation Constitution, which was amended in 1866 to grant citizenship to the Freedmen. As such, "[i]t stands to reason that if the Cherokee People had the right to define the Cherokee Nation citizenship in the [] 1866 Constitutional Amendment they would have the sovereign right to change the definition of Cherokee Nation citizenship in their sovereign expression in the March 3, 2007 Constitutional Amendment." *Id.* at 8.

Following the Cherokee Supreme Court's decision, the Cherokee Nation and Acting Principal Chief began taking steps to strip the Freedmen of their citizenship rights. The Cherokee Election Commission began removing Freedmen from the voting rolls in advance of the September 24 election. *See* D. E. Smoot, *Cherokee Election Officials Scramble to Adjust Voter Rolls*, Muskogee Phoenix, Aug. 23, 2011 ("'We're going to be working our butts off,' said Lloyd Cole Jr., the attorney for the Cherokee election commission. 'We are going to find out who those people are and then remove them from the voting rolls before the upcoming election.'") (attached as Exhibit 12); Letter from Kalyn Free to Cherokee Nation Election Commission (September 2, 2011) (Election Commission has coded 1233 registered Freedmen as "inactive" and has not sent absentee ballots to 354 registered Freedmen who requested them)

(attached as Exhibit 13); Email from Lloyd Cole, Jr. to Kalyn Free (September 2, 2011) (acknowledging that Freedmen are being removed from the Cherokee voter rolls and Cherokee Election Commission data base) (attached as Exhibit 14). The Freedmen Plaintiffs in the D.C. Action, the Freedmen Defendants in the Transferred Action, and all similarly situated Freedmen will be denied the right to vote in the September 24 election and subsequent elections if the Cherokee Nation is permitted to strip the Freedmen of their citizenship rights. *See, e.g.,* Declarations of Charlene White, Raymond Nash, Zenobia King-Howard, Melissa Chaplin, Shenedda Gaston, Verressa Gaston, Courtney Gaston, Debra Owens, Ashley Logan Knapper, Rena Logan, Johnny Toomer, Tommy Lee McNac, Jr., and Anna Nicholson (attached as Exhibits 15-26).

Cherokee Freedmen also will be systematically denied critical services available only to Cherokee citizens if the Cherokee Nation is permitted to strip the Freedmen of their citizenship rights.

Plaintiff Charlene White is being treated by at the Mankiller Clinic, operated by the Cherokee Nation, for glaucoma and cataracts. Her treatments provide costly eye drops and eye glasses every four months, and she is being tested every three months to determine whether she will need a costly cataract removal procedure. If she is stripped of her Cherokee citizenship and the health benefits provided to Cherokee citizens, she will lose these treatments and likely lose her sight as she cannot afford to pay for these services on her own. Declaration of Charlene White (September 2011) (attached as Exhibit 15).

Raymond Nash, who is a Freedmen Defendant in the Transferred Action, is a Freedmen citizen of the Cherokee Nation who is registered to vote, voted in the June 2011 election, has a Cherokee car tag, and has applied for Cherokee medical benefits. *See* Declaration of Raymond

Nash (September 1, 2011) (attached as Exhibit 16). Without Cherokee citizenship, he will lose his right to vote and his benefits.

Zenobia King-Howard, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, receives Cherokee health benefits, volunteers her time to Cherokee communities, and participates in the Cherokee Nation Parade. *See* Declaration of Zenobia King-Howard (September 1, 2011) (attached as Exhibit 17). Without Cherokee citizenship, she will lose her right to vote and her benefits.

Melissa Chaplin, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, has children who should be eligible to receive school supplies provided to Cherokee students. *See* Declaration of Melissa Chaplin (September 1, 2011) (attached as Exhibit 18). Without Cherokee citizenship, she will lose her right to vote and benefits for her children.

Shenedda Gaston, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, receives Cherokee health benefits, volunteers her time to Cherokee communities, and participates in the Cherokee Nation Parade. *See* Declaration of Shenedda Gaston (September 1, 2011) (attached as Exhibit 19). Without Cherokee citizenship, she will lose her right to vote and her benefits.

