ORAL ARGUMENT NOT YET SCHEDULED
No. 11-5322

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARILYN VANN, et al.,
***Appellants*,**

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
***Appellees*.**

On 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

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BRIEF OF APPELLEES CHEROKEE NATION AND PRINCIPAL CHIEF BILL JOHN BAKER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule of Appellate Procedure 28(a)(1), Appellees Cherokee Nation and Principal Chief Bill John Baker make the following certification as to Parties, Rulings and Related Cases:

A. Parties and Amici

All parties, intervenors and amici appearing before the District Court and in this Court are listed in the Opening Brief of Appellants.

B. Rulings Under Review

The rulings under review are listed in the Opening Brief of Appellants.

C. Related Cases

The case on appeal was previously before this Court as *Marilyn Vann, et al. v. Dirk Kempthorne, Secretary of the United States Department of the Interior, et al.*, Case No. 07-5024. On February 3, 2009, the Cherokee Nation initiated a separate action involving a related issue in the United States District Court for the Northern District of Oklahoma captioned as *Cherokee Nation v. Raymond Nash, et al*. That action was subsequently transferred to the United States District Court for the District of Columbia as Case No. 1:10-cv-1169 (HHK). The District Court for the District of Columbia transferred that action back to the District Court for the Northern District of Oklahoma on September 30, 2011, where it is currently proceeding as Case No. 04:11-cv-00648-TCK-TLW.

CORPORATE DISCLOSURE STATEMENT

The Cherokee Nation, a sovereign nation, is not an incorporated entity, has no parent company, and no publicly held company has an ownership interest in the Cherokee Nation. Cherokee Nation Principal Chief Bill John Baker is an individual.

STATEMENT REGARDING ORAL ARGUMENT

The Cherokee Nation and Cherokee Nation Principal Chief Bill John Baker respectfully submit that oral argument is not required given the straightforward legal issues presented by the appeal and this Court's prior ruling on sovereign immunity in this action.

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STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

GLOSSARY

Dawes Commission	Commission established by Act of Congress on March 3, 1893 to negotiate agreements with the Five Civilized Tribes, i.e., the Choctaw, Creek, Chickasaw, Seminole and Cherokee Indian Tribes.
Dawes Rolls	Officially known as The Final Rolls of the Citizens and Freedmen of the Five Civilized Tribes in Indian Territory, it contains rolls of names compiled by the Dawes Commission between 1898 and 1907 to determine who would receive an allotment of land and per capita payments as a member of one of the Five Civilized Tribes.
Cherokee Dawes Rolls	Rolls of names compiled by the Dawes Commission with various categories of individuals related to the Cherokee Nation. Categories included the Cherokee Blood Roll , the Delaware Indians Roll, the Freedmen Roll and the Inter-Married Whites Roll.
District of Columbia Action	Action under review in instant appeal. Originally captioned *Vann, et al. v. Norton, et al*., Case No. 1:03-cv-01711-HHK (D.D.C. 2003).
Federal Defendants	Ken Salazar, Secretary of the U.S. Department of the Interior and the U.S. Department of the Interior, collectively.
Freedmen	Individuals placed on the Cherokee Dawes Rolls under the "Freedmen" category because they were former slaves held by citizens of the Cherokee Nation or free Black persons who remained in or returned to Cherokee Nation territory as of February 11, 1867, and their descendants.
Nation	The Cherokee Nation.

Oklahoma Action	Action currently pending in United States District Court for the Northern District of Oklahoma, captioned as *Cherokee Nation v. Raymond Nash, et al.*, Case No. 04:11-cv-00648-TCK-TLW.
1866 Treaty	Treaty between the United States and the Cherokee Nation of 1866, 14 Stat. 799 (1866).

INTRODUCTION

The Cherokee Nation (the "Nation") is an independent sovereign entity and a federally recognized Indian tribe. The Nation's government sits in Tahlequah, Oklahoma. In recent years, the Nation has sought to restore its cultural identity as an Indian tribe, trying, in some small part, to reverse the damage caused by more than a hundred years of forced "assimilation" by the federal government. To restore its cultural identity, the Nation carefully considered what it means to be an Indian and a Cherokee. The Nation ultimately reached the collective decision, through constitutional referenda and popular elections, to bring the Nation back to what it was before the first European settlers arrived in this country: an Indian tribe comprised of Indians. Following implementation of that decision, now only descendants of individuals listed in the categories "Cherokees by Blood," "Delaware Cherokees," or "Shawnee Cherokees" on the 1906 U.S. government census, known as the Cherokee Dawes Rolls, satisfy the eligibility requirements for citizenship in the Nation.

The Nation recognizes that its eligibility requirements for citizenship in the Indian tribe necessarily exclude those whose ancestors were not Indians. Among those excluded are descendants of individuals who were listed in the "Freedmen" category on the Cherokee Dawes Rolls. Freedmen were former slaves of citizens of the Nation or free Black persons who remained in or returned to the Nation's

territory as of February 11, 1867. The eligibility requirement, however, does not mean that the Nation is not racially diverse. On the contrary, the Nation comprises citizens of African, Asian, Latino, and Caucasian descent, as well as descendants of Freedmen who also have an Indian ancestor on the Cherokee Dawes Rolls. *Cherokee Nation Registrar v. Nash*, Case No. SC-2011-02 (Sup. Ct. of the Cherokee Nation, Aug. 22, 2011) (taking judicial notice of the Nation's extensive racial diversity).[1]

Plaintiffs in this action are descendants of the Cherokee Freedmen who, because they do not have Indian ancestors, do not satisfy the Nation's eligibility requirements. Plaintiffs originally brought this action in the United States District Court for the District of Columbia (the "District of Columbia Action") against the Department of the Interior and its Secretary (the "Federal Defendants"). Plaintiffs alleged that the Federal Defendants failed to protect Plaintiffs' voting rights in Cherokee tribal elections. Plaintiffs subsequently amended their complaint challenging the citizenship requirements and added the Nation, its Principal Chief, and other unnamed tribal officials. The amended complaint sought extremely broad relief against the Nation, including, but not limited to, removing federal recognition of the Nation, prohibiting the Nation from determining its own citizenship, and prohibiting the Nation from amending its own Constitution.

[1] Judicial notice of this decision and other relevant material cited in this brief is proper pursuant to Fed. R. Evid. 201 and as further stated in the accompanying Motion for Judicial Notice.

On July 29, 2008, this Court dismissed Plaintiffs' claims against the Nation because of the Nation's sovereign immunity. This Court remanded the remaining portion of the District of Columbia Action against the Nation's officers back to the District Court, with instructions to determine "whether 'in equity and good conscience' the suit can proceed with the Cherokee Nation's officers but without the Cherokee Nation itself." *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008) (quoting Fed. R. Civ. P. 19(b)).

Following its dismissal from the District of Columbia Action (and not before), the Nation voluntarily commenced a targeted suit in federal court in Oklahoma with the goal of obtaining prompt resolution of a discrete legal issue that the Nation believes controls the citizenship dispute between the Nation and all descendants of the Freedmen: whether the Nation is required to provide citizenship rights and benefits to the Freedmen under the Treaty of 1866 between the United States and the Nation, 14 Stat. 799 (the "1866 Treaty"). Rather than simply agreeing to resolution of that issue in federal court in Oklahoma, Plaintiffs were determined to proceed with their overbroad complaint in the District of Columbia although this Court had already ruled the Nation was immune from suit there.

On September 30, 2011, the District Court dismissed the remainder of Plaintiffs' District of Columbia Action that had been remanded back by this Court. The District Court ruled:

- The Nation did not waive its immunity from suit in the District of Columbia Action by filing its own related action in federal court in Oklahoma. As a recognized sovereign, the Nation is "free to litigate these questions in the federal action of its choosing, or not at all" and that "the Nation nonetheless chooses to do so in a case with different parties but essentially identical issues while asserting its immunity from this suit does not produce the sort of inconsistency, anomaly or unfairness imagined in [*Lapides v. Bd. of Regents*, 535 U.S. 613 (2002)]." *Vann v. Salazar*, No. 03-1711 (HHK), 2011 WL 4953030, at *8 (D.D.C. Sept. 30, 2011).

- "Upon consideration of the circumstances of this suit, including the factors enumerated in Rule 19(b) . . . the suit cannot, in equity and good conscience, proceed without the Cherokee Nation." *Id*. at *6.

- Further, "[b]ecause an amended complaint that adds the Cherokee Nation as a party would be futile," Plaintiffs' motion for leave to file its proposed Fifth Amended Complaint is denied. *Id*. at *9.

Plaintiffs now appeal the District Court's ruling. Plaintiffs argue that the Nation's citizenship requirements wrongly discriminate against the Freedmen for reasons of their skin color, seizing on the fact that certain members of the Nation held slaves in the 19th Century. That history of suffering must not be forgotten. Nor should anyone forget the brutal subjugation, forced migration, and mass murder that the Nation suffered in the same period. But the suffering of both the Freedmen and the Nation in the 19th Century and beyond does not illuminate the legal issues before the Court today: whether the Nation waived its sovereign

immunity to Plaintiffs' suit in the District of Columbia by virtue of bringing suit against different parties in Oklahoma and, if not, whether the overbroad District of Columbia Action brought by Plaintiffs that attacks the Nation's sovereignty can proceed without the Nation. Moreover, even if that history were illuminating, the democratically expressed will of the Nation to restore itself to an Indian tribe composed of Indians is about sovereignty and not skin color. In enacting the citizenship requirements, the Nation is simply exercising its right, as a sovereign, to make its own determinations as to eligibility for citizenship—without regard to skin color but with regard to whether someone has an Indian ancestor. *Cherokee Nation Registrar v. Nash*, Case No. SC-2011-02. If a foreign sovereign nation were to make such citizenship determinations, we would not question them, nor the right of that sovereign to seek resolution in a U.S. court of their choosing. The result should be no different because the sovereign here is the Cherokee Nation.

In sum, the overbroad relief sought by Plaintiffs in their amended complaint directly attacks the Nation in the exercise of its sovereign rights. The Nation, however, is fully immune from such attack in the District of Columbia notwithstanding the fact that it has brought suit in Oklahoma. Further, the amended complaint cannot proceed in the District of Columbia without the Nation present to defend itself. Thus, the District Court properly upheld the Nation's sovereign immunity and concomitant right to seek adjudication of these sensitive

issues in the manner and federal court of its choosing. As such, the District Court's ruling must be affirmed.

JURISDICTIONAL STATEMENT

The Nation and Principal Chief Baker do not object to Appellants' Jurisdictional Statement. *See* D.C. Cir. R. 28(a)(4).

STATEMENT OF THE CASE

Plaintiffs filed their original complaint against then-Secretary of the Interior Gail A. Norton and the U.S. Department of the Interior in 2003. The Nation intervened and moved to dismiss on the grounds that it was immune from suit as a sovereign; was a required party; and the action could not proceed against the Nation's officials in its absence. The District Court denied the motion to dismiss. The Nation appealed. On appeal, this Court agreed that the Nation was immune from suit and dismissed the complaint against the Nation. This Court remanded the action to the District Court to determine whether the complaint could nevertheless proceed against the Nation's officials in the Nation's absence. The District Court subsequently ruled that it could not and dismissed the entire action. Plaintiffs filed a timely appeal of that ruling.

STATEMENT OF THE ISSUES

I. Whether the District Court correctly ruled that the Nation did not waive its immunity to suit in this action by filing a separate but related action in federal court in Oklahoma.

II. Whether the District Court correctly ruled that the Nation is a required party to this action under Fed. R. Civ. P. 19(a).

III. Whether the District Court correctly ruled that this action could not proceed "in equity and good conscience" against the Nation's Principal Chief without the Nation under Fed. R. Civ. P. 19(b).[2]

STATUTES AND REGULATIONS

Pursuant to D.C. Cir. R. 28(a)(5), pertinent statutes and regulations referenced herein are provided in a separately bound addendum attached to this brief.

STATEMENT OF FACTS

The detailed facts of this case are set out in the District Court's opinion in *Vann v. Kempthorne*, 467 F. Supp. 2d 56 (D.D.C. 2006) ("*Vann I*"), this Court's opinion in *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) ("*Vann II*"), and the District Court's opinion in *Vann v. Salazar*, No. 03-1711 (HHK), 2011 WL 4953030, at *1 (D.D.C. Sept. 30, 2011) ("*Vann III*"). The Nation and its Principal Chief provide the following summary to assist this Court.

