[ORAL ARGUMENT NOT YET SCHEDULED]

No. 11-5322

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARILYN VANN, et al.,
Appellants,

v.

DEPARTMENT OF THE INTERIOR, et al.,
Appellees

Appeal From the United States District Court For the District of Columbia,
Case No. 1:03-cv-01711
The Honorable Judge Henry H. Kennedy, Jr. Presiding

OPENING BRIEF OF APPELLANTS MARILYN VANN, et al.

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Dated: March 26, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellants 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 (the "Appellants"), by and through undersigned counsel, hereby make the following certification as to Parties, Rulings, and Related Cases pursuant to D.C. Circuit Rule 28(a)(1).

I. PARTIES, AMICI, AND INTERVENORS

A. Parties in the District Court

The following parties appeared before the District Court in the underlying action:

Plaintiffs: Marilyn Vann, Ronald Moon, Donald Moon, Charlene White, Ralph Threat, Faith Russell, Angela Sanders, Samuel E. Ford, Hattie Cullers (terminated from action on January 16, 2008), and The Freedmen Band of the Cherokee Nation of Oklahoma.

Defendants: Gale A. Norton, Secretary of the United States Department of the Interior (replaced by Dirk Kempthorne on July 17, 2007, pursuant to Federal Rule of Civil Procedure 25(d)); Dirk Kempthorne, Secretary of the United States Department of the Interior (replaced by Ken Salazar on January 30, 2009, pursuant to Federal Rule of Civil Procedure 25(d)); Ken Salazar, Secretary of the United

States Department of the Interior; United States Department of the Interior; The Cherokee Nation of Oklahoma (terminated from action on December 19, 2008); Chadwick Smith, Principal Chief of the Cherokee Nation of Oklahoma (replaced by S. Joe Crittenden on September 6, 2011, pursuant to Federal Rule of Civil Procedure 25(d)); S. Joe Crittenden, Acting Principal Chief of the Cherokee Nation of Oklahoma; John Does (terminated from action on December 19, 2008); Bill John Baker, Principal Chief of the Cherokee Nation of Oklahoma) (substituted for S. Joe Crittenden, pursuant to Federal Rule of Civil Procedure 25(d)).

***Amici* and Intervenors:** No *amici* appeared before the District Court in the underlying proceedings. The Cherokee Nation of Oklahoma appeared initially as an intervenor in the underlying District Court proceedings but was subsequently added as a defendant pursuant to an order of the District Court dated December 19, 2006. The Cherokee Nation of Oklahoma was later dismissed from the underlying action pursuant to an order of this Court dated July 29, 2008, and the entry of the Appellants' Fourth Amended Complaint.

B. Parties in the Court of Appeals

The following are parties to this appeal:

Appellants: 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.

Appellees: Ken Salazar, Secretary of the United States Department of the Interior; United States Department of the Interior; and Bill John Baker, Principal Chief of the Cherokee Nation of Oklahoma (substituted for Defendant Acting Principal Chief of the Cherokee Nation S. Joe Crittenden on October 19, 2011, pursuant to Federal Rule of Civil Procedure 25(d)).

***Amici* and Intervenors:** At present there are no *amici* or intervenors to this appeal.

II. RULINGS UNDER REVIEW

Appellants seek review of the District Court's rulings (1) granting the Principal Chief of the Cherokee Nation's Motion to Dismiss, and (2) denying the Plaintiffs' Motion for Leave to File Fifth Amended Complaint, as issued by United States District Court Judge Henry H. Kennedy, Jr. in his Judgment (A-771) in District Court Case No. 1:03-cv-01711 on September 30, 2011.

III. RELATED CASES

The case on review was previously before this Court as *Marilyn Vann, et al. v. Dirk Kempthorne, Secretary of the United States Department of the Interior,* Case No. 07-5024. A related case, *Cherokee Nation v. Raymond Nash*, originally filed in the United States District Court for the Northern District of Oklahoma, was transferred to the District Court and pending before the District Court as Case No. 1:10-cv-1169 (HHK), until the District Court transferred the case back to the

United States District Court for the Northern District of Oklahoma pursuant to an Order issued by Judge Kennedy on September 30, 2011. That case is currently pending before the Northern District of Oklahoma as Case No. 4:11-cv-00648-TCK-TLW (the "Oklahoma Action").

CORPORATE DISCLOSURE STATEMENT

The Freedmen Band of the Cherokee Nation of Oklahoma (the "Freedmen Band") is a political entity organized under a constitution and represented by leaders who as individuals can trace ancestry to the Cherokee Freedmen Dawes Rolls of 1906. The Freedmen Band has no parent company, nor does any publicly-held company have any ownership interest in the Freedmen Band. Appellants Marilyn Vann, Ronald Moon, Donald Moon, Charlene White, Ralph Threat, Faith Russell, Angela Sanders, and Samuel E. Ford are individuals.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request that the Court grant oral argument in the present appeal. Appellants, known as the Freedmen, are descendants of slaves held by Cherokee Nation members prior to the Civil War. For approximately 150 years, the political and other rights of the Freedmen have been recognized by the Cherokee Nation and the United States based on the Treaty Between the United States and the Cherokee Nation of Indians, July 19, 1866, 14 Stat. 799 (the "1866 Treaty"). In 2003, the Cherokee Nation denied to the Freedmen the right to vote in a Cherokee election to amend the Cherokee Constitution, solely due to the fact that the Freedmen are descendents of former slaves.

This appeal concerns important issues regarding the District Court's jurisdiction over the Cherokee Nation and the Cherokee Nation's officers. The just determination of these issues is a matter of sufficient importance that oral argument should be granted.

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GLOSSARY

1866 Treaty	Treaty Between the United States and the Cherokee Nation of Indians, July 19, 1866, 14 Stat. 799
Federal Defendants	Ken Salazar, Secretary of the U.S. Department of the Interior, and U.S. Department of the Interior, collectively
Freedmen	Former slaves previously held by Cherokee citizens and their descendants, "free blacks" living in the Cherokee Nation territory at the time of the Civil War, and the descendants of persons listed on the so-called "Freedmen Roll" of Cherokee citizens compiled by the Dawes Commission, which included the former slaves of Cherokee citizens and their descendants, regardless of any degree of Indian ancestry.
Five Civilized Tribes	Historical term used to collectively refer to the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Nations

INTRODUCTION

As this Court noted when this case was first before it, "[t]he Cherokee Nation shares with the United States a common stain on its history: the Cherokees owned African slaves." *Vann v. Kempthorne*, 534 F.3d 741, 744 (D.C. Cir. 2008) ("*Vann II*"), available at A-098-123). Yet while the United States has made great progress toward achieving racial equality, the Cherokee Nation continues to deny the descendents of its former slaves (the "Freedmen") the promise it made in the 1866 Treaty to grant them "all the rights of native Cherokees." (*See* A-133 ¶ 26).

In the first appeal of this action, this Court held that the Cherokee Nation was immune from suit but also held that its officers were not immune and could be held accountable under *Ex parte Young*, 209 U.S. 123 (1908). *Vann II*, 534 F.3d at 756. This Court remanded the case to the District 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.* (citing Fed. R. Civ. P. 19(b)).

On remand, the Cherokee Nation Principal Chief moved to dismiss the Freedmen's lawsuit on January 30, 2009, arguing that under Federal Rule of Civil Procedure 19(b) the suit could not proceed without the Cherokee Nation. (A-311-13). Four days later, the Cherokee Nation voluntarily filed its own action in the United States District Court for the Northern District of Oklahoma (the "Oklahoma Action") against five different Freedmen who were not Plaintiffs in this action, and

against the Secretary of the Interior and Department of Interior, who are defendants in this action. (A-372-81). In the Oklahoma Action, the Cherokee Nation sought a declaratory judgment that parts of the 1866 Treaty were abrogated by the United States and that therefore the Freedmen are no longer entitled to citizenship rights in the Cherokee Nation. (*Id.*).

The Cherokee Nation's filing of a separate lawsuit was a calculated litigation tactic aimed to deprive the District Court and this Court of jurisdiction over this case. Indeed, immediately after the Cherokee Nation filed the Oklahoma Action, the Cherokee Nation Principal Chief claimed, in support of his motion to dismiss in this action, that the Oklahoma Action gives the Freedmen "another procedurally appropriate avenue" to resolve their claim under the 1866 Treaty. (A-372-75).

The District Court failed to recognize the Cherokee Nation's pretext and improperly dismissed this action under Rule 19. (A-754-70). The District Court also held that by filing the Oklahoma Action the Cherokee Nation waived its immunity only in the Oklahoma court and not in the D.C. court. (*Id.*).