Verressa L. Gaston, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, receives Cherokee health benefits, receives scholarship funding through the Cherokee Nation, volunteers her time to Cherokee communities, and participates in the Cherokee Nation Parade. *See* Declaration of Verressa L. Gaston (September 1, 2011) (attached as Exhibit 20). Without Cherokee citizenship, she will lose her right to vote and her benefits.

Courtney Gaston, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, receives a Cherokee scholarship, receives Cherokee health benefits, and volunteers her time to Cherokee communities. *See* Declaration of Courtney Gaston (September 1, 2011) (attached as Exhibit 21). Without Cherokee citizenship, she will lose her right to vote and her benefits.

Debra Owens, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, receives Cherokee health benefits, volunteers her time to Cherokee communities, and participates in the Cherokee Nation Parade. *See* Declaration of Debra Owens (September 1, 2011) (attached as Exhibit 22). Without Cherokee citizenship, she will lose her right to vote and her benefits.

Ashley Logan Knapper, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, receives Cherokee health benefits, receives a Cherokee scholarship, and volunteers her time to Cherokee communities. *See* Declaration of Ashley Logan Knapper (September 1, 2011) (attached as Exhibit 23). Without Cherokee citizenship, she will lose her right to vote and her benefits and will be unable to continue her education.

Rena Logan, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, receives Cherokee health benefits, volunteers her time to Cherokee communities, and participates in the Cherokee Nation Parade. *See* Declaration of Rena Logan (September 1, 2011) (attached as Exhibit 24). Without Cherokee citizenship, she will lose her right to vote and her benefits.

Johnny Toomer, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, and receives Cherokee health benefits. *See*

Declaration of Johnny Toomer (September 1, 2011) (attached as Exhibit 25). Without Cherokee citizenship, he will lose his right to vote and his benefits.

Tommy Lee McNac, Jr., a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections and voted in the June 2011 election. *See* Declaration of Tommy Lee McNac (September 1, 2011) (attached as Exhibit 26). Without Cherokee citizenship, he will lose his right to vote.

Anna H. Nicholson, a Freedmen citizen of the Cherokee Nation, is registered to vote in Cherokee elections, voted in the June 2011 election, receives Cherokee health benefits, volunteers her time to Cherokee communities, and participates in the Cherokee Nation Parade. *See* Declaration of Anna H. Nicholson (September 1, 2011) (attached as Exhibit 27). Without Cherokee citizenship, she will lose her right to vote and her benefits.

Plaintiffs must now turn to this Court to prevent the Cherokee Nation from depriving them of their citizenship rights pending a determination on the merits of their claims against the Cherokee Defendants and the Federal Defendants.

ARGUMENT

Following the recent Cherokee Nation Supreme Court order affirming the validity of the March 2007 Amendment stripping the Cherokee Freedmen of their citizenship rights, the Cherokee Nation Defendants have begun taking immediate, concrete steps to deny the Freedmen their citizenship rights, while the Federal Defendants continue to ignore their obligation to protect the rights of the Freedmen. The expulsion of the Freedmen is the latest in a series of actions the Cherokee Nation Defendants have taken – and the Federal Defendants have not acted to stop or reverse – in violation of the Thirteenth Amendment, the Treaty of 1866, and the Principal Chiefs Act of 1970.

The Plaintiffs now seek a preliminary injunction to protect their rights to remain as full citizens of the Cherokee Nation pending a determination of their claims on the merits. Plaintiffs ask this Court to enjoin the Cherokee Nation Defendants from denying Plaintiffs and the other Freedmen their full citizenship rights and from holding any election as to which Plaintiffs and other Freedmen are denied the right to vote based solely upon their status as Cherokee Freedmen. Plaintiffs also ask this Court to enjoin the Federal Defendants from taking the following actions until the Cherokee Nation restores full citizenship rights to the Freedmen and complies with the Thirteenth Amendment, the Treaty of 1866 and the Principal Chiefs Act, which requires that the Federal Defendants review the Cherokee Nation's election procedures and ensure that they comply with all legal requirements, including the Cherokee Freedmen's right to vote: (1) distributing funds to the Cherokee Nation; (2) recognizing any Cherokee Nation election; and (3) recognizing the government-to-government relationship with the Cherokee Nation.