1. *Vann I*

In 2003, six individuals claiming to be citizens of the Nation as "direct descendants of individuals enrolled on [the] Dawes Commission Rolls of the

[2] These are the three substantive issues listed by Plaintiffs. The District Court also denied Plaintiffs' motion for leave to file a fifth amended complaint. Plaintiffs take issue with that ruling. Thus, its correctness is briefly discussed below in Section IV.

Cherokee Tribe, under the inclusive Freedmen category," filed this action for declaratory and injunctive relief in the District Court against the United States Department of the Interior and its Secretary. (Compl. ¶ 1, *Vann v. Norton*, Case No. 1:03-cv-01711 (Aug. 11, 2003)) (SA1).[3] Plaintiffs alleged in this, and subsequent amended complaints, that their rights under the U.S. Constitution, the 1866 Treaty, the Principal Chiefs Act, Pub. L. No. 91-495, 84 Stat. 1091 (1970), and the Indian Civil Rights Act, 25 U.S.C. § 1301 (1968) ("ICRA") were violated when they were excluded from voting in two Cherokee tribal elections in 2003. (A-125–A-127.) The Nation moved to intervene for the limited purpose of filing a motion to dismiss. The District Court granted the Nation's motion for limited intervention.

Plaintiffs moved for leave to file a Second Amended Complaint to add the Nation, its then-Principal Chief, and various unnamed tribal officials as defendants. The Second Amended Complaint sought to enjoin the Nation (i) from recognizing the results of the May 24, 2003 election (Second Am. Compl. ¶ 73 (Aug. 3, 2006)) (SA35); (ii) "from holding further elections without a vote of all citizens, including the Freedmen" (*id.* ¶ 74); and (iii) "from taking any further actions to disenfranchise or otherwise strip the membership rights of the Freedmen," (*id.* ¶

[3] Direct citations to the pertinent pages of the Appendix filed with the Opening Brief of Appellants are cited herein as "A-[ ]," and direct citations to the Supplemental Appendix filed with the instant brief are cited as "SA[ ]."

75). The Second Amended Complaint also contained a number of requests for declaratory and injunctive relief against the Nation and the U.S. government but only a single, narrow request for relief that would run against the Principal Chief: to "enjoin[] . . . [Principal Chief] Smith, individually, from holding further elections without a vote of all [Cherokee Nation] citizens, including the Freedmen." (*Id.* ¶ 74).

The District Court subsequently issued a Memorandum Opinion and Order denying the Nation's motion to dismiss and granting Plaintiffs' motion for leave to file a complaint adding the Nation and its officials as defendants. In reaching its decision, the District Court held that the Nation was a "necessary party that must be joined if feasible" under Rule 19(a) because of the Nation's interest in "administering its sovereign electoral and constitutional affairs" and because "the sovereign interests of a tribe clearly are affected when the validity of a tribe's elections are questioned."[4] *Vann I*, 467 F. Supp. 2d at 66. Nevertheless, the District Court held that the Nation, Principal Chief Smith and the Nation's officials were not immune from Plaintiffs' action. *Id.*

The Nation and its Principal Chief appealed the denial of their motion to dismiss. Plaintiffs did not cross-appeal the District Court's determination that the

[4] Following the District Court's December 19, 2006 ruling, the text of Fed. R. Civ. P. 19 was amended and, among other changes, the word "necessary" was replaced with the word "required." *See infra* note 12.

Nation was a required party under Rule 19(a). Plaintiffs then filed a motion for leave to file a Third Amended Complaint to add additional plaintiffs and new factual allegations. The Nation filed a motion to dismiss or, in the alternative, for a stay pending resolution of the Nation's interlocutory appeal. The District Court granted the Nation's motion to stay pending resolution of the appeal.

2. *Vann II*

Following briefing and oral argument, a three judge panel of this Court issued an opinion holding that the Nation enjoys immunity from Plaintiffs' action. This Court reaffirmed that Indian tribes are sovereigns who "did not relinquish their status as sovereigns with the creation and expansion of the republic on the North American continent." *Vann II*, 534 F.3d at 746. This Court continued: "Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'" *Id.* (quoting *Cohen's Handbook of Federal Indian Law* § 4.01[1][a] at 206 (Nell J. Newton, ed., 2005) (quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978))). As sovereigns, "Indian tribes enjoy immunity against suits" that flows "from a tribe's sovereign status in much the same way as it does for the States and for the federal government." *Id*. Further, while the scope of a tribe's sovereignty, including

sovereign immunity, is subject to the plenary authority of Congress, "abrogation of tribal sovereign immunity requires an explicit and unequivocal statement to that effect." *Id*. at 746–47.

This Court then addressed whether the Nation's sovereign immunity from the Freedmen's suit was abrogated, and held that it was not. The Court rejected the District Court's conclusion that the 1866 Treaty and the Thirteenth Amendment worked in tandem to abrogate the Nation's immunity. *Id.* at 748. The Court held the District Court "is mistaken to treat every imposition upon tribal sovereignty as an abrogation of tribal sovereign immunity," noting that "Congress can impose substantive constraints upon a tribe without subjecting the tribe to suit in federal court to enforce those constraints, as the Supreme Court made clear in *Santa Clara Pueblo* [*v. Martinez*, 436 U.S. 49 (1978)]." *Id*. at 747. The Court continued that "nothing in the Thirteenth Amendment or the 1866 Treaty amounts to an express and unequivocal abrogation of tribal sovereign immunity, [so] the Cherokee Nation cannot be joined in the Freedmen's federal court suit without the tribe's consent." *Id*. at 749. Of note, the Court also observed that "[n]othing in § 1 of the Thirteenth Amendment so much as hints at a federal court suit by a private party to enforce the prohibition against the badges and incidents of slavery against Indian tribes," and that "[a]lthough § 2 of the Thirteenth Amendment gives Congress the power to generate express and unequivocal language abrogating tribal sovereign immunity

to allow for such suits, that promise remains unfulfilled absent some further legislative enactment." *Id*. at 748 (citing U.S. Const. amend. XIII). The Court further held that "[t]he 1866 Treaty similarly lacks any clear abrogation of tribal sovereign immunity, as the Tenth Circuit correctly concluded in *Nero*." *Id*. (citing *Nero v. Cherokee Nation*, 892 F.2d 1457, 1461 (10th Cir. 1989)).

The Court then addressed Plaintiffs' claims against the Nation's officials. The Court held that sovereign immunity did not bar the Second Amended Complaint's "*single request* for relief against an officer: an injunction preventing [Cherokee Nation Principal] Chief Smith 'from holding further elections without a vote of all citizens, including the Freedmen.'" *Id.* at 754 (emphasis added). The action was then remanded 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" pursuant to Rule 19(b). *Id*. at 756 (citing Fed. R. Civ. P. 19(b)).

3. *Vann III*

Following remand, Plaintiffs filed a Fourth Amended Complaint against the Federal Defendants and the Nation's Principal Chief. (A-124.) Unlike Plaintiffs' initial complaint, which was limited to two causes of action asserted exclusively against the Federal Defendants arising from alleged failures to protect the Freedmen's voting rights in 2003, the Fourth Amended Complaint includes six

causes of action and dozens of allegations challenging various Cherokee elections and other actions by the Nation and the Federal Defendants over several years. The Fourth Amended Complaint also attributes actions of the Nation to the Nation's Principal Chief, who was alleged to be responsible for, among other things: "implementing policies denying Plaintiffs the right to vote;" "implementing policies denying Plaintiffs the right to run for office;" "implementing policies stripping Plaintiffs of their citizenship in the Cherokee Nation;" and "implementing policies denying Plaintiffs the right to equal access to federal funds provided to the Cherokee Nation for the benefit of all Cherokee citizens." (A-154–A-155.)

In addition, the Fourth Amended Complaint contains several severe and open-ended requests for declaratory relief that, if granted, would interfere with the Nation's ability to govern itself, hold elections, and determine, through its own democratic processes, who is and who is not a Cherokee Indian. Among other requests for relief, the Fourth Amended Complaint seeks to: "[e]njoin[] the Federal Defendants from recognizing the actions of the Cherokee Nation until such time that it is constituted with Freedmen representatives;" "[e]njoin[] the [Bureau of Indian Affairs] from recognizing the [Principal Chief] Chadwick Smith administration or any subsequent Cherokee Nation government until it is lawfully constituted and operating in compliance with the Treaty of 1866;" and "[e]njoin[]

Principal Chief Chadwick Smith from . . . implementing any law that denies citizenship rights to the Freedmen." (A-159–A-160.)

The Nation's Principal Chief subsequently moved to dismiss this action pursuant to Rules 19(b), 12(b)(6), and 12(b)(3). The Principal Chief asserted the Nation was a required party that could not be joined due to its sovereign immunity; Plaintiffs failed to allege cognizable claims supported by private rights of action; and Plaintiffs failed to allege sufficient facts to establish venue against him in this district. (A-311–A-312.)

Concurrently, the Nation—though no longer a party to the District of Columbia Action since its dismissal on the grounds of sovereign immunity by the D.C. Circuit—was faced with threats of adverse Congressional action, including the withholding of federal funds and the loss of federal recognition based on its collective decision to limit its membership to individuals who could trace their lineage to an Indian ancestor on the Cherokee Dawes Rolls. To seek a ruling on the discrete issue of whether or not the Nation must continue to extend citizenship rights and benefits to Freedmen by virtue of the 1866 Treaty, the Nation filed a four-page complaint for declaratory relief against the Department of the Interior and its Secretary and five individual Freedmen defendants in United States District Court for the Northern District of Oklahoma, the federal court in the closest proximity to the Nation and the individual defendants (the "Oklahoma Action").

In contrast to the allegations in Plaintiffs' District of Columbia Action, which relate to an almost ten-year period and assert various causes of action against both Federal Defendants and the Nation's Principal Chief, the Nation's Oklahoma Action requests only a judicial declaration that "the Treaty of 1866, including subsequent federal statutes and case law, does not bestow upon current descendants of Freedmen a right to citizenship within the Cherokee Nation that cannot be altered by the Cherokee Constitution." (Am. Compl. ¶ 18, *Cherokee Nation v. Nash*, No. 11-CV-0648 TCK TLW (N.D. Okla. May 3, 2012)). Plaintiffs recently filed an unopposed motion to intervene in the Oklahoma Action, begging the question why this appeal even needs to proceed.

Following the filing of the Oklahoma Action, Plaintiffs sought leave to file a Fifth Amended Complaint in the District of Columbia that re-named the Nation as a defendant and added the individual Freedmen defendants named in the Oklahoma Action as plaintiffs. (A-382.) Plaintiffs argued that the Nation waived its immunity from suit in the District of Columbia Action by filing the Oklahoma Action even though the Nation had already been dismissed from the District of Columbia Action at the time the Oklahoma Action was filed.

The District Court disagreed with Plaintiffs, denied Plaintiffs' motion for leave to amend, and granted the Principal Chief's motion to dismiss the District of

Columbia Action in its entirety in a comprehensive decision. *Vann III*, 2011 WL 4953030, at *1.

In its decision, the District Court held the Nation did not waive its immunity from the District of Columbia Action by filing the Oklahoma Action. The District Court recognized that "[t]he sovereign immunity of Indian tribes is a matter of common law and a necessary corollary to Indian sovereignty and self-governance," and that "the Court of Appeals has ruled that, as relevant to this suit, Congress did not impair the Nation's immunity." *Id.* at *7 (citations omitted). The District Court continued that, "like all sovereigns, the Nation is free to assert or to waive its immunity as it sees fit," *id.*, and "'[i]t is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums.'" *Id*. (quoting *West v. Gibson*, 527 U.S. 212, 226 (1999)). The District Court rejected Plaintiffs' argument that by filing the Oklahoma Action the Nation consented to federal jurisdiction "with regard to the subject matter of this case." *Id*. at *8. The District Court held the Nation's filing "of a separate suit on a similar subject" does not constitute clear waiver of its immunity from suit. *Id*. (citing *Tegic Commc'ns v. Bd. of Regents*, 458 F.3d 1335, 1343 (Fed. Cir. 2006)). The District Court further held that "[t]he plaintiffs' theory of 'subject matter' waiver also fails for a more basic reason: it would require the conclusion that a tribe waives its immunity as to compulsory counterclaims—those that 'arise [ ] out of the transaction or

occurrence that is the *subject matter* of the [tribe's] claim,' Fed. R. Civ. P. 13(a)(1)(A) (emphasis added)—when it files suit, and the Supreme Court has held to the contrary." *Id*. (citing *Okla. Tax Comm'n v. Citizen Band Potwatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).