The District Court's rulings were in error, for two independent reasons. First, because the Cherokee Nation – by filing the Oklahoma Action – waived its immunity to suit in this action, it can be re-joined to this action, and there would be no need to address Rule 19. The Supreme Court in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), held that a sovereign may

waive its immunity through litigation conduct, particularly when that conduct is focused on obtaining an unfair tactical advantage, as is the case here.

Second, even if the Cherokee Nation is not re-joined to this action, dismissal under Rule 19 was improper. The District Court's finding that the Cherokee Nation is a necessary party required to be joined under Rule 19(a) fails to account for the fact that relief against the Cherokee Nation's Principal Chief would be sufficient because the Principal Chief can adequately represent the Cherokee Nation's interests here. In addition, the District Court's application of Rule 19(b) erroneously ignores the effect of the Supreme Court's long-established *Ex parte Young* doctrine, under which this Court ruled that the Freedmen's suit may proceed against the Cherokee Nation officers. *Vann II*, 534 F.3d at 756.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia properly exercised jurisdiction under 28 U.S.C. §§ 1331 and 1362. Jurisdiction to review agency action was properly exercised under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-703. Appellants sought declaratory relief pursuant to 28 U.S.C. §§ 2201-2202 and equitable relief pursuant to 28 U.S.C. § 1343. This action arises under the Constitution and laws of the United States, including, but not limited to, the Thirteenth Amendment to the Constitution of the United States, the Treaty between the United States and the Cherokee Nation of 1866, July 19,

1866, 14 Stat. 799 ("1866 Treaty"), and the Principal Chiefs Act, Pub. L. No. 91-495, 84 Stat. 1091 (1970).

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 over Appellants' appeal from the Judgment entered on September 30, 2011. The Judgment represents a final judgment disposing of all of the Freedmen's claims. Appellants timely filed their Notice of Appeal on November 3, 2011.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in holding that the Cherokee Nation did not waive its immunity to suit in this action by filing the related case of *Cherokee Nation of Oklahoma v. Raymond Nash* (N.D. Okla., Case No. 4:11-cv-00648-TCK-TLW) (the "Oklahoma Action").

II. Whether the District Court erred in holding that the Cherokee Nation is a required party under Federal Rule of Civil Procedure 19(a), in light of the presence of the Cherokee Nation's officers in the case pursuant to *Ex parte Young*.

III. If the Cherokee Nation is a required party under Rule 19(a), whether the District Court erred in holding that this action could not proceed "in equity and good conscience" without the Cherokee Nation pursuant to Federal Rule of Civil Procedure 19(b).

STATEMENT OF THE CASE

This case concerns the Cherokee Freedmen's efforts to require the Cherokee Nation and the United States (and officers of each) to protect the fundamental civil rights of the Freedmen, as guaranteed by the 1866 Treaty, the U.S. Constitution, and federal law.

Appellants Marilyn Vann, *et al.* brought this action on August 11, 2003, against the Secretary of the Interior and the U.S. Department of the Interior (collectively, the "Federal Defendants"), alleging that the Federal Defendants had acted arbitrarily and capriciously in approving and/or failing to invalidate certain Cherokee Nation elections in which Appellants and other Cherokee Freedmen were denied the right to vote. (*See* A-001-11).

In January 2005, the Cherokee Nation sought leave to intervene for the limited purpose of moving to dismiss the case on the ground that it is a necessary and indispensable party under Federal Rule of Civil Procedure 19 that could not be compelled to join the action due to its sovereign immunity. (A-014). In September 2005, the District Court issued an order granting the Cherokee Nation's motion for limited intervention and deeming its motion to dismiss as filed. (*Id.*) Two weeks later, the Freedmen sought leave to add as defendants the Cherokee Nation, the Cherokee Nation Principal Chief, and other Cherokee Nation officers. (*See id.*). On December 19, 2006, the District Court held that, although the

Cherokee Nation was a necessary party under Rule 19(a), the Cherokee Nation and its officers could be joined because sovereign immunity did not insulate them from the Cherokee Freedmen's claims. *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 66, 70 (D.D.C. 2006) ("*Vann I*"), available at A-069-96.

The Cherokee Nation appealed. This Court held that, although sovereign immunity protected the Cherokee Nation from the Freedmen's lawsuit, the Cherokee Nation's officers could be sued under the doctrine of *Ex parte Young*. *Vann II*, 534 F.3d at 750. This Court did not review the District Court's ruling that Cherokee Nation was a necessary party under Rule 19(a). *Id.* at 756 n.6. This Court remanded the case to the District 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 (citing Fed. R. Civ. P. 19(b)).

On remand, the Cherokee Nation Principal Chief moved to dismiss the Freedmen's lawsuit on January 30, 2009, arguing, among other things, that under Rule 19(b) the suit cannot proceed without the Cherokee Nation. (A-311-13). Just four days later, on February 3, 2009, the Cherokee Nation filed a separate lawsuit against five separate Cherokee Freedmen (not the Plaintiffs in this action) and the Federal Defendants (also defendants in this action) in the United States District Court for the Northern District of Oklahoma (the "Oklahoma Action"). (A-377-81). In the Oklahoma Action, the Cherokee Nation sought a declaratory judgment

that the United States had abrogated portions of the 1866 Treaty, such that the 1866 Treaty no longer provides the Freedmen citizenship rights in the Cherokee Nation. (*Id.*). The Cherokee Nation Principal Chief then notified the District Court of the Oklahoma Action, arguing that it gives the Freedmen "another procedurally appropriate avenue" to resolve their claim under the 1866 Treaty. (A-372-75). The Cherokee Freedmen moved for leave to file a fifth amended complaint to add the Cherokee Nation as a defendant and to add the five Cherokee Freedmen sued in the Oklahoma Action as plaintiffs. (A-382-83). The Cherokee Freedmen also moved to consolidate this action with the Oklahoma Action. (A-640-41).[1]

The District Court dismissed this action under Rule 19(b) and held that by filing the Oklahoma Action, the Cherokee Nation waived its immunity only in the Oklahoma court and not in the D.C. court. (A-770). The District Court also denied the Cherokee Freedmen's motion for leave to file a fifth amended complaint and denied as moot the Cherokee Freedmen's motion to consolidate this case with the Oklahoma Action and a motion to dismiss filed by the Federal

[1] The United States District Court for the Northern District of Oklahoma, finding that the Principal Chief's "position in the D.C. Action with respect to Freedmen's status and rights under the 1866 Treaty is identical to the Cherokee Nation's position asserted in [the Oklahoma Action]," transferred the Oklahoma Action to the District Court under the first-to-file rule, holding that the District Court should determine whether the Oklahoma Action should be heard by the District Court or by the Northern District of Oklahoma. *Cherokee Nation v. Nash*, 724 F. Supp. 2d 1159, 1169 (N.D. Okla. 2010).

Defendants. (*Id.*).[2] Appellants timely filed their Notice of Appeal on November 3, 2011. (A-772-74).

STATEMENT OF FACTS

Prior to the Civil War, members of the Cherokee Nation, like many citizens of the United States, owned African slaves. The Cherokee Nation issued slave codes to regulate the industry of slavery within its borders. At the start of the Civil War, the Cherokee Nation entered into a treaty with the Confederate States of America, thereby severing its relationship with the United States. *See generally* Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma*, 52-81 (Univ. of Cal. Press, 2002); A-133 ¶ 24, A-685.

Following the Civil War, the United States and the Cherokee Nation reestablished relations by entering into the 1866 Treaty. (A-133 ¶ 26). In the 1866 Treaty, the Cherokee Nation and the United States agreed, among other things, that the Cherokee Freedmen "and their descendants, shall have all the rights of native Cherokees." (*Id.*).

The United States Congress established the Dawes Commission in 1893 to negotiate agreements with the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Nations (the so-called "Five Civilized Tribes") that would end tribal

[2] The District Court then transferred the Oklahoma Action back to the Northern District of Oklahoma. (A-776).

communal land ownership and give each member individual possession of a portion of the tribal lands. (A-138 ¶ 33). In 1896, Congress changed the character of the Dawes Commission to a judicial tribunal with the power to decide who was eligible for tribal membership. In 1898, the Curtis Act, Pub. L. 55-517, 30 Stat. 495 (1898), directed the Dawes Commission to create authoritative membership rolls for the Five Civilized Tribes, including the Cherokee Nation. (A-138 ¶¶ 33-34). The rolls produced by the Commission have since been commonly referred to as the "Dawes Rolls." (A-139 ¶ 37).