In order to obtain a preliminary injunction, Plaintiffs must demonstrate that

> (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm absent the injunction; (3) an injunction would not substantially impair the rights of . . . other interested parties; and (4) an injunction would be in the public interest, or at least would not be adverse to the public interest.

Tenacre Found. v. INS, 892 F. Supp. 289, 292 (D.D.C. 1995), *aff'd* 78 F.3d 693 (D.C. Cir. 1996), *following Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-44 (D.C. Cir. 1977). Depending upon the circumstances, it may be appropriate for the Court to give certain factors more weight than other factors. Where "the balance of hardships tips decidedly toward [the] plaintiff" and the plaintiff has "raised questions going to the merits so serious, substantial difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation," a preliminary injunction is justified even if the plaintiff is "less likely

than not to prevail on the merits." *Holiday Tours* at 844-45 (internal quotation marks and citations omitted).[8]

In this case, the Freedmen Plaintiffs are likely to prevail on the merits because denying the Freedmen their citizenship rights plainly violates federal statute, the Treaty of 1866, and the Thirteenth Amendment. Plaintiffs are entitled to relief against the Cherokee Nation Defendants, who are violating the Thirteenth Amendment and their treaty obligations. Plaintiffs are also entitled to relief against the Federal Defendants, who (a) have a fiduciary duty to protect the rights of Plaintiffs, Freedmen generally, and any other individual members whose rights are violated by the tribe or its majority members; (b) are obligated to enforce the Principal Chiefs Act; and (c) cannot act in an arbitrary and capricious manner.

Even if there were any doubt as to Plaintiffs' entitlement to relief on the merits – and there is not – a preliminary injunction is appropriate here because the balance of hardships tips decidedly in favor of relief. Without relief from this Court, the Cherokee Nation will continue to

[8] Defendants may argue that the standard for preliminary injunction has been circumscribed by the Supreme Court's recent decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), which emphasized that irreparable injury must be likely and not merely a "possibility." Although the D.C. Circuit has noted that *Winter* "does not squarely discuss whether the four factors are to be balanced on a sliding scale," it has yet to decide whether the sliding-scale approach should still be employed. *Davis v. Pension Ben. Guar. Corp*, 571 F.3d 1288, 1292 (declining to address validity of sliding-scale approach because plaintiffs failed even under the more lenient sliding-scale analysis); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (declining to address continued validity of sliding scale approach, but stating "we read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction,'" quoting *Davis*, 571 F.3d at 1296 (concurring opinion)). Several judges in this Court have ruled that *Winter* does not overturn the sliding-scale approach. *See, e.g., Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 12 (D.D.C. 2009) (Kollar-Kotelly, J.) ("the Court finds that the D.C. Circuit's sliding-scale standard remains viable even in light of the decision in *Winter*"). In any event, as set forth more fully herein, Plaintiffs meet the test for preliminary injunction without the need to apply the D.C. Circuit's "sliding scale" analysis. In this case, a preliminary injunction is appropriate regardless of whether *Winter* has changed the D.C. Circuit's sliding-scale approach.

deny to Plaintiffs and all Freedmen their rights as Cherokee Nation citizens: their right to vote, to hold office, and to participate in government in any way, as well as their right to medical benefits and other substantial benefits the Cherokee Nation offers its citizens. On the other hand, the burdens, if any, a preliminary injunction would impose on the Cherokee Nation Defendants and the Federal Defendants would be negligible.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are likely to succeed on the merits against both the Cherokee Nation Defendants and the Federal Defendants. The Cherokee Nation has taken the audacious step of disenfranchising its most vulnerable citizens by enacting a constitutional amendment in blatant violation of the Thirteenth Amendment and its treaty obligations. The Federal Defendants have failed to fulfill their fiduciary duties to protect the rights of the Cherokee Freedmen, to enforce the Principal Chiefs Act, and to ensure that the Cherokee Nation's actions do not violate the Thirteenth Amendment or the Treaty of 1866.