As to whether this action could proceed without the Nation, the District Court noted that "[t]he D.C. Circuit 'has observed that there is very little room for balancing of other factors set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests compelling by themselves.'" *Vann III*, 2011 WL 4953030, at *2 (quoting *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1496 (D.C. Cir. 1995)). Nevertheless, the District Court walked through each of the four factors set out under Rule 19(b), and determined that each weighed in favor of dismissing Plaintiffs' suit:

- First, the District Court held that judgment rendered in the absence of the Nation would potentially prejudice the Nation under Rule 19(b)(1), reiterating its prior holding that "'[t]he Nation has an interest in administering its sovereign electoral and constitutional affairs'" and "'the sovereign interests of a tribe clearly are affected when the validity of a tribe's elections are questioned.'" *Vann III*, 2011 WL 4953030, at *3 (quoting *Vann I*, 467 F. Supp. 2d at 66). The District Court added that

because one of the issues in this action is the Freedmen's rights under the 1866 Treaty, it "would surely prejudice the Nation's interest" for "the Court to decide the import of the Treaty absent the Nation, one of the Treaty's signatories." *Id.*

- Second, the District Court held that there was no way to shape the relief sought by Plaintiffs to lessen the prejudice to the Nation under Rule 19(b)(2). *Id.* at *4. The District Court added that the interests of the Nation's Principal Chief are not "identical to those of the Cherokee Nation as a whole," and that the Federal Defendants "cannot represent the Nation's interest in a suit where it has not only different but conflicting interests." *Id.* (citing *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986)).
- Third, the District Court held that relief awarded in the absence of the Nation would be inadequate under Rule 19(b)(3) "because only the Chief—not the legislative or judicial branches of the Cherokee government, nor the Nation as a whole—would be bound by the judgment." *Id.* at *5. "As a result, the parties are likely to be subject to additional lawsuits, which will bring the potential for inconsistent judgments." *Id.*
- And fourth, the District Court held that the Oklahoma Action provides the Freedmen with an alternative forum that more than satisfies Rule 19(b)(4).

Id. at *5. In so ruling, the Court noted that Plaintiffs are not necessarily entitled to an alternative forum (though one happens to exist in Oklahoma). *See id*. ("'[W]hile the absence of an alternative forum is properly weighed heavily against dismissal . . . absence of an alternative remedy alone does not dictate retention of jurisdiction under Rule 19[.]'" (quoting *Kickapoo*, 43 F.3d at 1499)).

The District Court also denied Plaintiffs' motion for leave to file a Fifth Amended Complaint on the grounds that "an amended complaint that adds the Cherokee Nation as a party would be futile." *Id.* at *9. In closing, the District Court concluded that "th[is] suit cannot proceed without the Cherokee Nation and [ ] the Cherokee Nation did not waive its sovereign immunity such that it can be joined as a party to this suit." *Id*. Plaintiffs subsequently appealed the District Court's ruling to this Court.

4. Tribal Court Proceedings

Before this Court heard argument regarding the District Court's *Vann I* decision, the citizens of the Nation voted overwhelmingly to pass an amendment to the Cherokee Constitution limiting citizenship in the Nation "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." (A-145 ¶ 65.)

Descendants of the Freedmen were permitted to vote in the election on approval of this amendment. (A-146 ¶ 69; Opening Brief of Appellants ("Appellants' Br.") at 12). On June 23, 2007, the electorate of the Nation also voted to approve an amendment to the Cherokee Constitution removing the requirement that amendments to the Cherokee Constitution be approved by the United States. (A-147 ¶ 71.) On August 9, 2007, the Bureau of Indian Affairs approved this amendment. (A-148 ¶ 75.)

During the litigation of Plaintiffs' District of Columbia Action, a number of Freedmen descendants sued the Nation in the Nation's tribal courts contesting the citizenship requirements. The Nation provided these individuals with a forum and actively participated in these cases. Ultimately, however, the Supreme Court of the Cherokee Nation held that the Cherokee people are entitled to approve an amendment to the Cherokee Constitution limiting Cherokee citizenship to those who can trace their lineage to at least one Indian relative on the Dawes Commission's Cherokee by Blood or Delaware Rolls. *Cherokee Nation Registrar v. Nash,* Case No. SC-2011-02. The Supreme Court of the Cherokee Nation further held the tribal courts did not have subject matter jurisdiction to overturn the Nation's March 3, 2007 popular vote on tribal citizenship requirements. *Id*. at 7. The Supreme Court of the Cherokee Nation added:

> This Court does not find that the actions of the Cherokee people in defining their citizenship in the March 3, 2007 Constitutional

> Amendment would be a Badge or Incident of Slavery which violates the Thirteenth Amendment to the United States Constitution in light of the facts that there are Cherokee Freedmen who have and can prove they are also descendants of Cherokees listed on the Dawes Rolls as Cherokees by Blood and who are either citizens or eligible for citizenship if they so desire.
>
> The Cherokee Nation Constitution [as amended] does not exclude people from citizenship in the manner the 13th Amendment protects against. It includes for eligibility those whose verifiable ancestors are listed on the Dawes Rolls as Cherokees by Blood.
>
> This Court takes judicial notice of the extensive racial diversity of the citizenry of the Cherokee Nation.

Id. at 9.

STANDARDS OF REVIEW

The parties agree this Court applies a *de novo* standard of review to: (i) dismissal of a complaint because of sovereign immunity, *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1497–98 (D.C. Cir. 1997); (ii) Rule 19(a)(1)(B)(ii) determinations, *Kickapoo*, 43 F.3d at 1495; and (iii) denial of a motion for leave to amend because the amended pleading would not survive a motion to dismiss, *In re Interbank Funding Corp. Sec. Lit.*, 629 F.3d 213, 218 (D.C. Cir. 2010). The parties also agree that this Court reviews Rule 19(b) determinations for abuse of discretion. *Kickapoo*, 43 F.3d at 1497.

As to determinations under Rule 19(a)(1)(A) and 19(a)(1)(B)(i), the parties disagree. Plaintiffs provide no specific support for their assertion that a *de novo* standard should apply to these determinations. The Nation and the Principal Chief

respectfully suggest an abuse of discretion standard of review as an available alternative for at least Rule 19(a)(1)(A) and 19(a)(1)(B)(i) determinations, and refer the Court to the following rulings from six Circuit Courts: *Picciotto v. Cont'l Cas. Co.*, 512 F.3d 9, 15 n.8 (1st Cir. 2008); *Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 385 (2d Cir. 2006); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002); *Nat'l Union Fire Ins. Co. v. Rite Aid, Inc.*, 210 F.3d 246, 250 n.7 (4th Cir. 2000); *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999); *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993) (all subjecting Rule 19(a) determinations to abuse of discretion standard).

SUMMARY OF ARGUMENT

It is well-established that a sovereign may seek relief in one U.S. court without waiving its immunity in other courts. Moreover, where a sovereign has immunity the action cannot proceed in the sovereign's absence if it would interfere significantly with core attributes of its sovereignty and the rights of its citizens. Applying these legal principles, the District Court was correct in holding that (i) the Nation did not waive its sovereign immunity in the District of Columbia Action by seeking targeted relief in the Oklahoma Action, and (ii) the District of Columbia Action cannot proceed against the Nation's Principal Chief without the Nation present to defend its interests. Plaintiffs rely on *Lapides* for their argument

that the District Court's holding was in error. But *Lapides* was an Eleventh Amendment case, which involved waiver by litigation conduct when a state removed an action to federal court and then immediately moved to dismiss it from that same court on the grounds of sovereign immunity. That sort of litigation conduct did not take place here. Rather, once the question of its sovereign immunity in the District of Columbia Action was settled, the Nation decided to litigate a discrete legal citizenship issue in a separate federal court in Oklahoma. Thus, the District Court was correct in finding that *Lapides* is inapposite.

The District Court's ruling dismissing the District of Columbia Action may be affirmed on the alternative and independent grounds that Plaintiffs failed to state a cognizable claim against the Nation's Principal Chief. That is because neither the Thirteenth Amendment nor the 1866 Treaty provides Plaintiffs with a private right of action.

Finally, because the proposed amendments will not cure the deficiencies that led to dismissal of the Fourth Amended Complaint, the District Court's decision to deny Plaintiffs' motion for leave to file a Fifth Amended Complaint was also correct.

Accordingly, the District Court's decision should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE NATION ENJOYS, AND HAS NOT WAIVED, IMMUNITY FROM THIS ACTION

A. The Nation Enjoys Immunity From This Action.

Sovereign immunity has two components: claims immunity and forum immunity. *See Pennhurst State Sch. & Hosp. v. Holderman*, 465 U.S. 89, 99 (1984) ("A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued."). Both components are available to Indian tribes. *See Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86–87 (2d Cir. 2011) (holding a tribe's sovereign interest includes both whether and where it may be sued).

Four years ago in this very case, this Court held that the Nation, as a sovereign, enjoys immunity from suit absent an unequivocal abrogation by Congress or a clear waiver from the Nation itself. This Court further determined that neither of those factors applied here, and dismissed Plaintiffs' claims against the Nation because "the tribe's sovereign immunity [remains] intact." *Vann II*, 534 F.3d at 749.

This Court's prior ruling on sovereign immunity constitutes the "law of the case." Thus, "[w]hen there are multiple appeals taken in the course of a single piece of litigation . . . decisions rendered on the first appeal should not be revisited

on later trips to the appellate court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*) (quoting *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1994)). In addition, this Court will not otherwise "reconsider issues already decided in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *United States v. Thomas*, 572 F.3d 945, 948 (D.C. Cir. 2009) (internal quotation marks omitted).

In *Vann III*, the decision that is the subject of this appeal, the District Court applied this Court's prior ruling on sovereign immunity and rejected Plaintiffs' arguments to bypass that decision. *See Vann III*, 2011 WL 4953030, at *3 n.5 ("There can be no doubt that the D.C. Circuit upheld the Cherokee Nation's sovereign immunity in this case . . . .").

Under the reconsideration analysis above, *Thomas*, 572 F.3d at 948, this Court's prior ruling was clearly correct. Plaintiffs' opening brief fails to identify the "manifest injustice" that would be visited upon Plaintiffs by this Court's continued recognition of the Nation's immunity from this suit. Plaintiffs and others similarly situated were permitted to challenge the Nation's membership determination in the Nation's tribal courts and, as the District Court noted, the Nation's Oklahoma Action provides yet another forum for the Freedmen that they have now taken advantage of. *See Vann III*, 2011 WL 4953030, at *5.

Under these circumstances, there is no cause to disturb the Nation's immunity from Plaintiffs' District of Columbia Action.

B. The Nation Has Not Waived Its Immunity by Initiating Its Own Action in a Separate Federal Court.

1. A sovereign is entitled to waive or assert its immunity in an action when and where it sees fit.

Plaintiffs' primary argument in response is that the Nation unequivocally waived its immunity in the District of Columbia Action by filing the separate Oklahoma Action. The District Court rejected this argument, holding the Nation did not waive its immunity because "like all sovereigns, the Nation is free to assert or to waive its immunity as it sees fit" and "[i]t is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums." *Vann III*, 2011 WL 4953030, at *7 (internal quotation marks omitted).[5]

Two leading federal circuit cases, *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987) and *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989), buttress the District Court's ruling and stand for the fact that clear intent is required for waiver by litigation conduct.

In *Jicarilla*, an Indian tribe brought an action against the U.S. Department of the Interior to cancel certain oil and gas lease contracts. Later, the tribe asserted

[5] The District Court also noted that "[i]n an analogous case, the Federal Circuit held that a state university that brought suit in federal court to enforce a patent did not thereby waive its sovereign immunity as to another suit concerning the validity of the same patent 'brought by a different party in a different state and a different district court.'" *Vann III*, 2011 WL 4953030, at *8 (quoting *Tegic*, 458 F.3d at 1343).

sovereign immunity to compel dismissal of an independent action brought by an oil company concerning the same lease agreements. 821 F.2d at 538. The oil company's lawsuit was dismissed on the grounds that the sovereign Indian tribe could not be joined. The Tenth Circuit rejected the oil company's argument that the tribe waived its sovereign immunity by filing suit in federal court as a plaintiff, holding "the terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain suit." *Id*. at 539. As such, the Court could not "construe the act of filing that suit as a sufficiently unequivocal expression of waiver in subsequent actions relating to the same leases" because "[w]aiver of immunity in the present action was not one of the terms of the Tribe's initial suit." *Id*. at 539–40.

In *McClendon*, the Colorado River Indian Tribal Council and the United States brought suit to obtain title to certain disputed lands and received joint title to the lands in a settlement agreement. A private party subsequently brought a lawsuit alleging the Tribal Council breached a lease agreement related to these lands and argued the Tribal Council waived immunity from the suit by initiating the first action. 885 F.2d at 629. Following the Tenth Circuit's opinion in *Jicarilla*, the Ninth Circuit held the Tribe did not waive its sovereign immunity in the second, related action, adding "tribal initiation of litigation alone does not establish waiver with respect to related matters" and "a tribe's waiver of sovereign

immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts." *Id*. at 630.