Although neither required nor authorized to distinguish between persons who claimed citizenship in the Five Civilized Tribes based on their status as Freedmen and those whose claim was based on their degree of Indian blood, the Commission enrolled the "Black Cherokees" on a "Freedmen Roll" and enrolled other Cherokees on a separate "Blood Roll." (*Id.*, A-138 ¶ 33). The Dawes Commission's enrollment criteria reflected the racial prejudices of the time: A Cherokee citizen with any known African ancestry was enrolled as a "Freedman," regardless of any degree of Indian blood he or she may have had; by contrast, a Cherokee citizen who was part white and part Indian was enrolled as Cherokee "by blood." (*Id.*). Moreover, the so-called "Blood Roll" recorded the degree of Indian blood for each member, but the "Freedmen Roll" recorded no information whatsoever regarding the ancestry (Indian or otherwise) of any of the persons

listed. (A-139 ¶ 37). Despite these and other known problems with the Dawes Commission's enrollment methods, the Dawes Rolls became – and remain today – the definitive source of proof of ancestry for any of the Five Civilized Tribes. Both the Cherokee Nation and the Federal Defendants continue to distinguish between those descended from persons on the Blood Roll and those descended from persons on the Freedmen Roll.

Under the Principal Chiefs Act, Congress authorized the Cherokee Nation and other tribes to choose their tribal leaders by popular election but made the tribes' election procedures subject to the approval of the Secretary of the U.S. Department of Interior (the "Secretary"). (A-139 ¶ 39).

In 1976, the Cherokee Nation, in an election in which the Cherokee Freedmen were permitted to vote, approved a Cherokee Constitution (the "1976 Cherokee Constitution") providing that all "members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls." (A-140 ¶¶ 40-43). The 1976 Cherokee Constitution did not distinguish between the Blood Roll and the Freedmen Roll for purposes of citizenship. (A-140 ¶ 45). In addition, the 1976 Cherokee Constitution stated that the Cherokee Nation would abide by any federal statutes requiring federal approval of any laws or enactments of the Cherokee Nation, including amendments to its Constitution. (A-140 ¶ 44).

On May 24, 2003, the Cherokee Nation held a special election to amend its constitution to state that any future constitutional amendments would not require approval by the Secretary. (A-142 ¶ 53). On July 26, 2003, the Cherokee Nation held a general election for Principal Chief and other officials. (*See* A-143 ¶ 55). For each of these two elections, the Cherokee Nation permitted only Cherokees who traced their Cherokee citizenship to the Dawes Commission Blood Roll to vote; the Cherokee Nation did not permit Cherokees who traced their Cherokee citizenship to the Freedmen Roll to vote. (A-141 ¶ 46).

The Freedmen objected to both the Cherokee Nation and to the Secretary that the denial of the right to vote in the 2003 elections deprived them of their rights as Cherokee citizens, as guaranteed by, among other things, the 1866 Treaty. The Cherokee Nation did not alter its course in response to the Freedmen's objections.

The Secretary initially supported the Freedmen with respect to the 2003 elections but then reversed course. (A-141-42 ¶¶ 47-48, 51-53). In response, the Freedmen brought this action on August 11, 2003, seeking relief against the Federal Defendants only. (*See* A-011). The Cherokee Nation moved to intervene for the limited purpose of moving to dismiss this action in its entirety on the ground that it was a necessary party but could not be joined because it is immune

from suit. (*See* A-014). The Cherokee Freedmen responded by moving to add the Cherokee Nation and the Cherokee officers to this action. (*See id.*).

On December 19, 2006, the District Court denied the Cherokee Nation's motion to dismiss and ruled that the Cherokee Nation was not immune from suit by the Cherokee Freedmen for claims brought by the Freedmen under the 1866 Treaty and the Thirteenth Amendment of the U.S. Constitution. (A-069-96). The Cherokee Nation appealed the District Court's denial of its motion to dismiss. (A-016-17).

While this action was on appeal to this Court, the Cherokee Nation on March 3, 2007, approved an amendment to the Cherokee Constitution limiting citizenship in the Cherokee Nation to descendents of persons listed on the Dawes Commission Rolls as "Cherokees by blood." (A-146 ¶ 67). The Cherokee Freedmen were permitted to vote in the election held to approve the amendment. (A-146 ¶ 69).

This Court on July 29, 2008, held that the Cherokee Nation was immune from suit but that the Cherokee officers could be sued under *Ex parte Young*. *Vann II*, 534 F. 3d 741. This Court remanded this action to the District 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" under Federal Rule of Civil Procedure 19(b). *Vann II*, 534 F.3d at 756. It expressly did not

decide the issue of whether the Cherokee Nation was a necessary party under Federal Rule of Civil Procedure 19(a). *Id.* at 756 n.6.

While the Cherokee Nation was litigating this action in the District Court and in this Court, the Cherokee Nation was also defending certain actions brought against it by different Cherokee Freedmen in the Cherokee Nation tribal courts. In *Allen v. Cherokee Nation Tribal Council*, Lucy Allen, a Cherokee Freedman, petitioned the Cherokee tribal court for a declaration that Cherokee laws requiring that applicants for citizenship have an ancestor on the Dawes "Blood Roll" violated the Cherokee Constitution. (*See* A-036-68 (Opinion of the Judicial Appeals Tribunal of the Cherokee Nation)). In *Nash v. Cherokee Nation Registrar*, a nominal class of Cherokee Freedmen[3] petitioned the tribal court for a declaration that the 2007 amendment to the Cherokee Constitution was void because it violated the 1866 Treaty. (A-684-707).

[3] No Freedmen initiated this Freedmen class action suit. The Cherokee Nation, when it notified its Freedmen citizens that their citizenship status was terminated as a result of the 2007 amendment, also provided a document that those individuals could, at their option, sign and return to the tribe to indicate that they challenged the termination of their citizenship rights. Individuals who submitted this challenge document were automatically determined to be members of the plaintiff class in the action at the behest of the Cherokee Nation in the Cherokee Nation District Court. (A-146 ¶ 67, A-234).

Each tribal court action concerned, in part at least, the proper interpretation and application of the 1866 Treaty.[4] (*See* A-036-68, A-684-707). The Cherokee Nation defended those actions in the Cherokee tribal courts. (*See id.*).

On January 30, 2009, after this action was remanded to the District Court, the Cherokee Nation's Principal Chief, represented by the Cherokee Nation's counsel, filed his motion to dismiss this action, arguing that under Federal Rule of Civil Procedure 19(b), the action could not proceed against him without the Cherokee Nation. (A-311-13). With respect to the question of whether the Freedmen "would have an adequate remedy if the action were dismissed for nonjoinder," the Principal Chief argued that the Cherokee Nation's absence due to its immunity "makes consideration of this factor largely irrelevant" but that, if relevant, the Freedmen had an adequate remedy in the *Nash v. Cherokee Nation Registrar* case, which at the time was pending in the Cherokee Nation District Court. (A-334-35).

Up to this point, the Cherokee Nation had engaged in extensive litigation in the District Court – including defending two motions for preliminary injunction

[4] In *Allen*, the Cherokee Judicial Appeals Tribunal held that the 1866 Treaty was binding upon the Cherokee Nation and guaranteed Cherokee citizenship to the Cherokee Freedmen but that the Cherokee Nation had the power to abrogate the 1866 Treaty unilaterally, so long as it did so expressly. (A-055). In *Nash*, the Cherokee District Court held that the 2007 Amendment was invalid under the 1866 Treaty, (A-684-87), but the Cherokee Supreme Court held that the District Court had no authority under the Cherokee Nation Constitution to rule on the validity of a provision of the Cherokee Nation Constitution. (A-698-99).

filed by the Freedmen[5] – and in the Cherokee Nation courts without filing its own action in federal court or even hinting that it believed a federal court should adjudicate the citizenship rights of the Freedmen.

The Cherokee Nation abruptly changed course on February 3, 2009 – nearly six years after the Cherokee Freedmen filed this action, more than four years after Lucy Allen filed her case in tribal court against the Cherokee Nation, and more than two years after the Cherokee Nation initiated the *Nash* class action suit against itself – when it filed a case in federal court in Oklahoma seeking a declaratory judgment that its actions were permitted under the 1866 Treaty. (A-377-81 (*Cherokee Nation v. Raymond Nash*, 09-CV-052-TCK-PJC (N.D. Okla.) (Complaint filed February 3, 2009))). Immediately thereafter, the Principal Chief filed a supplemental memorandum in support of his motion to dismiss this action under Rule 19(b), arguing that "another procedurally appropriate avenue has emerged for [the Freedmen] to judicially resolve their asserted and disputed claim that the Treaty of 1866 between the Cherokee Nation and the United States currently entitles them to rights of Cherokee Nation citizens." (A-372-775). The

[5] *See* A-001-33 at Docket Nos. 45, 59, 69, 83. Soon before the District Court dismissed this action on September 30, 2011, the Cherokee Nation Principal Chief defended a third Freedmen motion for preliminary injunction in this action and the Cherokee Nation defended an identical motion for preliminary injunction before the District Court in the transferred Oklahoma Action. (*See* A-001-33 at Docket Nos. 146, 153; *Cherokee Nation v. Raymond Nash*, 09-CV-052-TCK-PJC (N.D. Okla.) (Docket Nos. 75, 81)). The District Court held a hearing for each of the three preliminary injunction motions.