A. The Cherokee Nation Defendants Have Violated the Thirteenth Amendment and the Treaty of 1866

The March 2007 Amendment constitutes a blatant violation of both the Thirteenth Amendment and the Treaty of 1866. This Court set forth the history, purpose, and intent of the Thirteenth Amendment and the Treaty in its December 19, 2006, Order. There simply is no doubt that both the Thirteenth Amendment and the Treaty were enacted to protect former slaves such as the Freedmen "'not merely against slavery itself, but against all the badges and relics of a slave system.'" *Vann*, 467 F. Supp. 2d at 67 (quoting Akhil Reed Amar, *America's Constitution* 362 (2006)). The Treaty of 1866 requires no interpretation; its plain text provides that the Cherokee Freedman are granted "all the rights of native Cherokees," Treaty of 1866, art. IX, July 19, 1866, 14 Stat. 799, and that the Cherokee Nation shall enact no law "inconsistent with the

Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States." *Id*. art. XII. As this Court has held, "[t]he Treaty of 1866 not only incorporated the principles of the Thirteenth Amendment and the Civil Rights Act of 1866, but it made such principles a *condition* of the Cherokee Nation's existence within the United States." *Vann*, 467 F. Supp. 2d at 68 (emphasis original).

The March 2007 Amendment deprives Plaintiffs and all Cherokee Freedmen of their citizenship rights in the Cherokee Nation. As the text of the amendment itself states,

> [t]his amendment would take away citizenship of current citizens and deny citizenship to future applicants who are solely descendants of those on either the Dawes Intermarried Whites or Freedmen Rolls. A vote "no" would mean that Intermarried Whites and Freedmen original enrollees and their descendants would continue to be eligible for citizenship.

See Exhibit 7. The Cherokee Nation approved the amendment on March 3, 2007, and the Cherokee Nation is now taking action to implement the amendment, which would deprive Plaintiffs and all Cherokee Freedmen of their citizenship rights, solely due to their race and the status of their ancestors as slaves, in violation of the Thirteenth Amendment and the Treaty of 1866.

The position of the Cherokee Nation that the Treaty of 1866 did not require that the Cherokee Nation grant citizenship rights to the Freedmen ignores the plain language of the Treaty of 1866 and is contrary to the consistent holdings of the U.S. Supreme Court and the lower federal courts, including, in this case, this Court and the Court of Appeals.

Over 100 years ago, the Court of Claims held that the Freedmen were entitled to share in the tribe's proceeds and that the Cherokee Nation's sovereignty could not be exercised in a manner that breached the Nation's treaty obligations to the United States. *Whitmire, Trustee for the Cherokee Freedmen v. Cherokee Nation*, 30 Ct. Cl. 138, 180 (Ct. Cl. 1895). The U.S.

Supreme Court thereafter confirmed that the Freedmen are citizens of the Cherokee Nation entitled to the same property rights as other members of the Nation under the Treaty of 1866. *Red Bird v. United States*, 203 U.S. 76, 84 (1906). Lower courts have concurred. *See, e.g.*, *Keetoowah Society v. Lane*, 41 App. D.C. 319, 322 (App. D.C. 1914) ("We do not think the right of these freedmen to participate in the lands and funds of the Cherokee Nation longer open to question.").