Thus, both *Jicarilla* and *McClendon* hold that an Indian nation can voluntarily waive its immunity from suit in one action in a United States court without waiving its immunity from suit in a related action in another United States court.

2. A sovereign is entitled to assert immunity from an action initiated before or after filing a related action in which it has waived its immunity to participate.

The analysis above is not affected by the fact that the Nation filed its Oklahoma Action *after* the District of Columbia Action. (Appellants' Br. at 19). A sovereign is entitled to bring an action in federal court and waive its immunity as to that action alone without waiving its immunity as to the same subject matter in other actions.[6] *Vann III*, 2011 WL 4953030, at *8; *see also Jicarilla*, 821 F.2d

[6] The District Court held Plaintiffs' theory of "subject matter" waiver also fails because "it would require the conclusion that a tribe waives its immunity as to compulsory counterclaims — those that arise [ ] out of the transaction or occurrence that is the subject matter of the [tribe's] claims, Fed. R. Civ. P. 13(a)(1)(A) — when it files suit, and the Supreme Court has held to the contrary." *Vann III*, 2011 WL 4953030, at *8 (internal quotation marks omitted) (citation omitted).

537; *McClendon*, 885 F.2d 627.[7] Lest there be any doubt on that issue, the Federal Circuit recently rejected a retroactive waiver of immunity argument in *A123 Sys.*, 626 F.3d at 1219.

In that case, plaintiff A123 Systems, Inc. ("A123") filed suit against Hydro-Quebec ("HQ") in the U.S. District Court for the District of Massachusetts seeking a declaration of non-infringement and invalidity of two patents held by the University of Texas ("UT") and licensed to HQ. HQ subsequently moved to dismiss on the grounds that UT was a required party to the action but could not be joined based on its entitlement to Eleventh Amendment sovereign immunity. *Id.* at 1216. While the Massachusetts action was still pending, UT and HQ jointly filed an infringement action against A123 in U.S. District Court for the Northern District of Texas concerning the same patents. The Massachusetts court subsequently dismissed A123's action without prejudice to allow reexamination of the patents, then denied A123's motion to reopen the action and yielded jurisdiction to the later-filed Texas suit "in light of its conclusion that A123's first-

[7] *Accord Tegic*, 458 F.3d at 1344–45; *Biomedical Patent Mgmt. Corp. v. California*, 505 F.3d 1328, 1341 (Fed. Cir. 2007); *A123 Sys., Inc. v. Hydro-Quebec*, 626 F.3d 1213, 1219-20 (Fed. Cir. 2011); *Fairley v. Stalder*, 294 F. App'x. 805, 810 (5th Cir. 2008) (rejecting subject matter waiver); *Montana v. Goldin*, 394 F.3d 1189, 1197 (9th Cir. 2005) (declining to extend a waiver where "there has already been one proceeding, . . . and now there is a subsequent proceeding, involving newly arisen claims against the State"); *Wagoner Cnty. Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1260 (10th Cir. 2009) (holding "any waiver of immunity in the [prior] case does not extend to the present lawsuit"); *Shieldalloy Metallurgical Corp. v. New Jersey Dep't. of Envtl. Prot.*, 743 F. Supp. 2d 429, 437 (D.N.J. 2010) (holding that "a prior sovereign immunity waiver does not extend to a subsequent suit simply because that suit is between the same parties and involves the same subject matter as the previous suit").

filed action, if reopened, would be subject to imminent dismissal for failure to join a necessary party." *Id*. at 1216. On appeal, the Federal Circuit rejected A123's argument that UT waived its immunity in the first-filed Massachusetts action by bringing a separate but related action, reiterating "where a waiver of immunity occurs in one suit, the waiver does not extend to an entirely separate lawsuit, even one involving the same subject matter and the same parties." *Id*. at 1219 (citing *Biomedical Patent Mgmt.*, 505 F.3d at 1339).

Like the sovereigns in *Jicarilla*, *McClendon*, and *A123*, the Nation did not waive its immunity in this action by filing a separate action in the Northern District of Oklahoma against different parties and after this Court determined it was immune from suit here. To be sure, Plaintiffs' District of Columbia Action and the Nation's Oklahoma Action share a common question: whether the Nation is required under the Treaty of 1866 to extend citizenship rights and benefits to the Freedmen. But the Nation's act of waiving its immunity in one federal forum by filing suit there "does not establish [the Nation's] waiver [of immunity] with respect to related matters . . . even if those matters arise from the same set of underlying facts" in another forum. *McClendon*, 885 F.2d at 630; *see also Lewis v. Norton*, 424 F.3d 959, 962 (9th Cir. 2005) (holding tribe's waiver of sovereign immunity for purposes of pursuing a lawsuit to obtain federal recognition of its

membership roll "did not constitute a waiver of the tribe's sovereign immunity in perpetuity for the resolution of all claims to tribal membership").

C. *Lapides* is Inapposite.

In connection with their waiver argument, Plaintiffs rely on the Supreme Court's decision *Lapides*. In *Lapides*, the Supreme Court held that when a state voluntarily removed an action from state to federal court, it could no longer assert sovereign immunity as to that same action. 535 U.S. at 619. In *Vann III*, the District Court correctly rejected Plaintiffs' reliance on *Lapides*. 2011 WL 4953030, at *8.

Unlike the instant action, *Lapides* involved a claim brought in state court against a state entity—the Board of Regents of the University of Georgia—pursuant to specific enabling legislation that abrogated the state's immunity under the Eleventh Amendment. In an effort to avoid liability, the state entity removed the suit to federal court, then immediately moved to dismiss on the basis of sovereign immunity. The Supreme Court rejected the state's course of conduct, recognizing "[i]t would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Lapides*, 535 U.S. at 619. The Supreme Court further reasoned

"a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same *case* could generate seriously unfair results." *Id.* (emphasis added). Thus, *Lapides* was a claims immunity case that did not address forum immunity.[8] That case simply reaffirmed the century-old principle that a state waives its Eleventh Amendment immunity by voluntarily appearing in federal court. *Lapides* then extended that principle to a state's removal of an action against it to federal court. Of note, the Supreme Court expressly confined its specific discussion to that Eleventh Amendment immunity, and noted that the issue resolved was different from "an effort to protect an Indian tribe." *Id.* at 623. The other cases cited by Plaintiffs finding constructive waiver of sovereign immunity through so-called "litigation conduct" involve similar circumstances.[9]

[8] The Federal Circuit in *Biomedical Patent Mgmt.* further notes that the word "matter" in *Lapides* refers not to the subject matter of a case but to the specific "case at hand" and that a "State's waiver of immunity generally does *not* extend to a separate or re-filed suit." 505 F.3d at 1335-36, 1339.

[9] Including *Lapides*, courts have held waiver occurred through "litigation conduct" in the following, readily distinguished contexts: (i) where a state removes an action to federal court and then asserts immunity, *Lapides*, 535 U.S. 613 (2002); (ii) where a state voluntarily intervenes in a case but later asserts immunity, *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *Clark v. Barnard*, 108 U.S. 436, 447 (1883); (iii) where a state initiates an administrative patent proceeding and then attempts to block an appeal of that proceeding, *Vas-Cath, Inc. v. Curators of the Univ. of Mo.*, 473 F.3d 1376, 1378–80 (Fed. Cir. 2007); (iv) where a state actively defends itself before various proceedings, including an appeal to a federal court, before asserting the proceedings are precluded by its immunity, *New Hampshire v. Ramsey*, 366 F.3d 1, 15–16 (1st Cir. 2004); and (v) where a state submits to a determination on an entity's tax liability but asserts immunity when the entity files a petition to enforce the original ruling, *Gunter v. Atl. Coast Line R.R.*, 200 U.S. 273, 284 (1906).

Lapides is distinguishable for at least two reasons. First, the Nation is not a state and it is not seeking to remove an action to a federal court solely to dismiss that same action. Rather, after this Court ruled that it need not subject itself to the overbroad claims brought by Plaintiffs in the District of Columbia Action, the Nation sought—in a different case and with different parties—a judicial ruling on a contentious, sensitive issue, through the use of a targeted stand-alone declaratory judgment action, in a federal court of its choosing. Later, Plaintiffs sought anew to initiate an action against the Nation here. These facts are far removed from "the sort of inconsistency, anomaly, or unfairness imagined in *Lapides*" where a sovereign defendant seeks to remove a case solely to dismiss that same case. *Vann III*, 2011 WL 4953030, at *8.

Second, the sharp elbows, "same case" litigation conduct that occurred in *Lapides* is not present here. The Nation's filing of the Oklahoma Action after it was determined that its Principal Chief was subject to suit in the District of Columbia does not amount to the tactical litigation conduct alleged by the Plaintiffs. The Nation brought the Oklahoma action only after this Court ruled in *Vann II* that the Nation was not subject to Plaintiffs' suit. *Vann II*, 534 F.3d at

749.[10] To be sure, Plaintiffs take issue with the perceived "unfairness" that sovereigns are immune from suit and can choose where they wish to waive their immunity. But any such unfairness "must be accepted in view of . . . overriding federal and tribal interests" in preserving sovereign immunity and promoting Indian self-governance. *Three Affiliated Tribes v. World Eng'g*, 476 U.S. 877, 893 (1986). That "unfairness" does not override the Nation's sovereignty.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE NATION IS A REQUIRED PARTY WITHOUT WHOM THIS ACTION CANNOT PROCEED UNDER RULE 19

Having addressed the sovereign immunity waiver issue, the Nation and the Principal Chief now turn to whether the Nation is a required party under Fed. R. Civ. P. 19.

Rule 19 "establishes a two-step procedure for determining whether an action must be dismissed because of the absence of a party needed for a just

[10] In challenging the District Court's ruling, Plaintiffs assert without support that the District Court erred in relying upon *Tegic*, 458 F.3d 1555, because the Nation, unlike the sovereign entity in *Tegic*, filed suit after the Plaintiffs in order to gain a "litigation advantage." (Appellants' Br. at 25). As explained above, however, Plaintiffs mischaracterize the actions of the Nation, and the District Court's reference to *Tegic* was appropriate. In fact, *Tegic* is but one of numerous cases that aptly supports the District Court's ruling. *See* cases cited *supra* note 6.

adjudication." *Cherokee Nation of Okla.*, 117 F.3d at 1495–96.[11] In step one, a court determines whether an absent party is required to be joined under any of the factors enumerated in Rule 19(a). *Id.*; *see also Republic of the Philippines v. Pimentel*, 553 U.S. 851, 854–55 (2008). If the court finds that a party is required but cannot be joined, it proceeds to step two. In step two, the court determines whether, "in equity and good conscience," the action should proceed among the existing parties or should be dismissed under the non-exclusive factors enumerated in Rule 19(b). Fed. R. Civ. P. 19(b).

Plaintiffs challenge both the District Court's December 19, 2006 ruling that the Nation is a required party under Rule 19(a) and the District Court's September

[11] The current version of Fed. R. Civ. P. 19 provides in relevant part:

(a) Persons Required to be Joined if Feasible. (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined if: (A) in that person's absence the court cannot accord 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.

. . .

(b) When Joinder is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: (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.

30, 2011 ruling that this action cannot proceed without the Nation under Rule 19(b). Neither challenge has merit.

A. The Nation is Required to be Joined if Feasible Under Rule 19(a).

As to the Rule 19(a) challenge, a party is required to be joined, if feasible, if, in its absence, the court cannot accord complete relief among the existing parties. Fed. R. Civ. P. 19(a)(1)(A). In addition, a party is required to be joined if it has an interest in the action and resolving the action in its absence may (i) as a practical matter, impair or impede its ability to protect that interest, Fed. R. Civ. P. 19(a)(1)(B)(i), or (ii) leave an existing party subject to inconsistent obligations because of that interest, Fed. R. Civ. P. 19(a)(1)(B)(ii).

At oral argument before this Court on May 6, 2008, Plaintiffs conceded that the Nation is a required party to this action.[12] In fact, the District Court's holding in *Vann I* that the Nation was a required party to this case was unchallenged until the instant appeal. In any event, the Nation satisfies all tests for a required party under Rule 19(a). *Vann I*, 467 F. Supp. 2d at 66.