Principal Chief reiterated this argument in his reply brief, filed with the District Court on March 11, 2009. (*See* A-029 at Docket No. 126).

STANDARDS OF REVIEW

A claim of tribal sovereign immunity is a question of law that this Court reviews *de novo*. *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1497-98 (D.C. Cir. 1997). The denial of a motion for leave to amend a complaint on the ground that the amendment would be futile "is, for practical purposes, identical to review of a Rule 12[] dismissal based on the allegations in the amended complaint. . . ., [such that] the standard of review is *de novo*." *In re Interbank Funding Corp. Secs. Litig.*, 629 F.3d 213, 215-16, 218 (D.C. Cir. 2010).

This Court reviews Rule 19(a) determinations *de novo*. *See W. Md. Ry Co. v. Harbor Ins. Co.*, 910 F.2d 960, 963 (D.C. Cir. 1990) (applying *de novo* review to a Rule 19(a)(1)(B)(ii) determination); *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995) (same). It reviews Rule 19(b) determinations for an abuse of discretion. *See Kickapoo*, 43 F.3d at 1495. A court abuses its discretion if it applies an incorrect legal standard, "misapprehends the underlying substantive law," ignores a relevant factor, relies on an improper factor, or if it gives reasons that do not reasonably support its conclusion. *Id.* at 1497, *citing Johnson v. United States*, 398 A.2d 354, 365 (D.C. 1979). This includes instances where a trial court errs when it "recognizes its right to exercise discretion but

declines to do so, preferring instead to adhere to a uniform policy." *Johnson*, 398 A.2d at 365.

SUMMARY OF THE ARGUMENT

The Cherokee Nation enjoys immunity from suit, but that immunity is not absolute and can be waived, in particular, by voluntary litigation conduct. In this case, the Cherokee Nation waived its immunity by filing a nearly identical action in the United States District Court for the Northern District of Oklahoma. The District Court held that the Cherokee Nation's waiver was limited to the Oklahoma forum and does not subject the Cherokee Nation to suit in this action because the Cherokee Nation controls where it can be sued and what claims can be brought against it.

The District Court erred by failing to apply the Supreme Court's clear guidance in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), that sovereigns may not engage in "selective use of 'immunity' to achieve litigation advantages" and that waiver may be found to prevent "inconsistency, anomaly, and unfairness[.]" *Id. at* 620. The District Court failed to recognize that the Cherokee Nation filed the Oklahoma Action as a tactical device to strip the District Court and this Court of jurisdiction over this case, which had been pending for nearly six years before the Cherokee Nation filed the Oklahoma Action.

The District Court also erred in two other respects when it dismissed this action under Rule 19. First, the District Court erred by holding that the Cherokee Nation is a required party under Rule 19(a), failing to acknowledge that the Cherokee Nation's officers are parties to this action under *Ex parte Young* and can adequately represent the Cherokee Nation's interests in this action. Second, the District Court erred by holding that this action must be dismissed under Rule 19(b) because the Cherokee Nation is an indispensable party to this action, again failing to recognize that because this action may proceed against the Cherokee Nation's officers under *Ex parte Young*, the Cherokee Nation is not an indispensable party under Rule 19(b).

ARGUMENT

I. The Cherokee Nation Waived Its Immunity To Suit In This Action By Filing the Oklahoma Action To Achieve A Litigation Advantage

Indian tribes, like other sovereigns, enjoy immunity from suit. But that immunity is not absolute. Sovereigns can and do waive their immunity, either by articulating their consent to be sued or through their litigation conduct. *See, e.g.*, *Lapides*, 535 U.S. at 619; *Vann v. Salazar*, --- F. Supp. 2d. ----, No. 03-1711 (HHK), 2011 WL 4953030, at *8 (D.D.C. Sept. 30, 2011) ("*Vann III*"), available at A-754-70 ("[l]itigation conduct may constitute a clear waiver of tribal sovereign immunity . . ., as it can for state sovereign immunity") (citations omitted).

There is no dispute that the Cherokee Nation voluntarily invoked the jurisdiction of a federal court when it filed the Oklahoma Action. Under the circumstances of this case and in light of the principles of fairness and consistency underpinning the holding in *Lapides*, the Cherokee Nation's waiver of its immunity must be found to extend to this action as well. The Oklahoma Action is focused on resolving the core issue in this action – namely, whether the Cherokee Nation has a legal obligation to provide its Freedmen with "all the rights of native Cherokees." Moreover, the record demonstrates that the Cherokee Nation filed the Oklahoma Action only after this Court determined that its Principal Chief was subject to suit, pursuant to *Ex parte Young*, and after this case had been pending for nearly six years. Such belated forum shopping is an attempt by the Cherokee Nation to abuse its shield of sovereign immunity to obtain an improper and unfair result.

The District Court's holding that the Cherokee Nation had not waived its immunity from suit in this case by filing the nearly identical Oklahoma Action in essence permitted a sovereign to invoke the judicial authority of the federal forum and at the same time use its immunity to deny the consequences that naturally flow from it. That holding is therefore directly contrary to clear Supreme Court precedent that there is a "judicial need to avoid inconsistency, anomaly, and unfairness" where a sovereign voluntarily invokes the jurisdiction of the federal

forum and thereafter seeks to avoid the implications of that choice by invoking its own immunity. *Lapides*, 535 U.S. at 620. Accordingly, in order to avoid substantial unfairness, that would result, this Court can and should find that the Cherokee Nation waived its immunity in this action through its litigation conduct.

A. Under The *Lapides* Doctrine, The Cherokee Nation Waived Its Immunity In This Action When It Filed The Oklahoma Action To Obtain A Litigation Advantage

The U.S. Supreme Court has long held that a State may waive its immunity through its litigation conduct. *See, e.g., Clark v. Barnard*, 108 U.S. 436, 447 (1883) (State waives its immunity when it intervenes in a federal court action); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (when a State voluntarily litigates a claim and does not assert its immunity, it waives its immunity with respect to a later action that is, in effect, a continuation of the original action); *Gardner v. N.J.*, 329 U.S. 565, 574 (1947) (when the State files a claim against the bankruptcy estate, "it waives any immunity which it otherwise might have had respecting the adjudication of the claim").

Most recently in *Lapides*, a unanimous Supreme Court affirmed and further articulated the rationale for finding litigation conduct waiver. Where a sovereign "*voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking [immunity]." *Lapides*, 535 U.S. at 619, *quoting Gunter*,

200 U.S. at 284 (1906) (emphasis in *Lapides*). The Court explained that "[i]t would seem anomalous or inconsistent" for a State to invoke federal court jurisdiction and assert immunity in the same case and that permitting a State to do so "could generate seriously unfair results." *Lapides*, 535 U.S. at 619. The Supreme Court distinguished affirmative invocations of federal court jurisdiction from cases of constructive waiver, which require a showing of "clear intent" to waive immunity (by statute or agreement):

> And this makes sense because an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of "immunity" to achieve litigation advantages.

Id. at 620. Following *Lapides*, the Courts of Appeal have held that, in contrast to waiver by statute or agreement, waiver by litigation conduct is not narrowly construed. *See Bd. of Regents of the Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.*, 653 F.3d 448, 469-70 (7th Cir. 2011) (collecting cases). Waiver by litigation conduct will be found where the sovereign "has made a voluntary change in behavior that demonstrates it is no longer defending the lawsuit and is instead taking advantage of the federal forum." *Id.* at 462.