Moreover, it is the law of the case in this action that the Treaty of 1866 grants citizenship rights to the Cherokee Freedmen. This Court held that the Freedmen's citizenship rights "must be protected by the Thirteenth Amendment and the Treaty of 1866. To conclude otherwise would be to deny effect to the Thirteenth Amendment as well as Congress's repeated enactments to protect the Freedmen's rights to full membership in the Cherokee Nation, which includes the fundamental right to vote." *Vann I* , 467 F Supp. 2d at 70. The Court of Appeals similarly held that "the Thirteenth Amendment and the 1866 Treaty whittled away the tribe's sovereignty with regard to slavery and left it powerless to discriminate against the Freedmen on their basis as former slaves. The tribe does not just lack a 'special sovereign interest' in discriminatory elections – it lacks any sovereign interest in such behavior." *Vann II*, 534 F.3d at 756.

B. The Federal Defendants Have Failed to Fulfill Their Fiduciary Duties to the Cherokee Freedmen

As the Court has already held, the Federal Defendants have fiduciary duties to uphold the rights of the Cherokee Freedmen against abuses by the Cherokee Nation. *See Vann*, 467 F. Supp. 2d at 71. The Court held that such duties include an obligation to ensure that "tribal leaders are truly representative of the members they purport to present in relations with the United States government," *id.* (citing *Seminole Nation v. United States*, 316 U.S. 286 (1942)),

and that the Principal Chiefs Act "unequivocally requires the Secretary to review and approve the procedures by which a principal chief of the Cherokee Nation is selected." *Id.* at 72.[9]

The Federal Defendants have not always shirked their fiduciary duties to minority members of Indian tribes.[10] As this Court has recognized, the Federal Defendants took action to protect the rights of the Seminole Freedmen when the Seminole Nation sought to disenfranchise the Seminole Freedmen. The Federal Defendants recognized that denial of citizenship rights of

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[9] In addition, the Court has cited with approval the Court's prior ruling in *Seminole II*, which held that the Federal Defendants are "'charged not only with the duty to protect the rights of the tribe, but also the rights of individual members . . . whether the infringement is by non-members or members of the tribe.'" *Vann*, 467 F. Supp. 2d at 71 n.12 (quoting *Seminole II*, 223 F. Supp. 2d at 137).

This Court in *Seminole II* set forth in greater detail the fiduciary duty of the Federal Defendants:

> The Court acknowledges and appreciates the importance of the [Seminole] Nation's right, as a sovereign body, to self-determination and self-government. However, as a sovereign, the Nation has the duty and the responsibility to respect the rights of all of its members, including the rights of its minority members, as guaranteed by the Nation's Constitution . . . . And, where the Nation evidences that it does not intend to respect those rights, the government, as part of "the distinctive obligation of trust incumbent upon [it] in its dealings with these dependent and sometimes exploited people," has a duty to ensure that its minority members are protected against the will of the majority that is being imposed in violation of its own Constitution. The United States has itself dealt with many of these same issues, where, if the will of the majority had prevailed, many minority members of this society would not have been able to enjoy the same privileges and benefits as other citizens. Where the Nation will not protect the Constitutional rights of its minority members, the BIA has the responsibility and indeed, the duty, to intervene and attempt to protect those rights through appropriate remedies.

Seminole II at 146-147.

[10] From the moment that the Principal Chiefs Act of 1970 became law, the Federal Defendants recognized that it required them to protect the right of the Freedmen to participate in Cherokee Nation elections. In 1971, the Bureau of Indian Affairs issued a memorandum regarding the review of voting procedures pursuant to the Act stating that "[v]oter qualifications for the Choctaw, Seminole, Cherokee and Creek people must be broad enough to include the enrolled freedmen citizens…" *See* Exhibit 1.

the Seminole Freedmen violated the Seminole Nation Treaty of 1866, which is identical in substance to the Cherokee Nation Treaty of 1866. In that instance, the Federal Defendants cut off the U.S.'s government-to-government relationship with the Seminole Nation. *See Seminole II* at 125-26.