[12] During argument on May 6, 2008 before this Court, Plaintiffs' counsel used the term "necessary," stating "I think [the Nation is] a necessary party, they are not an indispensable party." *See* Tr. at 31:14–15. Following the District Court's December 19, 2006 opinion, Rule 19 was amended and renumbered. Among other changes, the word "required" replaced the word "necessary" in subparagraph (a) and the word "indispensable" was removed altogether. *See* Advisory Committee's Notes on 2007 Amendment to Fed. R. Civ. P. 19 (2008). The Supreme Court has recognized that the changes were "stylistic only," and that "the substance and operation of the Rule both pre- and post-2007 are unchanged." *Pimentel*, 553 U.S. at 855. Outside of quotations from pre-2007 Rule 19 opinions, this brief refers to the present, revised version of Rule 19.

1. In the absence of the Cherokee Nation, the Court cannot accord complete relief between the parties.

Turning to Rule 19(a)(1)(A), the Cherokee Constitution provides citizens and elected officials of the Nation with rights and responsibilities that cannot be controlled by the Nation's Principal Chief. Put another way, a ruling binding the Principal Chief will not necessarily bind the Nation. For example, the Cherokee Constitution establishes the Cherokee National Election Commission as an "autonomous and permanent entity charged with the administration of all Cherokee Nation elections." Cherokee Nation Const. art. IX, § 1. That Commission can hold an election counter to the demands of Plaintiffs without the Principal Chief's involvement. Furthermore, Cherokee citizens have the power to amend the Cherokee Constitution through both initiative and referendum and the Principal Chief does not have veto power over the popularly expressed will of the people. *Id*. art. XV, § 4. Notwithstanding the limitations on the rights and powers of the Principal Chief, the relief requested by Plaintiffs goes much further and attacks the Nation's "sovereign electoral and constitutional affairs" and the voting rights enjoyed by every citizen of the Nation. *Vann III*, 2011 WL 4953030, at *3, *5. For example, as the District Court correctly recognized, "one of the issues in this suit is the Freedmen's rights under the Treaty of 1866" and it would be prejudicial to the Nation "[f]or the Court to decide the import of the Treaty absent the Nation" because the Nation would not be bound by any such ruling. *Id*. at *3.

Thus, the Court cannot accord complete relief in an action against only the Principal Chief.

2. The Nation has an interest in an action challenging its ability to govern itself and function as a sovereign and proceeding without the nation may prejudice the Nation or existing parties.

As to Rule 19(a)(1)(B)(i), the Nation has a legitimate and undeniable interest in defending elemental attributes of its sovereignty, such as administering elections, amending its Constitution, and determining its own membership. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters."); *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (holding "absent tribes have an interest in preserving their own sovereign immunity, with its concomitant 'right not to have [their] legal duties judicially determined without consent'"); *Vann III*, 2011 WL 4953030, at *3–4.[13]

[13] *See also Fletcher v. United States*, 116 F.3d 1315, 1333 (10th Cir. 1997) (holding tribe was necessary party with requisite interest under Rule 19(a) where "relief requested . . . posed a practical threat to the ability of Tribal Defendants to protect their interest as the sole governing body of the Tribe"); *Confederated Tribes of Chehalis Indian Res. v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (dismissing suit against Quinault Nation upon finding that it "undoubtedly has a legal interest in the litigation. Plaintiffs seek a complete rejection of the Quinault Nation's current status as the exclusive governing authority of the reservation.").

The relief sought by Plaintiffs would severely impair or impede the Nation's interests and its ability to exercise these basic sovereign functions. As such, the District Court correctly determined the Nation possesses the requisite interest and potential impairment to qualify as a required party under Rule 19(a)(1)(B)(i). *Vann III*, 2011 WL 4953030, at *3.

The cases of *Kickapoo* and *Davis* squarely support the District Court's ruling. In *Kickapoo*, this Court held that a party to a tribal gaming compact—the State of Kansas—was a required party because "the State of Kansas has an interest in the validity of a compact to which it is a party, and this interest would be directly affected by the relief that the Tribe seeks." 43 F.3d at 1495. As in *Kickapoo*, the Nation's direct interest in the relief sought here arises from the interpretation of a treaty to which it is party—the 1866 Treaty.[14] Similarly, in *Davis*, the Tenth Circuit held that the Seminole Nation was a required party in a suit brought by the Seminole Freedmen against the Secretary of the Interior seeking to compel the Secretary to divide the proceeds of a federal fund created in an analogous 1866 treaty between the Seminole Nation and the United States. The court held that the Seminole Nation had a legally protected interest under Rule

[14] Of further note, an Indian tribe's interest in a negotiated treaty is so strong that a canon of construction requires that treaties be construed in favor of tribes. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("[T]reaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor.") (internal citations omitted).

19(a) because it had adopted ordinances specifying how the funds would be allocated, and "[a] ruling on the merits in favor of Plaintiffs on their Judgment Fund Award claim will have the practical effect of modifying the Tribal ordinances containing the Eligibility Requirement." 192 F.3d at 959. Here, the Nation has adopted laws consistent with its interpretation of the 1866 Treaty, and a ruling in favor of Plaintiffs on any of their claims would have a direct impact on those laws.

In response, Plaintiffs argue again that the Nation "lacks any sovereign interest" in discriminating against Freedmen. (Appellants' Br. at 37). Putting aside the fact that the citizenship requirements relate to Indian ancestry, not skin color, Plaintiffs' disagreement with the Nation's position on the requirements for citizenship does not mean the Nation lacks a legitimate sovereign interest in that issue. To that end, following the lead of other courts, the District Court rightly declined to turn an assessment of a claimed "interest" under Rule 19 into an adjudication on the merits of the case. *Vann III*, 2011 WL 4953030, at *3; s*ee also Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1291 (10th Cir. 1999) (holding plaintiffs' "narrow interpretation of the term 'legally protected interest' inappropriately presupposes Plaintiffs' success on the merits" and that "[s]uch an approach is untenable because it would render the Rule 19 analysis an adjudication on the merits") (quoting *Davis*, 192 F.3d at 958).

3. Disposition of this action in the absence of the Nation would subject the Principal Chief to a substantial risk of incurring inconsistent obligations.

As to Rule 19(a)(1)(B)(ii), Plaintiffs' requests for relief go beyond the powers delegated to the Principal Chief, and a decision in this case without the Nation would not be binding on the Nation. Thus, if this case proceeds against the Principal Chief but without the Nation, the Principal Chief faces the very real possibility that a federal court would expect him to comply with rulings affecting the Nation's sovereignty that are wholly at odds with the popular will or laws of the Nation. Therefore, resolving the action without the Nation may leave the Principal Chief subject to inconsistent obligations. *See* Fed. R. Civ. P. 19(a)(1)(B)(ii); *Lujan*, 928 F.2d at 1498 (dismissing suit against Quinault Nation upon determination that it "undoubtedly has a legal interest in the litigation. Plaintiffs seek a complete rejection of the Quinault Nation's current status as the exclusive governing authority of the reservation. Even partial success by plaintiffs could subject both the Quinault Nation and the federal government to substantial risk of multiple or inconsistent legal obligations.").

4. Plaintiffs' *Ex Parte Young* claims against the Principal Chief do not mean the Nation is not a required party to this action.

Plaintiffs further assert that even if the Nation is a required party for purposes of Rule 19, it is appropriate to proceed without the Nation because the

Nation's interests would be adequately represented by the Principal Chief as a defendant. In the same vein, Plaintiffs assert that the court can accord complete relief to all parties in the absence of the Nation because it has jurisdiction over the Principal Chief and can bind the Principal Chief and his successors to a judgment. (Appellants' Br. at 37–38). For support, Plaintiffs rely upon the Ninth Circuit's recent decision in *Salt River Project Agricultural Improvement & Power Distributors v. Lee*, 672 F.3d 1176 (9th Cir. 2012), holding an Indian tribe was not a required party to a lawsuit challenging the tribe's right to sue two non-Indian corporate entities in tribal court because tribal official defendants could be expected to adequately represent the tribe's interests.

Plaintiffs' arguments omit any reference to the gravity and scope of the claims asserted and the relief requested in Plaintiffs' Fourth Amended Complaint. As discussed above, the relief sought by Plaintiffs cannot be the type that can be remedied by a simple injunction that would run only against the Principal Chief. The expansive relief requested would impact and interfere with any number of constitutionally guaranteed rights and privileges of the Cherokee people which far exceed the enumerated powers of the Principal Chief. And, as the District Court correctly observed, "[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 *4. Indeed, the Principal Chief's interests in defending his individual

Ex Parte Young suit could differ from the interests of the Nation and there is no guarantee the Principal Chief would make every argument that the Nation could—or would—present.[15]

Further, this Court, in *Vann II*, approved Plaintiffs' limited *Ex Parte Young* action for injunctive relief against the Nation's Principal Chief to prevent the Chief "from holding further elections without a vote of all citizens, including the Freedmen." *Vann II*, 534 F.3d at 754. Plaintiffs subsequently repackaged their previously asserted substantive claims against the Nation into claims against the Principal Chief. (*Compare* Pls.' Second Am. Compl. ¶ 74 *with* Pls.' Fourth Am. Compl. ¶¶ 137–44). The expansive relief requested against the Principal Chief in Plaintiffs' Fourth Amended Complaint exceeds the scope of permissible *Ex Parte Young* claims as they are substantially claims against the Nation itself that would affect the rights and privileges of the Nation's citizens. *See, e.g.*, *Fletcher*, 116 F.3d at 1324 (holding tribal officials were entitled to sovereign immunity with respect to claims made against them in their official capacity because "the relief requested by Individual Plaintiffs, concerning rights to vote in future tribal

[15] *See Shermoen*, 982 F.2d at 1318 (considering whether tribal officials would adequately represent absent tribe based on assessment of whether "the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; whether the party is capable of and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings that the present parties would neglect" before affirming holding that tribal officials could not adequately represent absent tribe in suit alleging violation of constitutional rights) (internal quotations omitted).

elections and hold tribal office, if granted, would run against the Tribe itself"); *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 925 (D. Wyo. 1997) (dismissing suit against tribal official on sovereign immunity grounds where relief requested "would compel tribal membership for over 400 individuals and their progeny").[16]

Accordingly, in addition to exceeding the permissible scope of *Ex Parte Young* type claims for non-monetary injunctive relief, the claims against the Principal Chief in the Fourth Amended Complaint further underscore that the Nation is a required party that must be joined in this action.

For all these reasons, the District Court did not abuse its discretion or commit legal error in holding that the Nation is a required party under each of the Rule 19(a) tests.

B. This Action Cannot Proceed in Equity and Good Conscience Without the Nation Under Rule 19(b).

Once a court determines that a party is required but cannot be joined under Rule 19(a), it must then determine whether, "in equity and good conscience," the action should proceed among the existing parties or should be dismissed. *See* Fed. R. Civ. P. 19(b). That determination "will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Pimentel*, 553

[16] *See also Pennhurst*, 465 U.S. at 101–02 ("[R]elief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.") (internal quotation marks omitted); *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (finding suit is against the sovereign "if the effect of the judgment would be to restrain the Government from acting, or to compel it to act") (internal quotation marks omitted).

U.S. at 862–63. The Rule 19(b) factors are: (1) the extent to which a judgment rendered in the absence of a party might prejudice that party or existing parties; (2) the extent to which prejudice could be lessened or avoided; (3) whether judgment rendered in the absence of a party would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action was dismissed for non-joinder.

When considering these factors, the U.S. Supreme Court has warned courts against giving insufficient weight to sovereign status. *Id.* at 865–66. The reason is straightforward: when a required party is immune from suit, "there is very little room for balancing of other factors set out in Rule 19(b) . . . because immunity may be viewed as one of those interests 'compelling by themselves.'" *Kickapoo*, 43 F.3d at 1496. Consequently, as the District Court recognized, "a court's inquiry under Rule 19(b) is 'more circumscribed' when determining whether a suit can proceed in equity and good conscience without a party who is absent for reasons of sovereign immunity, as here." *Vann III*, 2011 WL 4953030, at *2 (quoting *Kickapoo*, 43 F.3d at 1497).

1. Judgment rendered in the Nation's absence will prejudice the Nation.

The first factor under Rule 19(b)(1) examines whether a judgment entered in the absence of a party might prejudice the absent party or the existing parties.

On appeal, Plaintiffs assert that the Nation would not suffer any prejudice if the action proceeds because the Nation does not have a legitimate interest here and

the Principal Chief can adequately represent the Nation's interests. (Appellants' Br. at 3). For the same reasons discussed in Section II.A.2, *supra*, the District Court correctly held that the Nation has a legitimate interest in this action and that judgment rendered without the Nation's participation could prejudice the Nation. *See Vann III*, 2011 WL 4953030, at *3 (citing *St. Pierre v. Norton*, 498 F. Supp. 2d 214, 220–21 (D.D.C. 2007)).