Although on its facts *Lapides* involved removal, the Supreme Court made clear that the litigation waiver doctrine extends to all "voluntary invocations" of federal court jurisdiction, explaining that the doctrine is necessary to prevent States

from achieving "unfair tactical advantages, if not in this case, in others. . . . And that being so, the rationale for applying the general 'voluntary invocation' principle is as strong here, in the context of removal, as elsewhere." *Lapides*, 535 U.S. at 621. Other Circuit Courts of Appeal have broadly applied *Lapides* to find waiver of sovereign immunity in cases where a sovereign voluntarily invokes the jurisdiction of the federal courts. *See Phoenix Int'l Software, Inc.*, 653 F.3d at 462 (collecting cases).[6]

There is no dispute that the Cherokee Nation waived its immunity by filing the Oklahoma Action, given that "[t]he filing of a complaint in a federal district court is the quintessential means of invoking its jurisdiction." *United States v. Metro. St. Louis Sewer Dist.*, 578 F.3d 722, 725 (8th Cir. 2009). The question is the scope of that waiver. Even though the Oklahoma Action involves the same issues and functionally all of the same parties present in this case, the Cherokee Nation has argued that it is entitled, by virtue of its sovereign immunity, to control

[6] The Freedmen have found only one reference by this Court to *Lapides*: dicta in a footnote in *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002), an opinion issued only two months after *Lapides*. In a pre-*Lapides* decision addressing waiver by litigation conduct, this Court held that "[t]here can be no doubt that the [tribes'] voluntary intervention as party defendants was an express waiver of their right not to be joined in the Wichita's suit." *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986); *see also United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 890, 892 (D.C. Cir. 1999) (noting in dicta that a state can waive its immunity from suit in the context of a litigation); *Dep't of the Army v. Fed. Labor Relations Auth.*, 56 F.3d 273, 275 (D.C. Cir. 1995) (noting in dicta that a state may waive its sovereign immunity by appearing in federal court).

fully, in absolutely every circumstance, (i) the specific venue in which it litigates and (ii) the specific issues that it litigates. The District Court improperly accepted that argument – and failed to apply the Supreme Court's clear guidance in *Lapides* that sovereigns may not engage in "selective use of 'immunity' to achieve litigation advantages." *Lapides*, 535 U.S. at 620.

The District Court acknowledged *Lapides*, but it did not follow it and did not apply its principles. Instead, it relied on a number of inapposite cases, only one of which, *Tegic Communications Corp. v. Board of Regents of the University of Texas System*, 458 F.3d 1335 (Fed. Cir. 2006), even addressed the scope of the voluntary invocation waiver doctrine set forth in *Lapides*. The District Court focused on the fact that *Tegic* found that waiver by the State in one forum did not waive its immunity in a similar suit in another forum but completely ignored the unique facts and circumstances of the Cherokee Nation's litigation conduct here. That conduct, unlike the State's actions in *Tegic*, bring this case well within the scope of the *Lapides* litigation conduct waiver doctrine. Under the broad principles of *Lapides*, a sovereign may waive its immunity in one lawsuit when it files a second lawsuit on the same subject matter for the express purpose of achieving the dismissal of the first lawsuit in order to gain an unfair litigation advantage.

B. The District Court Relied On Inapposite Cases In Giving The Cherokee Nation Free Reign To Litigate The Issues It Chooses, Where It Chooses

The District Court held, in essence, that a sovereign can file one federal court action without ever risking waiver of its immunity in any other federal court action, no matter the circumstances of its own litigation conduct and no matter the similarity of the two actions. But that bright-line rule is not consistent with the "'voluntary invocation' principle" articulated in *Lapides*. The District Court did not cite a single case that suggests that litigation waiver can never extend to a separate action or to a different federal venue.

Instead, the District Court relied on inapposite authority and failed to properly consider the consequences of the Cherokee Nation's voluntary invocation of federal jurisdiction in light of *Lapides*. In so doing, the District Court erred.

1. *Tegic* Is Not "An Analogous Case"

Of all the cases the District Court examined, only *Tegic* considered the voluntary invocation doctrine in light of *Lapides*. Although the District Court described *Tegic* as "an analogous case," (*Vann III*, 2011 WL 4953030, at *8), *Tegic* simply does not apply here.

The District Court focused on only one aspect of *Tegic*: that the Federal Circuit, on the specific facts of that case, found that the University of Texas's waiver by invocation of federal jurisdiction in one federal court venue did not

waive its immunity in a separate declaratory judgment action on that patent in another federal court venue. *Vann III*, 2011 WL 4953030, at *8 (citing *Tegic*, 458 F.3d at 1343). But in so doing, the District Court ignored that, in stark contrast with the Cherokee Nation's litigation conduct in filing the Oklahoma Action, the University's litigation conduct in *Tegic* was reasonable, non-tactical, and in no sense unfair to the party asserting waiver.

In *Tegic*, the University of Texas filed the first lawsuit, a patent infringement action against cellular telephone companies in federal court in Texas. *Tegic*, 458 F.3d at 1337. Tegic Communications Corporation, which sold and licensed software that it alleged was implicated by the University of Texas lawsuit, responded by filing its own declaratory judgment action against the University of Texas in federal court in Washington State. *Id.* at 1337-38. Tegic argued that, by filing its suit in Texas, the University necessarily waived its immunity as to Tegic's later-filed declaratory judgment action in Washington State. *Id.* at 1340.

The Federal Circuit held that the University did not so waive its immunity to suit in the later-filed action, noting that Tegic was not without remedy, as it had the option of counterclaiming against the University of Texas in the Texas lawsuit. *Id.* at 1344. There was absolutely no suggestion in *Tegic* that the University of Texas, in filing the first lawsuit in Texas, did so in order to obtain a litigation advantage. Indeed, the University agreed not to sue Tegic for infringement at all – the very

opposite of seeking a litigation advantage.[7] In addition, at the time the University filed the initial action, the University and its officers were not parties to a pending suit on the same subject matter.

By contrast, in this case the Cherokee Nation did not file the first lawsuit – the Freedmen did. Moreover, the Cherokee Nation did not even file suit within a reasonable period of time after the Freedmen filed the first lawsuit, but waited nearly six years and only then, after there had been extensive litigation in the first federal court lawsuit, including an appeal and two preliminary injunction motions, did it file suit. And the suit the Cherokee Nation eventually filed was in essence the same lawsuit in a separate federal court filed for the express purpose of achieving the dismissal of the first lawsuit.

Tegic therefore is not analogous at all. In fact, we have not found a truly analogous case because the facts and circumstances of the Cherokee Nation's litigation conduct here are so extraordinary.[8]

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[7] The University of Texas "filed with the district court in Washington a covenant not to sue Tegic for past, present, or future acts of infringement[.]" 458 F.3d at 1338. The Federal Circuit found that "the University's express promise not to sue Tegic . . . weighs strongly against favoring Tegic's manufacturer's action in Washington." *Id.* at 1343.

[8] The District Court did acknowledge that at least one other Court of Appeals has observed that "[t]here is an interesting argument to be made that invocations of federal jurisdiction in related suits waive sovereign immunity as to other suits " pursuant to the *Lapides* doctrine. *Vann III*, 2011 WL 4953030 at *8 (quoting *Fairley v. Stalder*, 294 F. App'x 805, 809-10 (5th Cir. 2008)).

2. Where A Sovereign Waives Immunity By Filing Suit, The Circumstances Of The Litigation Conduct Determine The Scope of Waiver

The District Court cited *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), to support its view that "like all sovereigns, the Nation is free to assert or waive its immunity as it sees fit." *Vann III* , 2011 WL 4953030, at *7. Yet the District Court failed to recognize that *Oklahoma Tax Comm'n* did not hold that a sovereign in all cases controls where it may be sued. It held only that "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it *merely because* those actions were pleaded in a counterclaim to an action filed by the tribe." *Okla. Tax Comm'n*, 498 U.S. at 509 (emphasis added). *Oklahoma Tax Comm'n* addressed the litigation conduct of a tribe, but in that case the tribe did little more than file a lawsuit seeking injunctive relief – when no other action had been filed in any court concerning the subject matter of the tribe's action. *Oklahoma Tax Comm'n* did not concern litigation conduct similar to the Cherokee Nation's litigation conduct here.

The District Court also erroneously applied *Oklahoma Tax Comm'n* to find that a tribe's waiver of its immunity by litigation conduct extends only to the particular claim brought by the tribe and cannot extend to compulsory counterclaims. This Court's sister circuits, relying on *Lapides*, have held otherwise: "[W]hen a state waives its sovereign immunity by litigation conduct,

that waiver opens the door to counterclaims regarded as compulsory within the meaning of Federal Rule of Civil Procedure 13(a)." *Phoenix Int'l Software*, 653 F.3d at 470 (examining cases and adopting rule finding "that our sister circuits have articulated the rule that is most consistent with *Lapides*").[9]

3. The District Court Improperly Relied On Inapposite Cases Addressing Waivers By Statute Or Agreement

As previously noted, only a sovereign's waiver by statute or agreement is narrowly construed; a waiver of immunity by affirmative litigation conduct is more broadly construed. *See Phoenix Int'l Software*, 653 F.3d at 469-70 (collecting cases). Nevertheless, the District Court relied upon inapposite cases involving only waiver by statute or agreement.