The Federal Defendants' failure to follow here the actions they took to protect the rights of the Seminole Freedmen is another reason Plaintiffs are likely to prevail on the merits. "An agency's departure from its prior decisions can be considered to be arbitrary, capricious and an abuse of discretion, especially where the agency 'has failed to explain its departure from prior precedent.'" *Id.* at 143 (quoting *Bush-Quayle '92 Primary Comm. v. Federal Election Comm'n,* 104 F.3d 448, 453 (D.C. Cir.1997); *see also Oglala Sioux Tribe of Indians v. Andrus,* 603 F.2d 707, 718-19 (8th Cir. 1979)). The United States Court of Appeals for the District of Columbia Circuit has held repeatedly that "an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." *Independent Petroleum Association of America v. Babbitt,* 92 F.3d 1248, 1258 (D.C. Cir. 1996) (citing *National Association of Broadcasters v. FCC,* 740 F.2d 1190, 1201 (D.C. Cir. 1984)); *see also Transactive Corp. v. United States,* 91 F.3d 232, 237 (D.C. Cir. 1996); *Doubleday Broadcasting Co. v. FCC,* 655 F.2d 417, 423 (D.C. Cir. 1981). "Government is at its most arbitrary when it treats similarly situated people differently." *Etelson v. Office of Personnel Management,* 684 F.2d 918, 926 (D.C. Cir. 1982). The Department of Interior's reversal from the position it took in the Seminole Nation matter is arbitrary and capricious and cannot be permitted to stand.

II. THE EQUITIES DECIDEDLY FAVOR THE FREEDMEN PLAINTIFFS

A. The Freedmen Plaintiffs Will Suffer Immediate and Irreparable Harm Without a Preliminary Injunction

There can be no doubt that the Freedmen Plaintiffs will suffer immediate and irreparable harm if the Cherokee Nation strips them of their citizenship rights. Without injunctive relief, Plaintiffs and all Cherokee Freedmen will be deprived of the most sacred right of citizenship – the right to participate in government, including, most urgently, the right to vote in the upcoming election on September 24, 2011, at which Cherokee voters will elect a principal chief. Without injunctive relief, the Freedmen will also be deprived of other substantial benefits of citizenship, including health care benefits, housing, education, employment, and commodities.

The importance of the benefits of citizenship – particularly the right to vote – can hardly be overstated. As the United States Supreme Court has held, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In addition, "[d]enial of the right to participate in an election is by its nature an irreparable injury." *U.S. v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570, 578 (E.D. Pa. 2003); *see also Cardona v. Oakland Unified School Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) ("abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury"); *Spirit Lake Tribe v. Benson County, North Dakota*, Civ. No. 2:10-cv-095, 2010 U.S. Dist LEXIS 116827 at *14 (D.N.D. October 21, 2010) ("Once a citizen is deprived of his right of suffrage in an election there is usually no way to remedy the wrong. … Once an election is over, it is over and it is little consolation to say that the problem will be remedied in the next election.").

B. An Injunction Would Have Minimal Impact on the Cherokee Nation or the United States

An injunction preserving the status quo – the Freedmen Plaintiffs' citizenship rights – would not damage any legitimate interest of the Cherokee Nation or the United States. The impact of a preliminary injunction on the Cherokee Nation would be minimal. Plaintiffs and their ancestors had been full citizens of the Cherokee Nation since the Treaty of 1866. Some Freedmen citizens had been permitted to vote in the 2007 election and, most recently, in the initial election for Principal Chief held on June 25, 2011. Preserving the status quo by allowing Plaintiffs to retain the citizenship rights that they have held for almost 150 years pending a final determination in the present case would not harm the Cherokee Nation. *See generally The Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1082 (N.D. Fla. 2004) ("This irreparable injury to a voter is easily sufficient to outweigh any harm defendants may suffer from a narrow preliminary injunction requiring them to allow a person who asserts he or she is at the correct polling place to cast a provisional ballot.")). Likewise, the United States has a fiduciary duty to protect the rights of Plaintiffs in this case and cannot argue that it would be adversely impacted by a preliminary injunction that would require that it fulfill its fiduciary duty.[11]