The District Court's holding is amply supported by applicable case law. *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) (upholding dismissal of suit on tribal sovereign immunity grounds and noting "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable"); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991) (same); *Jicarilla*, 821 F.2d at 540 (same). Moreover, the District Court's holding follows the Supreme Court's admonition in *Pimentel* to "accord proper weight to the compelling claim of sovereign immunity" in assessing whether a sovereign's interests would be prejudiced if a case were to proceed in its absence. *Pimentel*, 553 U.S. at 869; *see also Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1001 (10th Cir. 2001) (recognizing the "strong policy favoring dismissal when a court cannot join a tribe because of sovereign

immunity") (citation omitted); *Vann III*, 2011 WL 4953030, at *4 (citing *Pimentel*, 553 U.S. at 869).

2. The prejudice to the Nation cannot be lessened.

The second factor is whether prejudice to the absent party can be lessened or avoided by protective provisions in a judgment, shaping of relief, or other measures. *See* Fed. R. Civ. P. 19(b)(2)(A)–(C).

The District Court correctly understood that the nature of the relief requested against the Nation (and the concomitant prejudice—particularly Plaintiffs' demand for citizenship rights)—is binary in nature and cannot be lessened or avoided. *See Vann III*, 2011 WL 4953030, at *4; *St. Pierre*, 498 F. Supp. 2d at 221 (observing it is "difficult to imagine any way in which the Court could shape relief so as not to prejudice the Tribe" when "[t]he ruling Plaintiffs request goes straight to the heart of the Tribe's internal governance"); *Davis v. United States*, 199 F. Supp. 2d 1164, 1177 (W.D. Okla. 2002) (same). Plaintiffs do not contest this but argue that the Nation's interests can be represented by the Principal Chief and the Federal Defendants. However, as the District Court observed, neither the Principal Chief nor the Government share identical interests with the Nation as a whole and, in any event, there is "no means available to lessen or avoid the prejudice to the Cherokee Nation" given the relief requested. *Vann III*, 2011 WL 4953030, at *4.

3. Judgment rendered in the absence of the Nation would not be adequate.

The third factor is whether a judgment rendered in the absence of the Nation would be adequate. *See* Rule 19(b)(3).

Plaintiffs argue that a judgment would be adequate because it would bind the Nation's Principal Chief. But that misses the point: the judgment would not bind the Nation. As the District Court observed, a ruling on the claims and relief requested in the absence of the Nation would all but guarantee additional lawsuits and inconsistent judgments "because only the Chief—not the legislative or judicial branches of the Cherokee government, nor the Nation as a whole—would be bound by the [District Court's] judgment." *Vann III*, 2011 WL 4953030, at *5 (citing *St. Pierre*, 498 F. Supp. 2d at 221).[17]

4. Plaintiffs do not enjoy an absolute right to pursue this action in the forum of their choice.

The last factor is whether Plaintiffs would have an adequate remedy if the action were dismissed for nonjoinder. *See* Rule 19(b)(4).

In that regard, Plaintiffs can litigate the central issue driving the citizenship dispute between the parties: whether the Nation must recognize descendants of the Freedmen as Cherokee citizens under the 1866 Treaty. *Vann III*, 2011 WL

[17] *See also Davis*, 199 F. Supp. 2d at 1178 (holding judgment in favor of Freedmen Seminoles awarded in absence of tribe "would not necessarily afford complete relief because a favorable decision by this Court will not have a binding effect on the absent Tribe" and Tribe "would certainly continue to assert its authority, management responsibilities and control . . . via its tribal ordinances").

4953030, at *5. The Nation, as plaintiff, has sought a ruling on that issue in Oklahoma. Moreover, on July 10, 2012, Plaintiffs filed an unopposed motion to intervene there as counterclaimants. (Unopposed Motion to Intervene at 5, *Cherokee Nation v. Nash*, No. 11-CV-0648 TCK TLW (N.D. Okla. July 10, 2012)). Additionally, a number of Cherokee Freedmen challenged in the Nation's tribal court system the Nation's collective decision to require its citizens to identify at least one Indian ancestor on the Cherokee Dawes Rolls. While the Freedmen's litigation in the Nation's court system was ultimately unsuccessful, that litigation constituted a viable alternative forum for purposes of satisfying Rule 19's fourth factor. *St. Pierre*, 498 F. Supp. 2d at 221 (holding plaintiffs had an alternative forum under Rule 19(b) where plaintiffs had "already litigated this issue in tribal court . . . and lost").

In the end, Plaintiffs do not have the right to sue a sovereign wherever they choose. To the contrary, courts have consistently recognized that a plaintiff may be left without a forum to sue a sovereign. As the Supreme Court declared recently in *Pimentel*, "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity." 552 U.S. at 872. And with respect to claims against Indian tribes in particular, this Court has observed: "Although we are sensitive to the problem of dismissing an

action where there is no alternative forum, we think the result is less troublesome" where "the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita & Affiliated Tribes of Okla.*, 788 F.2d at 777.

Accordingly, the District Court's holding that the fourth factor under Rule 19(b) weighs in favor of dismissal of the Nation was also correct.

For all of these reasons, the District Court did not abuse its discretion in holding that this action could not proceed "in equity and good conscience" without the Nation under each of the Rule 19(b) factors.

5. The "Public Interest" exception to Rule 19 does not apply.

In addition to the foregoing, the District Court correctly recognized that dismissal of this action is not foreclosed by the "public interest" exception to Rule 19. *See Vann III*, 2011 WL 4953030, at *6 (citing *Kickapoo*, 43 F.3d at 1500).

Although the "'exact contours of the public interest exception [to Rule 19] have not been defined,' the exception generally applies where 'what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons.'" *Kickapoo*, 43 F.3d at 1500 (quoting *Sierra Club v. Watt*, 608 F. Supp. 305, 324 (E.D. Cal. 1985)). The public interest exception does not apply here under either factor. The nature of this case does not require the joining of a large number of parties. Further, the claim here is "a

private one focused on the merits of [plaintiff's] dispute rather than on vindicating a larger public interest" and "the essence of [the] dispute is [plaintiff's] disagreement with the Tribal leaders over what is in the best interests of [the defendant Indian tribes]." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

Accordingly, because this case remains a tribal membership dispute between a sovereign Indian nation and a group of individuals, the District Court correctly held that Rule 19's "public interest" exception did not apply.

III. THE DISTRICT COURT'S DISMISSAL OF THIS ACTION CAN ALSO BE AFFIRMED ON THE GROUNDS THAT NO PRIVATE RIGHT OF ACTION EXISTS AGAINST PRINCIPAL CHIEF BAKER UNDER THE THIRTEENTH AMENDMENT OR THE TREATY OF 1866

While the District Court dismissed Plaintiffs' Fourth Amended Complaint under Rule 19, the dismissal was also appropriate on the alternative basis that Plaintiffs failed to state a cognizable claim under Rule 12(b)(6). *See, e.g.*, *Kleiman v. Dep't of Energy*, 956 F.2d 335, 339 (D.C. Cir. 1992) (holding that the Court of Appeals "may affirm on different grounds the judgment of a lower court 'if it is correct as a matter of law'") (citation omitted).

Plaintiffs' Fourth Amended Complaint asserts a single cause of action against the Nation's Principal Chief based on alleged violations of (i) ICRA, (ii) the Principal Chiefs Act, (iii) the Cherokee Constitution, (iv) the 1866 Treaty, and (v) the Thirteenth Amendment of the United States Constitution. (A-154–A-155.)

Plaintiffs concede that they have no private right of action under the Principal Chiefs Act. (Plaintiffs' Memorandum of Law in Opposition to Defendant Chadwick Smith's Motion to Dismiss at 7 n.2, *Vann v. Salazar*, No. 1:03-cv-01711 (Mar. 2, 2009)) (SA43). Further, the District Court previously dismissed Plaintiffs' claims arising under ICRA and the Cherokee Constitution against the Principal Chief and other tribal officials because such claims are not cognizable in federal court. *Vann I*, 467 F. Supp. 2d at 74. Plaintiffs never appealed the dismissal of these claims and though Plaintiffs reasserted them in the Fourth Amended Complaint, they are no more viable now than they were six years ago.

In the same vein, Plaintiffs' claims against the Principal Chief founded upon alleged violations of the Thirteenth Amendment and the Treaty of 1866 should also be dismissed for failure to state a claim. As this Court previously recognized, "Nothing in § 1 of the Thirteenth Amendment so much as hints at a federal court suit by a private party to enforce the prohibition against badges and incidents of slavery against Indian tribes," and "[a]lthough § 2 of the Thirteenth Amendment gives Congress the power to generate express and unequivocal language abrogating tribal sovereign immunity to allow for such suits, that promise remains unfulfilled absent some further legislative enactment." *Vann II*, 534 F.3d at 748. Further, the 1866 Treaty is not Thirteenth Amendment enforcement legislation that gives rise to a private right of action. *Id.*; *see also Nero*, 892 F.2d 1457

(dismissing claims brought by Freedmen plaintiffs against the Cherokee Nation and tribal official under, *inter alia*, the Thirteenth Amendment and the 1866 Treaty for failure to state a claim); *Richardson v. Loyola Coll. in Md., Inc.*, 167 F. App'x. 223, 225 (D.C. Cir. 2005) (holding Thirteenth Amendment does not provide an independent cause of action for discrimination).[18]

IV. THE DISTRICT COURT CORRECTLY DENIED PLAINTIFFS' MOTION FOR LEAVE TO FILE A FIFTH AMENDED COMPLAINT

As a final matter, Plaintiffs briefly refer to the District Court's denial of their motion for leave to file a Fifth Amended Complaint when they state the standard of review for the denial of a motion for leave to amend. It is well settled that the failure to thoroughly develop and provide support for an argument in an opening brief results in waiver of that argument before this Court.[19] *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (dismissing a claim of violation of due process rights "on the basis of briefing and argument by counsel which literally consisted of no more than the assertion of violation of due process rights, with no discussion

[18] *See also Westray v. Porthole, Inc.*, 586 F. Supp. 834, 838–39 (D. Md. 1984) (holding that "the Thirteenth Amendment does not give rise to an independent cause of action. The plaintiffs instead must avail themselves of the remedies, such as 42 U.S.C. § 1981, that Congress has created under the power granted to it in that amendment. These statutes define the scope of the cause of action; one cannot try for broader scope by suing under the Thirteenth Amendment itself") (internal citations omitted); *Holland v. Bd. of Trs.*, 794 F. Supp. 420, 424 (D.D.C. 1992) ("The Thirteenth Amendment does not give rise to an independent cause of action; plaintiffs in discrimination suits must confine themselves to remedies such as 42 U.S.C. 1981 adopted pursuant to Section 2 of that amendment.").

[19] Federal Rule of Appellate Procedure 28(a)(9)(A) requires that an appellant's argument contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." This is notably separate and distinct from the "concise statement of the applicable standard of review" required in Rule 28(a)(9)(B).

of case law supporting that proposition or of the statutory text and legislative history relevant to the central question"); *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 653 n.2 (D.C. Cir. 1991) (dismissing a claim as appellant "was obligated to [assert its claim] in its opening brief and to include an argument, with citations to authorities in its favor"). Plaintiffs provide no argument or legal support for their assertion that the District Court erred on this point outside of citing the standard of review. This results in the forfeiture of this claim.

Even if Plaintiffs had provided support or reasoning to their argument, the Court should affirm the District Court's denial of Plaintiff's motion for leave to file a Fifth Amended Complaint. Following remand and full briefing on separate motions to dismiss filed by the Nation's Principal Chief and the Federal Defendants, Plaintiffs sought leave to file a Fifth Amended Complaint, adding as plaintiffs the individual Freedmen named as defendants in the Nation's Oklahoma Action and adding as a defendant the previously dismissed Cherokee Nation. (A-382.) The proposed Fifth Amended Complaint does not offer a new allegation or cause of action, only new parties. (A-384–A-422.) Plaintiffs cannot add the Nation back into this action because the Nation enjoys sovereign immunity and has not waived its immunity here by filing a separate action in Oklahoma. Moreover, even if the Nation were to be added back to the District of Columbia Action, Plaintiffs have not cured their failure to state a claim upon which relief can be

granted by pleading a cognizable cause of action against the Nation or its Principal Chief. Accordingly, the District Court's denial of Plaintiffs' motion to amend should be affirmed. *See Vann III*, 2011 WL 4953030, at *9; *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004) (affirming denial of motion for leave to amend and noting "a district court has discretion to deny a motion to amend on grounds of futility where the proposed pleading would not survive a motion to dismiss").