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[9] We have not found a case in which this Court has ruled on the question of whether waiver by litigation conduct extends to compulsory counterclaims. Alternately, under the equitable doctrine of recoupment, the Cherokee Nation has waived immunity as to each of the Oklahoma Action counterclaims because the counterclaims "(1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim." *Berrey v. Asarco, Inc.*, 439 F.3d 636, 645 (10th Cir. 2006) (holding that a tribe waives sovereign immunity as to counterclaims that sound in recoupment and that a counterclaim sounds in recoupment when it satisfies this three-part test); *see also Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 500 F. Supp. 2d 1143, 1147 (E.D. Wis. 2007) (collecting cases holding that counterclaims for declaratory relief can sound in recoupment). *Oklahoma Tax Comm'n* does not hold otherwise, because in that case the counterclaims "did not sound in recoupment because they sought money damages while the Tribe sought only an injunction." *Berrey*, 439 F.3d at 644 n.5.

The statement in *Pennhurst* that "a sovereign's 'interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued," *Vann III*, 2011 WL 4953030, at *7 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)) (emphasis in *Pennhurst*), does not mean a State can never, under any circumstances, waive its immunity in one federal action when it voluntarily waives its immunity in another federal action. *Pennhurst* held only that *Ex parte Young*, which permits a lawsuit in federal court to obtain an injunction against State officers to prevent a violation of *federal* law, does not permit a similar suit in federal court against state officers based on *state* law. *Id.* at 106. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944), similarly held only that the State's statutory authorization to be sued in its own courts did not authorize suit in a federal court.[10]

Neither *Pennhurst* nor *Read* addressed waiver by litigation conduct, and neither held that a sovereign enjoys complete control over "where it may be sued" when the sovereign affirmatively invoked federal court jurisdiction by filing a lawsuit. Indeed, the fact that *Pennhurst* treats the entire federal court system as a single "forum" indicates that a sovereign's waiver through litigation conduct should not be limited to a single federal venue of its choosing.

[10] The portion of *Read* cited by the District Court specifically refers to the related principle that "[t]he Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize suit in a state court." *Read*, 322 U.S. at 54 n. 6.

The District Court's quote from *West v. Gibson*, 527 U.S. 212, 226 (1999) – "[i]t is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums" – is also inapplicable. The quote is from the dissent, not the majority opinion, and *West* addresses only waiver pursuant to statute. The dissent merely points out that the federal government's consent to suit by statute may be circumscribed to a particular court (*e.g.*, the Court of Federal Claims).

The District Court similarly improperly relied upon several other cases that address waiver by statute or agreement and not waiver by litigation conduct. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (addressing waiver by statute and by activities in interstate commerce); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (waiver by agreeing to arbitration provision in standard form construction contract); *Lawrence v. Barona Valley Ranch Resort & Casino*, 64 Cal. Rptr. 3d 23, 27 (Cal. Ct. App. 2007) (concerning waiver by agreement between tribe and State); *Campo Band of Mission Indians v. Superior Court*, 39 Cal. Rptr. 3d 875, 883 (Cal. Ct. App. 2006) (waiver by arbitration agreement tribe and State).

C. The Purely Tactical Purpose Of The Oklahoma Action And The Substantial Unfairness Of The Cherokee Nation's Immunity Assertion Require A Finding Of Waiver

The District Court refused to see the Cherokee Nation's litigation conduct for what it was: a purely tactical device to strip the District Court and this Court of jurisdiction over this case, which the Freedmen had filed nearly six years before the Cherokee Nation filed the Oklahoma Action. The District Court also failed to acknowledge the substantial unfairness of permitting the Cherokee Nation to assert its immunity in this case after filing the Oklahoma Action. The extraordinary facts and circumstances of the filing of the Oklahoma Action and the Cherokee Nation's immunity assertion require a finding of waiver in this case.

The fact that the Cherokee Nation filed the Oklahoma Action solely as a tactical device is evident from the timing of the filing and the action taken by the Cherokee Nation's Principal Chief immediately after the filing. If the Cherokee Nation truly wanted to have a federal court adjudicate the citizenship rights of the Cherokee Freedmen – even in the location of its choosing – it could have filed the Oklahoma Action years earlier. Yet the Cherokee Nation held its fire because its strategy for nearly six years was to deprive the Freedmen of a federal court forum – in any location. At every turn – after the Cherokee Freedmen filed this action in 2003, before this Court in the first appeal, and before the District Court on remand

– the Cherokee Nation argued that no federal court could hear the Freedmen's claims.

That strategy changed on February 3, 2009, when the Cherokee Nation concluded that it would subject itself to the jurisdiction of the Oklahoma court as part of an effort to deprive the District Court and this Court of jurisdiction. The Cherokee Nation filed the Oklahoma Action in order to bolster arguments the Cherokee Nation's Principal Chief was making in support of dismissal of this action under Rule 19. In his filing on January 30, 2009, the Principal Chief was forced to all but concede that the Freedmen would not "have an adequate remedy if the action were dismissed for non-joinder." Fed. R. Civ. P. 19(b)(4); A-334-35 (Principal Chief's Memorandum in Support of his Motion to Dismiss). Immediately after the Cherokee Nation filed the Oklahoma Action, the Principal Chief argued that "another procedurally appropriate avenue has emerged for Plaintiffs to judicially resolve [their claims under the 1866 Treaty]." (A-373).

Of course the filing of the Oklahoma Action was no surprise to the Cherokee Nation Principal Chief, who directs the Cherokee Nation's actions and who is represented by the same attorneys who represent the Cherokee Nation. Rather, the Oklahoma Action was filed for the precise purpose of giving the Cherokee Nation Principal Chief a litigation advantage in this action – by strengthening his motion

to dismiss under Rule 19. The District Court ignored this critical and inescapable fact.

The District Court also failed to acknowledge the substantial unfairness of permitting the Cherokee Nation to use the filing of the Oklahoma Action to achieve the dismissal of this action and to continue to assert its immunity in this action. Under *Lapides* and its progeny, a court should hold that a sovereign has waived its immunity through its litigation conduct when necessary to avoid substantial unfairness. At its core, the assessment must involve balancing the equities, and in this case the equities support a finding of waiver more strongly than in any other case we have seen.

This case does not involve the adjudication of intellectual property rights between a sovereign and corporate parties. Nor does this case involve any effort to obtain a money judgment against a sovereign or a judgment for prospective relief that would have a future financial impact on a sovereign. And this is not a case where the litigation conduct involves the sovereign suing first and then using its immunity to block a later suit against it. Rather, the Cherokee Nation in this case has brought a lawsuit in federal court against five of its own citizens who did nothing more than assert their rights to equal treatment under a treaty and the U.S. Constitution. These five citizens did not threaten a monetary claim against the

Cherokee Nation and did not themselves bring an action in federal court against the Cherokee Nation.

For a sovereign to sue its own citizens in federal court for a declaration that those citizens are not entitled to equal treatment by the sovereign is in itself extraordinary and perhaps unprecedented in the history of American jurisprudence. Yet that is not all the Cherokee Nation did in this case. The Oklahoma Action is a suit the Cherokee Nation *never would have brought* but for its need to find a way to dismiss this action, which had been pending for nearly six years. The Cherokee Nation's litigation conduct here was patently unfair and should constitute a waiver of its immunity to suit in this action.

II. The District Court Erroneously Dismissed This Case Under Rule 19

Because the Cherokee Nation waived its immunity from suit in this action as a result of its litigation conduct, this Court need not address the District Court's dismissal of this action under Federal Rule of Civil Procedure 19. If the Court finds that the Cherokee Nation has not waived its immunity from suit in this action, this Court should reverse the District Court's dismissal under Rule 19 for two reasons.

First, the District Court erroneously held that the Cherokee Nation is a required party under Rule 19(a) because it failed to acknowledge the fact that the Cherokee Nation Principal Chief, as a party to this action under *Ex parte Young*, can adequately

represent any interest that the Cherokee Nation has in this action. Second, the District Court erroneously held that if the Cherokee Nation is a required party but cannot be joined because it is immune from suit, this action must be dismissed under Rule 19(b), again because it failed to recognize this action may proceed against the Principal Chief under *Ex parte Young*. The District Court's dismissal under Rule 19 cannot stand.

A. The Cherokee Nation Is Not A Required Party Under Rule 19(a)

The District Court held that the Cherokee Nation is a required party under Rule 19(a).[11] In so doing, it ignored the fact that the Cherokee Nation Principal Chief, as a party to this action, is able to represent the Cherokee Nation's interests in this action, such that the Cherokee Nation is *not* a required party under Rule 19(a).[12]

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[11] Prior to December 1, 2007, Rule 19(a) asked whether an absent party is "necessary" to the action. The 2007 Amendment, which made changes that were intended to be "stylistic only," changed the reference to "required." Fed. R. Civ. P. 19 advisory committee's note (2007). We refer in this brief to the current version of Rule 19.