C. The Public Interest Would Be Served by a Preliminary Injunction

Finally, a preliminary injunction would serve the public interest, which favors judicial review on the merits to ensure that the laws are properly enforced. *See Mova Pharm. Corp. v.*

[11] The Freedmen Plaintiffs should not be required to post a bond in order to obtain a preliminary injunction. The question of whether to require a bond and, if so, in what amount, is within the discretion of this Court. *See, e.g., Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 636 F.2d 755, 759 (D.C.Cir.1980). "[O]nly a party seeking to change (not maintain) the status quo needs to post a bond." *Laster v. District of Columbia*, 439 F. Supp. 2d 93, 100 n.7 (D.D.C. 2006). Plaintiffs do not seek to change the status quo. Instead, they seek to maintain the status quo, which is to preserve their status as citizens in the Cherokee Nation. Moreover, "indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)." *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971).

Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (public's interest in "faithful application of the laws"); *Holiday Tours*, 559 F.2d at 843 (general public's interest in having legal questions decided on the merits). The public would benefit from the review of fundamental civil rights at issue in this case. *Segar v. Civiletti*, 516 F. Supp. 314, 320 (D.D.C. 1981) ("Assuming arguendo that some pubic interest would be disserved by the issuance of a preliminary injunction, it would be more than offset by the public's interest in full vindication of the rights codified in Title VII.").[12]

CONCLUSION

Based on the foregoing, the Freedmen Plaintiffs respectfully request that the Court grant their motion and enter an order enjoining the Cherokee Nation Defendants from denying Plaintiffs and the other Freedmen their full citizenship rights and from holding any election as to

[12] As noted in the Background and Procedural History above, a number of procedural issues still await determination in this case, and in the related Transferred Action. One primary issue is whether or not this Court has jurisdiction over the Cherokee Nation, either in this action, based on the Freedmen Plaintiffs' argument that they have waived their immunity by filing suit in federal court in Oklahoma while this action was still pending, or in the Transferred Action, based on the Freedmen Defendants' argument that the Cherokee Nation, by filing suit in a federal court, waived its immunity in the federal forum, including this Court, on this matter, and not merely in the United States Court for the Northern District of Oklahoma.

To the extent that the Cherokee Defendants may argue that this Court does not have the authority to issue injunctive relief against the Cherokee Nation, that is incorrect. Even while the Cherokee Nation Defendants' renewed sovereign immunity argument remains pending, the Court "retains both the authority to determine its own jurisdiction, and the related power, until the jurisdictional issues are finally determined, to make orders to preserve the existing conditions and the subject of the petition." *Al Maqaleh v. Gates*, No. 06-1669, 2007 WL 2059128, at *2 (D.D.C. July 18, 2007) (internal citations and quotations omitted); *see also United States v. United Mine Workers of Amer.*, 330 U.S. 258, 292 (1947) ("In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief."); *United States v. Shipp*, 203 U.S. 563, 573 (1906) ("Until [the Court's] judgment declining jurisdiction should be announced, it had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition."). Therefore, the Court may grant Plaintiffs' motion without first ruling on whether the Cherokee Nation has waived its sovereign immunity in this forum.

which Plaintiffs and other Freedmen are denied the right to vote based solely upon their status as Cherokee Freedmen. The Freedmen Plaintiffs also respectfully request that this Court enjoin the Federal Defendants from taking the following actions until the Cherokee Nation restores full citizenship rights to the Freedmen Plaintiffs and other Freedmen and complies with the Principal Chiefs Act, which requires that the Federal Defendants review the Cherokee Nation's election procedures and ensure that they comply with all legal requirements, including the Cherokee Freedmen's right to vote: (1) distributing funds to the Cherokee Nation; (2) recognizing any Cherokee Nation election; and (3) recognizing the government-to-government relationship with the Cherokee Nation.

Dated: September 2, 2011

Respectfully submitted,

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