CONCLUSION

For the reasons stated herein, both the District Court's dismissal of Plaintiffs' Fourth Amended Complaint and denial of Plaintiffs' motion for leave to file a Fifth Amended Complaint should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,985 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 Office Word 2003 in 14 point, Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify on this 19th day of July, 2012, the Brief of Appellees Cherokee Nation and Principal Chief Bill John Baker was electronically filed with the court using CM/ECF, which will automatically serve the counsel who are registered for CM/ECF:

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TABLE OF CONTENTS FOR STATUTORY ADDENDUM

TAB 1

Constitution of the Cherokee Nation

Article IX. Election

Section 1. There is hereby created a Cherokee Nation Election Commission. The Commission shall be an autonomous and permanent entity charged with the administration of all Cherokee Nation elections, in accordance with election laws. The Council shall enact an appropriate law not inconsistent with the provisions of this Constitution that will govern the conduct of all elections.

TAB 2

Constitution of the Cherokee Nation

Article XV. Initiative, Referendum and Amendment

Section 4. Referendum petitions shall be filed with the Secretary of State not more than ninety (90) days after the final adjournment of the session or meeting of the Council which passed the bill on which the referendum is demanded. The veto power of the Principal Chief shall not extend to measures voted on by the People. All elections on measures referred to the People of the Cherokee Nation shall be had at the next regular general election except when the Council or the Principal Chief shall order a special election for the express purpose of making such reference. Any measure referred to the People by the initiative shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon.

TAB 3

United States Code Annotated
Title 25. Indians
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1301

§ 1301. Definitions

Currentness

For purposes of this subchapter, the term--

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

Credits

(Pub.L. 90-284, Title II, § 201, Apr. 11, 1968, 82 Stat. 77; Pub.L. 101-511, Title VIII, § 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892.)

Notes of Decisions (30)

25 U.S.C.A. § 1301, 25 USCA § 1301

Current through P.L. 112-139 approved 6-27-12 End of Document

TAB 4

Public Law 91-495

AN ACT

To authorize each of the Five Civilized Tribes of Oklahoma to popularly select their principal officer, and for other purposes.

October 22, 1970
[S. 3116]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any other provisions of law, the principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes of Oklahoma and the governor of the Chickasaw Tribe of Oklahoma shall be popularly selected by the respective tribes in accordance with procedures established by the officially recognized tribal spokesman and or governing entity. Such established procedures shall be subject to approval by the Secretary of the Interior.

Five Civilized Tribes of Oklahoma.
Principal chiefs, popular selection.

SEC. 2. The Secretary of the Interior or his representative is hereby authorized to assist, upon request, any of such officially recognized tribal spokesman and/or governing entity in the development and implementation of such procedures.

SEC. 3. A principal officer selected pursuant to section 1 of this Act shall be duly recognized as the principal chief, or in the case of the Chickasaw Tribe, the governor, of that tribe.

Term of office.

SEC. 4. Any principal officer currently holding office at the date of enactment of this Act shall continue to serve for a period not to exceed twelve months or until expiration of his most recent appointment, whichever is shorter, unless an earlier vacancy arises from resignation, disability, or death of the incumbent, in which case the office of principal chief or governor may be filled at the earliest possible date in accordance with section 1 of this Act.

SEC. 5. Nothing in this Act shall prevent any such incumbent referred to in section 4 of this Act from being elected as a principal chief or governor.

Approved October 22, 1970.

TAB 5

14 Stat. 799
(TREATY)

TREATY WITH THE CHEROKEE, 1866.

July 19, 1866.

Articles of agreement and convention at the city of Washington on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs, (and) Elijah Sells, superintendent of Indian affairs for the southern superintendency, and the Cherokee Nation of Indians, represented by its delegates, James McDaniel, Smith Christie, White Catcher, S. H. Benge, J. B. Jones, and Daniel H. Ross - - John Ross, principal chief of the Cherokees, being too unwell to join in these negotiations. [FNA][FNB]

PREAMBLE.

Whereas existing treaties between the United States and the Cherokee Nation are deemed to be insufficient, the said contracting parties agree as follows, viz:

ARTICLE 1

The pretended treaty made with the so-called Confederate States by the Cherokee Nation on the seventh day of October, eighteen hundred and sixty-one, and repudiated by the national council of the Cherokee Nation on the eighteenth day of February, eighteen hundred and sixty-three, is hereby declared to be void. [FNC]

ARTICLE 2

Amnesty is hereby declared by the United States and the Cherokee Nation for all crimes and misdemeanors committed by one Cherokee on the person or property of another Cherokee, or of a citizen of the United States, prior to the fourth day of July, eighteen hundred and sixty-six; and no right of action arising out of wrongs committed in aid or in the suppression of the rebellion shall be prosecuted or maintained in the courts of the United States or in the courts of the Cherokee Nation. [FND]

But the Cherokee Nation stipulate and agree to deliver up to the United States, or their duly authorized agent, any or all public property, particularly ordnance, ordnance stores, arms of all kinds, and quartermaster's stores, in their possession or control, which belonged to the United States or the so-called Confederate States, without any reservation.

ARTICLE 3

The confiscation laws of the Cherokee Nation shall be repealed, and the same, and all sales of farms, and improvements on real estate, made or pretended to be made in pursuance thereof, are hereby agreed and declared to be null and void, and the former owners of such property so sold, their heirs or assigns, shall have the right peaceably to re-occupy their homes, and the purchaser under the confiscation laws, or his heirs or assigns, shall be repaid by the treasurer of the Cherokee Nation from the national funds, the money paid for said property and the cost of permanent improvements on such real estate, made thereon since the confiscation sale; the cost of such improvements to be fixed by a commission, to be composed of one person designated by the Secretary of the Interior and one by the principal chief of the nation, which two may appoint a third in cases of disagreement, which cost so fixed shall be refunded to the national treasurer by the returning Cherokees within three years from the ratification hereof.[FNE][FNF]

ARTICLE 4

All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee Nation prior to June first, eighteen hundred and sixty-one, who may within two years elect not to reside northeast of the Arkansas River and southeast of Grand River, shall have the right to settle in and occupy the Canadian district southwest of the Arkansas River, and also all that tract of country lying northwest of Grand River, and bounded on the southeast by Grand River and west by the Creek reservation to the northeast corner thereof; from thence west on the north line of the Creek reservation to the ninety-sixth degree of west longitude; and thence north on said line of longitude

so far that a line due east to Grand River will include a quantity of land equal to one hundred and sixty acres for each person who may so elect to reside in the territory above-described in this article: Provided, That that part of said district north of the Arkansas River shall not be set apart until it shall be found that the Canadian district is not sufficiently large to allow one hundred and sixty acres to each person desiring to obtain settlement under the provisions of this article. [FNG][FNH]

ARTICLE 5

The inhabitants electing to reside in the district described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by their numbers they may be entitled in any general council to be established in the Indian Territory under the provisions of this treaty, as stated in Article XII, and to control all their local affairs, and to establish all necessary police regulations and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee Nation or the laws of the United States; Provided, The Cherokees residing in said district shall enjoy all the rights and privileges of other Cherokees who may elect to settle in said district as hereinbefore provided, and shall hold the same rights and privileges and be subject to the same liabilities as those who elect to settle in said district under the provisions of this treaty; Provided also, That if any such police regulations or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same. And all rules or regulations in said district, or in any other district of the nation, discriminating against the citizens of other districts, are prohibited, and shall be void. [FNI][FNJ][FNK]

ARTICLE 6

The inhabitants of the said district hereinbefore described shall be entitled to representation according to numbers in the national council, and all laws of the Cherokee Nation shall be uniform throughout said nation. And should any such law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil, and to adopt the means necessary to secure the impartial administration of justice, as well as a fair and equitable application and expenditure of the national funds as between the people of this and of every other district in said nation. [FNL][FNM]

ARTICLE 7

The United States court to be created in the Indian Territory; and until such court is created therein, the United States district court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case, and all process issued in said district by any officer of the Cherokee Nation, to be executed on an inhabitant residing outside of said district, and all process issued by any officer of the Cherokee Nation outside of said district, to be executed on an inhabitant residing in said district, shall be to all intents and purposes null and void, unless indorsed by the district judge for the district where such process is to be served, and said person, so arrested, shall be held in custody by the officer so arresting him, until he shall be delivered over to the United States marshal, or consent to be tried by the Cherokee court: Provided, That any or all the provisions of this treaty, which make any distinction in rights and remedies between the citizens of any district and the citizens of the rest of the nation, shall be abrogated whenever the President shall have ascertained, by an election duly ordered by him, that a majority of the voters of such district desire them to be abrogated, and he shall have declared such abrogation: And provided further, That no law or regulation, to be hereafter enacted within said Cherokee Nation or any district thereof, prescribing a penalty for its violation, shall take effect or be enforced until after ninety days from the date of its promulgation, either by publication in one or more newspapers of general circulation in said Cherokee Nation, or by posting up copies thereof in the Cherokee and English languages in each district where the same is to take effect, at the usual place of holding district courts. [FNN][FNO][FNP][FNQ]

ARTICLE 8

No license to trade in goods, wares, or merchandise merchandise shall be granted by the United States to trade in the Cherokee Nation, unless approved by the Cherokee national council, except in the Canadian district, and such other district north of Arkansas River and west of Grand River occupied by the so-called southern Cherokees, as provided in Article 4 of this treaty. [FNR]

ARTICLE 9

The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of the national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: Provided, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated. [FNS][FNT][FNU]

ARTICLE 10

Every Cherokee and freed person resident in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory. [FNV]

ARTICLE 11

The Cherokee Nation hereby grant a right of way not exceeding two hundred feet wide, except at stations, switches, water stations, or crossing of rivers, where more may be indispensable to the full enjoyment of the franchise herein granted, and then only two hundred additional feet shall be taken, and only for such length as may be absolutely necessary, through all their lands, to any company or corporation which shall be duly authorized by Congress to construct a railroad from any point north to any point south, and from any point east to any point west of, and which may pass through, the Cherokee Nation. Said company or corporation, and their employees and laborers, while constructing and repairing the same, and in operating said road or roads, including all necessary agents on the line, at stations, switches, water tanks, and all others necessary to the successful operation of a railroad, shall be protected in the discharge of their duties, and at all times subject to the Indian intercourse laws, now or which may hereafter be enacted and be in force in the Cherokee Nation.[FNW]

ARTICLE 12

The Cherokees agree that a general council, consisting of delegates elected by each nation or tribe lawfully residing within the Indian Territory, may be annually convened in said Territory, which council shall be organized in such manner and possess such powers as hereinafter prescribed. [FNX]

First. After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior, and prior to the first session of said council, a census or enumeration of each tribe lawfully resident in said Territory shall be taken under the direction of the Commissioner of Indian Affairs, who for that purpose is hereby authorized to designate and appoint competent persons, whose compensation shall be fixed by the Secretary of the Interior, and paid by the United States. [FNY]

Second. The first general council shall consist of one member from each tribe, and an additional member for each one thousand Indians, or each fraction of a thousand greater than five hundred, being members of any tribe lawfully resident in said Territory, and shall be selected by said tribes respectively, who may assent to the establishment of said general council; and if none should be thus formally selected by any nation or tribe so assenting, the said nation or tribe shall be represented in said general council by the chief or chiefs and headmen of said tribes, to be taken in the order of their rank as recognized in tribal usage, in the same number and proportion as above indicated. After the said census shall have been taken and completed, the superintendent of Indian affairs shall publish and declare to each tribe assenting to the establishment of such council the number of members of such council to which they shall be entitled under the provisions of this article, and the persons entitled to represent said tribes shall meet at such time and place as he shall approve; but thereafter the time and place of the sessions of said council shall be determined by its action: Provided, That no session in any one year shall exceed the term of thirty days: And provided, That special sessions of said council may be called by the Secretary of the Interior whenever in his judgment the interest of said tribes shall require such special session.[FNZ][FNAA][FNBB][FNCC]

Third. Said general council shall have power to legislate upon matters pertaining to the intercourse and relations of the Indian tribes and nations and colonies of freedmen resident in said Territory; the arrest and extradition of criminals and offenders escaping from one tribe to another, or into any community of freedmen; the administration of[FNDD] justice between members of different tribes of said Territory and persons other than Indians and members of said tribes or nations; and the common defence and safety of the nations of said Territory.