[12] The District Court ruled in its 2006 Order that the Cherokee Nation is a required party under Rule 19(a). *Vann I*, 467 F. Supp. 2d at 66. This Court has not reviewed that ruling because the parties did not address it when this case was first before this Court. *Vann II*, 534 F.3d at 756 n.6. The Freedmen did not file a cross-appeal of the 2006 Order because they prevailed on the issue of the Cherokee Nation's waiver of sovereign immunity, making the secondary Rule 19(a) ruling irrelevant to the outcome of the order. *See Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009) ("a party that prevails entirely in the district court . . . needn't cross-appeal an adverse interlocutory order to urge the rejected argument as an alternative ground for affirming the final judgment."). (cont.)

As this Court has held, "under Rule 19(a), a person is 'to be joined if feasible' if (1) complete relief cannot be accorded in its absence; or (2) the absentee's ability to protect its interests may be impaired by the disposition of the action; or (3) those already [present] parties will be subject to a substantial risk of incurring inconsistent obligations because of the absence."[13] *Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Wash.*, 699 F.2d 1274, 1278-79 (D.C. Cir. 1983). In making its Rule 19(a) determination, the District Court held that the

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It is appropriate for this Court to consider the District Court's Rule 19(a) ruling in this appeal because determining whether an absent party is "necessary" to an action is "sufficiently important that it can be raised at any stage of the proceedings" by the parties. *McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984); *see also EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1080 (9th Cir. 2010) ("Even though Peabody had been a defendant in the suit from the outset, this was the first time it made this argument."), *cert. denied*, 132 S. Ct. 91 (2011). Moreover, even if the parties do not raise the issue, this Court has "an independent duty to raise it *sua sponte*." *Hodel*, 788 F.2d at 772; *see also Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 382-83 (2d Cir. 2006) (explaining that "both trial courts and appellate courts may consider this issue [Rule 19(a)] sua sponte even if it is not raised by the parties to the action").

[13] Under the full text of Rule 19(a)(1), a party is required to be joined to an action if

> (A) in that person's absence, the court cannot afford complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may;
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

Cherokee Nation has interests in this suit and that these interests would be impaired or impeded by the Nation's absence. Those holdings were in error.

A party is not a required party under Rule 19(a) unless it can assert a "legally protected interest." *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996). In *Vann I*, the District Court identified only one such interest: the Nation's "interest in administering its sovereign electoral and constitutional affairs." *Vann I*, 467 F. Supp. 2d at 66. That interest, however, is not viable in this action because this Court has now determined that the Cherokee Nation's officers may be sued under *Ex parte Young*. The fundamental premise of *Ex parte Young* is that a sovereign has no legally protected interest in its officer's violations of federal law. As this Court explained, the governmental officer seeking to enforce state or tribal law that is claimed to violate federal law is "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct." *Vann II*, 534 F.3d at 749, *citing Ex parte Young*, 209 U.S. at 159-60. "The tribe does not just lack a 'special sovereignty interest' in discriminatory elections – it lacks any sovereign interest in such behavior." *Id.* at 756.

The District Court's holding in *Vann I* that the interests of the Cherokee Nation, even if legitimate, would be "significantly affect[ed]" by the Nation's absence, is also in error. Where, as here, a tribe's officer fully represents its interests,

the tribe is not a party required to be joined under Rule 19(a) precisely "because the tribal officials can be expected to adequately represent the tribe's interests in this action and because complete relief can be accorded among the existing parties without the tribe." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, Case No. 10-17895, 2012 U.S. App. LEXIS 5432, at *2 (9th Cir. Mar. 15, 2012); *S.D. v. Bourland*, 949 F.2d 984, 989 (8th Cir. 1991), *rev'd on other grounds*, 508 U.S. 679 (1993) (A state may sue a tribal official to enjoin enforcement of a tribe's regulations because "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. . . . The State's suit seeking injunctive relief against the named tribal officials therefore is proper, and the Tribe is not an indispensable party.") (internal citations and quotations omitted); *Kansas v. United States*, 249 F.3d 1213, 1226-27 (10th Cir. 2001) (A tribe's absence "does not prevent the State from obtaining its requested relief," and is not "likely to subject the parties to this action to multiple or inconsistent obligations." The "potential for prejudice to the [tribe] is largely nonexistent" due to the presence of tribal officials, federal defendants, and other interested parties.); *c.f. Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999).

Presumably because it held that the Cherokee Nation had a legally protected interest in this action, the District Court did not address the other aspects of Rule 19(a). Not one of those supports a finding that the Cherokee Nation is a party

required to be joined when the Cherokee Nation's Principal Chief is a party to this action under *Ex parte Young*.

First, a court can accord complete relief in a tribe's absence when it already has *Ex parte Young* jurisdiction over a tribe's officers. *See Salt River*, 2012 U.S. App. LEXIS 5432. An injunction against the current Principal Chief would grant complete relief because it would be binding on any future Principal Chief. *Id.* at *9 ("An injunction against a public officer in his official capacity . . . remains in force against the officer's successors."), *citing Hernandez v. O'Malley*, 98 F.3d 293, 294 (7th Cir. 1996); 11A Charles Alan Wright *et al*., *Federal Practice and Procedure* § 2956 (2d ed. 1995) ("A decree binding a public official generally is valid against that official's successors in office."); *cf.* Fed. R. Civ. P. 25(d) (providing for automatic substitution of a public officer's successor when the officer ceases to hold office).

Second, if proceeding in this action without the Cherokee Nation would expose any existing party to a substantial risk of incurring multiple or inconsistent obligations, *see* Fed. R. Civ. P. 19(a)(1)(B)(ii), any such risk was created by the Cherokee Nation itself when it filed the Oklahoma Action. As a result, this factor should not be weighed in favor of finding that the Cherokee Nation is a required party under Rule 19(a).

The few cases that address whether a sovereign is a necessary party under Rule 19(a) when the sovereign's officers are subject to suit under *Ex parte Young* do not support the District Court's Rule 19(a) holding. The holding in *Vann I* relied only upon *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991), which did hold that the tribe was a required party under Rule 19(a), but did so where the plaintiffs had not sued *any* tribal officers under *Ex parte Young*. *Id.*; *see also Lebeau v. United States*, 115 F. Supp. 2d 1172, 1180 (D.S.D. 2000) (distinguishing *Confederated Tribes*). When courts have found that a sovereign's officers are subject to suit under *Ex parte Young*, they have held that the sovereign is not a necessary party under Rule 19(a). *Salt River*, 2012 U.S. App. LEXIS 5432; *Kansas*, 249 F.3d 1213.

B. The District Court Erred In Its Rule 19(b) Determination

Even if the Cherokee Nation could properly be considered a party required to be joined under Rule 19(a), which it cannot, the District Court erred in concluding that the Cherokee Nation is an indispensable party under Rule 19(b). The District Court yet again ignored the fact that the Principal Chief is able to represent any interest that the Cherokee Nation has in this action.

The District Court relied at every turn upon cases that did not involve *Ex parte Young* suits against the officers of sovereigns found to be indispensible. The *Ex parte Young* decisions addressing whether a sovereign must be joined under

Rule 19 have held uniformly that the sovereign is not an indispensable party *precisely because* that sovereign's officer is a party to the action. The District Court's ruling, if permitted to stand, could in effect eviscerate *Ex parte Young*.

Rule 19(b) sets out four non-exclusive factors that a court must consider when determining whether, "in equity and good conscience," an action may proceed without the required absentee or whether it must be dismissed:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The rule "suggests four interests that must be examined in each case": (1) The plaintiff's interest in having a forum, (2) the defendant's desire to avoid multiple litigation, inconsistent relief or "sole responsibility for a liability he shares with another," (3) an unjoined third party's interest in the action, and (4) the court's and the public's interest in "complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-11 (1968). "These four factors are not rigid, technical tests, but rather guides to the overarching equity and good conscience

determination." *Hodel*, 788 F.2d at 774 (internal citations and quotations omitted).

1. The Cherokee Nation Is Not Prejudiced By Its Absence From This Suit

The District Court held that the Cherokee Nation's "legally protected interests" could be prejudiced by its absence from this action. *Vann III*, 2011 WL 4953030, at *10. However, the import of this Court's ruling that the Cherokee Nation Principal Chief is subject to suit under *Ex parte Young* is that the Cherokee Nation has no "legally protected interests" in violating federal law and that the Principal Chief fully and adequately represents any interests that the tribe has. *See Vann II*, 534 F.3d at 749-50.

The District Court emphasized the interests of the Cherokee Nation as a sovereign and gave substantial weight to those interests. Yet again, the District Court reached an erroneous conclusion by relying entirely on cases in which no officers of the sovereign found to be indispensible were joined under *Ex parte Young*. *See Republic of Philippines v. Pimental*, 553 U.S. 851 (2008) (no Philippines officer was joined)[14]; *Kickapoo*, 43 F.3d 1491 (no officers of the State of Kansas were joined); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1001

[14] No official could be sued because the foreign sovereign's officials were not subject to the court's *Ex parte Young* jurisdiction. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 Green Bag 2d 137 (2010).

(10th Cir. 2001) (no tribal officer was joined); *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1292 (10th Cir. 2003) (same); *St. Pierre v. Norton*, 498 F. Supp. 2d 214, 220-21 (D.D.C. 2007) (same).

Under *Ex parte Young*, a sovereign official's violation of federal law is an act "which does not affect [the] state in its sovereign or governmental capacity." *Ex parte Young*, 209 U.S. at 159-60. In other words, because states and tribes cannot authorize their officers to violate federal law, suits seeking to enjoin such unlawful conduct do not prejudice the sovereign itself, even though the injunction resulting from such suits has the practical effect of forcing the sovereign to comply with federal law. *See Am. Bank & Trust Co. v. Dent*, 982 F.2d 917, 920-21 (5th Cir. 1993). The District Court's suggestion that the Principal Chief is not an adequate representative of the tribe, *Vann III*, 2011 WL 4953030, at *8, also ignores the underpinnings of this Court's holding that the Principal Chief is subject to suit under *Ex parte Young*. Suits are allowed against the officers of a sovereign under *Ex parte Young* precisely because the officers adequately represent the interests of the sovereign.

The District Court erroneously stated, without explanation, that "[i]t cannot be said that [the Principal Chief's] interests are identical to those of the Cherokee Nation as a whole." *Vann III*, 2011 WL 4953030, at *14. However, the Principal Chief of the Cherokee Nation is the principal government official responsible for

the enforcement of the Cherokee Constitution and for the protection of all citizens of the Cherokee Nation. *See* Article 7, Section 9 of the CNO Constitution ("The Principal Chief shall cause the laws of the Cherokee Nation to be faithfully executed, and shall conduct in person and in such manner as prescribed by law, all communications and business of the Cherokee Nation."). Constitution of the Cherokee Nation, Art. 7 § 9, available at http://www.cherokee.org/Docs/Tribal Government/Executive/CCC/2003_CN_CONSTITUTION.pdf. The Principal Chief is constitutionally required to enforce the Cherokee Nation's laws, and his arguments have faithfully tracked the Cherokee Nation's efforts to disenfranchise the Freedmen. Because the Principal Chief will make each of the tribe's arguments regarding the tribe's elections, its membership determinations, and their legality under federal law, his presence in this action under *Ex parte Young* eliminates any potential prejudice to the tribe. *See Hodel*, 788 F.2d at 774-75; *Babbitt*, 87 F.3d at 1351; *Kansas*, 249 F.3d at 1227 (when tribal officials represent the sovereign's interests in a suit, "the potential for prejudice to [the tribe] is largely nonexistent").

2. There Is No Need To Lessen Or Avoid Prejudice To The Cherokee Nation Because It Is Not Prejudiced In Its Absence

In this case, because the Cherokee Nation's absence does not prejudice its legally protected interests (either because it has no such interests or because the

presence of the Principal Chief adequately protects such interests), there is no prejudice to be lessened or avoided.

3. This Court Can Award Adequate Relief In The Absence Of The Cherokee Nation

Because the Principal Chief is subject to suit under *Ex parte Young*, he is a proper party to this action, which seeks to enjoin the Principal Chief from enforcing Cherokee Nation laws that violate federal law by depriving the Freedmen of their full citizenship rights. The Principal Chief is the senior law enforcement officer of the Cherokee Nation and has the full authority to ensure that the Freedmen are provided their full citizenship rights – now and in the future. *See Salt River*, 2012 U.S. App. LEXIS 5432, at *9 ("An injunction against a public officer in his official capacity [. . .] remains in force against the officer's successors.").

4. The Freedmen Could Lack An Adequate Remedy If This Action were Dismissed for Nonjoinder

The filing of the Oklahoma Action should not weigh in favor of dismissal under Rule 19(b). The claim of the Cherokee Nation in that case – under the 1866 Treaty – is only one part of the claims the Freedmen raise in this action, and it is not clear that the Freedmen would be permitted to raise all of their claims –

including their Thirteenth Amendment claim – in the Oklahoma Action.[15] The Supreme Court has held that one of four interests that a court must examine in making a Rule 19(b) determination is the court's and the public's interest in "complete, consistent, and efficient settlement of controversies." *Patterson*, 390 U.S. at 111. Those interests weigh heavily against dismissal, given this Court's and the District Court's extensive involvement with this case – and their resultant familiarity with the 150-year history of the issues involving the Freedmen, the Cherokee Nation, and the federal government.

5. The Public Rights Exception Applies In This Case

Finally, the District Court erred in finding that the public rights exception would not apply in this case, even if the tribe is an indispensible party. The exception provides a means for a case, otherwise subject to dismissal under Rule 19, to proceed where the litigation is necessary for enforcement of a public right. *See, e.g., Natural Res. Def. Council, Inc. v. Berklund*, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (compulsory joinder in litigation of constitutional or national issues "would effectively preclude such litigation against the government. . . . Rule 19 was not intended to cause such a

[15] As previously noted, there is no dispute that the Cherokee Nation waived its sovereign immunity by filing the Oklahoma Action. The Freedmen contend, and other Circuit Courts of Appeal have agreed, that "[t]he filing of a complaint in a federal district court is the quintessential means of invoking its jurisdiction," *Metro. St. Louis Sewer Dist.*, 578 F.3d at 725, and that the Cherokee Nation's waiver extends to compulsory counterclaims.

result, and courts have not permitted it to do so"); *see also Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 276 (D.D.C., 1985) (in a case involving 170 million acres of public lands, court held that the subject matter "extends this case far beyond the boundaries of a private dispute" to "a matter of transcending importance" to the public), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987).

The Ninth Circuit has suggested two requirements for applying the exception: (1) "the litigation must transcend the private interests of the litigants and seek to vindicate a public right" and (2) "although the litigation may adversely affect the absent parties' interests, the litigation must not destroy the legal entitlements of the absent parties." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (citation omitted). This case meets both requirements.

The District Court erroneously asserted that the Freedmen's claims implicate the Thirteenth Amendment, the Treaty of 1866, and their relationship with the Cherokee Nation, "which are not truly public rights." *Vann III*, 2011 WL 4953030, at *20 (citation omitted). This is simply not true. The Thirteenth Amendment rights at issue here are public rights guaranteed to all citizens of the United States and not merely private rights applying only to the Freedmen. While other classes of citizens have other means to enforce these public rights, unless this case moves forward, the Thirteenth Amendment will continue to be nothing more than an empty promise to the Freedmen. By contrast, the Cherokee Nation would

be only incidentally affected by the enforcement of the Freedmen's Thirteenth Amendment rights, for no legal entitlement of the Cherokee Nation is at stake. The Cherokee Nation has no right to discriminate against its Freedmen citizens based solely on their status as the descendents of former slaves.

Furthermore, the Freedmen seek to enforce their public right to full citizenship in the Cherokee Nation under the 1866 Treaty. This matter is of "transcending importance" to the public; citizenship rights strike to the core of individual sovereignty. *C.f. Burford*, 676 F. Supp. at 276.

Finally, the District Court wrongly indicated that because the issue in this case is "the joinder of the Cherokee Nation, not a large number of persons," the public rights exception should not apply. *Vann III*, 2011 WL 4953030, at **19-20. The public rights exception applies when an otherwise indispensable party cannot be joined. It should not change the analysis if a court finds that one party cannot be joined because of its sovereign immunity, as opposed to finding that several parties cannot be joined because of their numerosity. The public rights exception prevents entities, such as the Cherokee Nation in this case, from hiding behind Rule 19 to avoid suits to enforce public rights. *C.f.* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. Rev. 745 (1987). There could be no more fundamental public rights than the basic human rights, guaranteed by

the Constitution, to be free of slavery and to be free of the "badges and incidents of slavery."

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the District Court erred in determining that the Cherokee Nation did not waive its immunity to be subject to suit in this action as to the issues presented in the Oklahoma Action, and the District Court erred in determining that the D.C. Action could not proceed in the absence of the Cherokee Nation. This Court should reverse the grant of the Principal Chief's Motion to Dismiss, reverse the denial of the Freedmen's Motion to Amend, and remand to the District Court for further proceedings.

Dated: March 26, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation, typeface requirements, and type style requirements of Fed. R. App. P. 32(a)(7)(B)(i).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,215 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2012, the foregoing Opening Brief of Appellants Marilyn Vann, *et al.* was electronically filed with the Court using CM/ECF, which will automatically serve the counsel of record who are registered for CM/ECF:

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