All laws enacted by such council shall take effect at such time as may therein be provided, unless suspended by direction of the President of the United States. No law shall be enacted inconsistent with the Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States. Nor shall said council legislate upon matters other than those above indicated: Provided, however, That the legislative power of such general council may be enlarged by the consent of the national council of each nation or tribe assenting to its establishment, with the approval of the President of the United States. [FNEE][FNFF]

Fourth. Said council shall be presided over by such person as may be designated by the Secretary of the Interior. [FNGG]

Fifth. The council shall elect a secretary, whose duty it shall be to keep an accurate record of all the proceedings of said council, and who shall transmit a true copy of all such proceedings, duly certified by the presiding officer of such council, to the Secretary of the Interior, and to each tribe or nation represented in said council, immediately after the sessions of said council shall terminate. He shall be paid out of the Treasury of the United States an annual salary of five hundred dollars. [FNHH][FNII]

Sixth. The members of said council shall be paid by the United States the sum of four dollars per diem during the term actually in attendance on the sessions of said council, and at the rate of four dollars for every twenty miles necessarily traveled by them in going from and returning to their homes, respectively, from said council, to be certified by the secretary and president of the said council. [FNJJ]

ARTICLE 13

The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: Provided, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty. [FNKK]

ARTICLE 14

The right to the use and occupancy of a quantity of land not exceeding one hundred and sixty acres, to be selected according to legal subdivisions in one body, and to include their improvements, and not including the improvements of any member of the Cherokee Nation, is hereby granted to every society or denomination which has erected, or which with the consent of the national council may hereafter erect, buildings within the Cherokee country for missionary or educational purposes. But no land thus granted, nor buildings which have been or may be erected thereon, shall ever be sold or (o)therwise disposed of except with the consent and approval of the Cherokee national council and the Secretary of the Interior. And whenever any such lands or buildings shall be sold or disposed of, the proceeds thereof shall be applied by said society or societies for like purposes within said nation, subject to the approval of the Secretary of the Interior. [FNLL][FNMM][FNNN]

ARTICLE 15

The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national[FNOO] fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such

tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.[FNPP] [FNQQ]

And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96 degrees of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve the tribal organizations shall be permitted to settle, as herein provided, east of the 96 degrees of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96 degrees of longitude. [FNRR][FNSS]

ARTICLE 16

The United States may settle friendly Indians in any part of the Cherokee country west of 96 degrees, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee-simple to each of said tribes to be held in common or by their members in severalty as the United States may decide. [FNTT] [FNUU]

Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96 degrees of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied. [FNVV]

ARTICLE 17

The Cherokee Nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835; and also that strip of the land ceded to the nation by the fourth article of said treaty which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State.

The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the Commissioner of the General Land-Office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council and one by the Secretary of the Interior, and, in case of disagreement,[FNWW][FNXX] by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

And the Secretary of the Interior shall, from time to time, as such surveys and appraisements are approved by him, after due advertisements for sealed bids, sell such lands to the highest bidders for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: Provided, That whenever there are improvements of the value of fifty dollars made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning, and in person residing on such improvements, shall, after due proof, made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in legal subdivisions which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to be paid by the Secretary out of the proceeds of sale of said land: Provided, That

nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre. [FNYY][FNZZ][FNAAA]

ARTICLE 18

That any lands owned by the Cherokees in the State of Arkansas and in States east of the Mississippi may be sold by the Cherokee Nation in such manner as their national council may prescribe, all such sales being first approved by the Secretary of the Interior.[FNBBB]

ARTICLE 19

All Cherokees being heads of families residing at the date of the ratification of this treaty on any of the lands herein ceded, or authorized to be sold, and desiring to remove to the reserved country, shall be paid by the purchasers of said lands the value of such improvements, to be ascertained and appraised by the commissioners who appraise the lands, subject to the approval of the Secretary of the Interior; and if he shall elect to remain on the land now occupied by him, shall be entitled to receive a patent from the United States in fee-simple for three hundred and twenty acres of land to include his improvements, and thereupon he and his family shall cease to be members of the nation. [FNCCC]

And the Secretary of the Interior shall also be authorized to pay the reasonable costs and expenses of the delegates of the southern Cherokees.

The moneys to be paid under this article shall be paid out of the proceeds of the sales of the national lands in Kansas.

ARTICLE 20

Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States. [FNDDD]

ARTICLE 21

It being difficult to learn the precise boundary line between the Cherokee country and the States of Arkansas, Missouri, and Kansas, it is agreed that the United States shall, at its own expense, cause the same to be run as far west as the Arkansas, and marked by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council. [FNEEE]

ARTICLE 22

The Cherokee national council, or any duly appointed delegation thereof, shall have the privilege to appoint an agent to examine the accounts of the nation with the Government of the United States at such time as they may see proper, and to continue or discharge[FNFFF] such agent, and to appoint another, as may be thought best by such council or delegation; and such agent shall have free access to all accounts and books in the executive departments relating to the business of said Cherokee Nation, and an opportunity to examine the same in the presence of the officer having such books and papers in charge.

ARTICLE 23

All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States, as hereinbefore provided for, shall be invested in the United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, and shall be applied to the following purposes, to wit: Thirty-five per cent. shall be applied for the support of the common-schools of the nation and educational purposes; fifteen per cent. for the orphan fund, and fifty per cent. for general purposes, including reasonable salaries of district officers; and the Secretary of the Interior, with the approval of the President of the United States, may pay out of the funds due the nation, on the order of the national council or a delegation duly authorized by it, such amount as he may deem necessary to meet outstanding obligations of the Cherokee Nation, caused by the suspension of the payment of their annuities, not to exceed the sum of one hundred and fifty thousand dollars. [FNGGG][FNHHH]

ARTICLE 24

As a slight testimony for the useful and arduous services of the Rev. Evan Jones, for forty years a missionary in the Cherokee Nation, now a cripple, old and poor, it is agreed that the sum of three thousand dollars be paid to him, under the direction of the Secretary of the Interior, out of any Cherokee fund in or to come into his hands not otherwise appropriated. [FNIII]

ARTICLE 25

A large number of the Cherokees who served in the Army of the United States having died, leaving no heirs entitled to receive bounties and arrears of pay on account of such service, it is agreed that all bounties and arrears for service in the regiments of Indian United States volunteers which shall remain unclaimed by any person legally entitled to receive the same for two years from the ratification of this treaty, shall be paid as the national council may direct, to be applied to the foundation and support of an asylum for the education of orphan children, which asylum shall be under the control of the national council, or of such benevolent society as said council may designate, subject to the approval of the Secretary of the Interior. [FNJJJ]

ARTICLE 26

The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes. They shall also be protected against inter(r)uptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes, the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done. [FNKKK]

ARTICLE 27

The United States shall have the right to establish one or more military posts or stations in the Cherokee Nation, as may be deemed necessary for the proper protection of the citizens of the United States lawfully residing therein and the Cherokee and other citizens of the Indian country. But no sutler or other person connected therewith, either in or out of the military organization, shall be permitted to introduce any spirit(u)ous, vinous, or malt liquors into the Cherokee Nation, except the medical department proper, and by them only for strictly medical purposes. And all persons not in the military service of the United States, not citizens of the Cherokee Nation, are to be prohibited from coming into the Cherokee Nation, or remaining in the same, except as herein otherwise provided; and[FNLLL][FNMMM][FNNNN] it is the duty of the United States Indian agent for the Cherokees to have such persons, not lawfully residing or sojourning therein, removed from the nation, as they now are, or hereafter may be, required by the Indian intercourse laws of the United States.

ARTICLE 28

The United States hereby agree to pay for provisions and clothing furnished the army under Appotholehala in the winter of 1861 and 1862, not to exceed the sum of ten thousand dollars, the accounts to be ascertained and settled by the Secretary of the Interior. [FNOOO]

ARTICLE 29

The sum of ten thousand dollars or so much thereof as may be necessary to pay the expenses of the delegates and representatives of the Cherokees invited by the Government to visit Washington for the purposes of making this treaty, shall be paid by the United States on the ratification of this treaty. [FNPPP]

ARTICLE 30

The United States agree to pay to the proper claimants all losses of property by missionaries or missionary societies, resulting from their being ordered or driven from the country by united States agents, and from their property being taken and occupied or destroyed by by United States troops, not exceeding in the aggregate twenty thousand dollars, to be ascertained by the Secretary of the Interior. [FNQQQ]

ARTICLE 31

All provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby re-affirmed and declared to be in full force; and nothing herein shall be construed as an acknowledgment by the United States, or as a relinquishment by the Cherokee Nation of any claims or demands under the guarantees of former treaties, except as herein expressly provided.[FNRRR]

In testimony whereof, the said commissioners on the part of the United States, and the said delegation on the part of the Cherokee Nation, have hereunto set their hands and seals at the city of Washington, this ninth (nineteenth) day of July, A.D. one thousand eight hundred and sixty-six. [FNSSS]

D. N. Cooley, Commissioner of Indian Affairs.

Elijah Sells, Superintendent of Indian Affairs.

Smith Christie,

White Catcher,

James McDaniel,

S. H. Benge,

Danl. H. Ross,

J. B. Jones.
Delegates of the Cherokee Nation, appointed by Resolution of the National Council.

In presence of - -

W. H. Watson,

J. W. Wright.
Signatures witnessed by the following-named persons, the following interlineations being made before signing: On page 1st the word “the” underlined, on page 11 the word “the” struck out, and to said page 11 sheet attached requiring publication of laws; and on page 34th the word “ceded” struck out and the words “neutral lands” inserted. Page 47/1/2 added relating to expenses of treaty.

Thomas Ewing, jr.

Wm. A. Phillips,

J. W. Wright.

Footnotes

A Ratified July 27, 1866.
FNB Proclaimed Aug. 11, 1866.
FNC Pretended treaty declared void.
FND Amnesty.
FNE Confiscation laws repealed and former owners restored to their rights.
FNF Improvements.
FNG Cherokees, freed persons, and free negroes may elect to reside where.
FNH Proviso.
FNI Those so electing to reside there may elect local officers, judges, etc.
FNJ Proviso.
FNK Proviso.
FNL Representation in national council.
FNM Unequal laws.
FNN Courts.
FNO Process.

FNP Proviso.
FNQ Proviso.
FNR Licenses to trade not to be granted unless, etc.
FNS Slavery, etc., not to exist.
FNT Freedmen.
FNU No pay for emancipated slaves.
FNV Farm products may be sold, etc.
FNW Right of way of railroads.
FNX General council.
FNY Census.
FNZ First general council; how composed.
FNAA Time and place of first meeting.
FNBB Session not to exceed thirty days.
FNCC Special sessions.
FNDD Powers of general council.
FNEE Laws, when to take effect.
FNFF Legislative power may be enlarged.
FNGG President of council.
FNHH Secretary of council.
FNII Pay.
FNJJ Pay of members of council.
FNKK Courts.
FNLL Lands for missionary or educational purposes.
FNMM Not to be sold except for.
FNNN Proceeds of sale.
FNOO The United States may settle civilized Indians in the Cherokee country.
FNPP How may be made part of Cherokee Nation.
FNQQ Those wishing to preserve tribal organization to have land set off to them.
FNRR To pay sum into national fund.
FNSS Limits of places of settlement
FNTT Where the United States may settle friendly Indians.
FNUU Lands.
FNVV Cession of lands to the United States in trust.
FNWW Cession of lands to the United States in trust.
FNXX Lands to be surveyed and Appraised.
FNYY May be sold to highest bidder.
FNZZ Improvements.
FNAAA Proviso.
FNBBB Sales by Cherokee of lands in Arkansas.
FNCCC Heads of families.
FNDDD Lands preserved to be surveyed and allotted.
FNEEE Boundary line to be run and marked.
FNFFF Agent of Cherokees to examine accounts, books, etc.
FNGGG Funds, how to be invested.
FNHHH Interest, how to be paid.
FNIII Payment to Rev. Evan Jones.
FNJJJ Bounties and arrears for services as Indian volunteers; how to be paid.
FNKKK Possession and protection guaranteed.
FNLLL Military posts in Cherokee Nation.
FNMMM Spirituous, etc., liquors forbidden except, ect.
FNNNN Certain persons prohibited from coming into the nation.
FNOOO Payment for certain provisions and clothing.
FNPPP Expenses of Cherokee delegations.

FNQQQ Payment of certain losses by missionaries, etc.
FNRRR Inconsistent treaty provisions annulled.
FNSSS Execution.

End of Document

TAB 6

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIII. Slavery Abolished; Enforcement

U.S.C.A. Const. Amend. XIII-Full Text

Amendment XIII. Slavery Abolished; Enforcement

Currentness

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

<This amendment is further displayed as separate documents for sections 1 and 2, see USCA Const Amend. XIII, § 1 or see USCA Const Amend. XIII, § 2>

U.S.C.A. Const. Amend. XIII-Full Text, USCA CONST Amend. XIII-Full Text
Current through P.L. 112-135 approved 6-21-12

End of Document