ORAL ARGUMENT SCHEDULED FOR OCTOBER 18, 2012

No. 11-5322

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

MARILYN VANN, et al.,
Appellants,

v.

DEPARTMENT OF THE INTERIOR, et al.,
Appellees

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

REPLY BRIEF OF APPELLANTS MARILYN VANN, et al.

Jack McKay
Alvin Dunn
Thomas G. Allen
Cynthia Cook Robertson
PILLSBURY WINTHROP SHAW
PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Phone: (202) 663-8000
jack.mckay@pillsburylaw.com
alvin.dunn@pillsburylaw.com
thomas.allen@pillsburylaw.com
cynthia.robertson@pillsburylaw.com

Jonathan Velie
VELIE LAW FIRM
401 W. Main St., Ste. 310
Norman, Oklahoma 73069
Phone: (405) 310-4333
jon@velielaw.com

Dated: August 30, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

MISCELLANEOUS

GLOSSARY

1866 Treaty	Treaty Between the United States and the Cherokee Nation of Indians, July 19, 1866, 14 Stat. 799
Cherokee Appellees	Cherokee Nation of Oklahoma and Principal Chief Bill John Baker, collectively.
Cherokee Nation	The Cherokee Nation of Oklahoma
D.C. Action	The instant action, *Marilyn Vann, et al. v. DOI, et al.,* No. 11-5322, on appeal from the United States District Court for the District of Columbia Case No. 1:03-cv-01711. The case 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.
Federal Appellees	Ken Salazar, Secretary of the U.S. Department of the Interior, and U.S. Department of the Interior, collectively.
Freedmen	Former slaves previously held by Cherokee citizens and their descendants, "free blacks" living in the Cherokee Nation territory at the time of the Civil War, and the descendants of persons listed on the so-called "Freedmen Roll" of Cherokee citizens compiled by the Dawes Commission, which included the former slaves of Cherokee citizens and their descendants, regardless of any degree of Indian ancestry. The Freedmen are represented in this action by Appellants Marilyn Vann, Ronald Moon, Donald Moon, Charlene White, Ralph Threat, Angela Sanders, Samuel E. Ford, and The Freedmen Band of the Cherokee Nation of Oklahoma.
Five Civilized Tribes	Historical term used to collectively refer to the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Nations.
Oklahoma Action	*The Cherokee Nation v. Raymond Nash*, et al., currently pending before the Northern District of Oklahoma as Case No. 4:11-cv-00648-TCK-TLW (the "Oklahoma Action"). Originally filed in February 3, 2009 in the United States District Court for the Northern District of Oklahoma, this action was transferred to the District Court in 2010, and transferred back pursuant to an order issued by the District Court on September 30, 2011.

SUMMARY OF THE ARGUMENT

The Cherokee Appellees do not seriously dispute that the Cherokee Nation brought the Oklahoma Action as a purely tactical effort to protect Cherokee Nation officials from suit in the District of Columbia under *Ex parte Young*. They attempt to avoid the natural consequences of the Cherokee Nation's affirmative litigation conduct by making a number of arguments, each of which boils down to the idea that a tribe that files suit in federal court need not play by the same rules as other sovereigns, let alone other litigants. While it might be appropriate to provide some additional protections for tribal sovereignty where a tribe is in a defensive position, once a tribe voluntarily takes an offensive litigation position, as the Cherokee Nation has in this case, there is no reason to apply a different set of rules. Under a straightforward application of *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 621 (2002), the Cherokee Nation has waived its immunity to suit in the District of Columbia.

Even if the Cherokee Nation has not waived its immunity, this action should proceed in the District of Columbia against the Cherokee officials under Rule 19 and *Ex parte Young*. Courts have held time and again that a sovereign has no legally-recognized interest in violating federal law and that, if a sovereign has protectable interests, the sovereign's officials are able to adequately protect those

interests. Under these circumstances, affirming dismissal would eviscerate more than 100 years of jurisprudence under *Ex parte Young*.

There is also no basis to affirm on the ground that the Freedmen lack a private right of action under the Thirteenth Amendment or the Treaty of 1866. *Ex parte Young* does not require that the federal law that the plaintiff seeks to enforce include an express private right of action or a detailed remedial scheme. Here, the Treaty of 1866 incorporates the Thirteenth Amendment and provides an implied private right of action for the Freedmen to enforce their citizenship rights.

Finally, the Freedmen did not waive their arguments regarding the District Court's denial of their Motion to Amend. The District Court denied that motion for the same reasons that it granted the Cherokee Appellees' Motion to Dismiss, and, accordingly, the Freedmen's entire opening brief addressed the merits of both the Motion to Dismiss and the Motion to Amend.

Accordingly, this Court should reverse the grant of the Principal Chief's Motion to Dismiss, reverse the denial of the Freedmen's Motion to Amend, and remand to the District Court for further proceedings.

.

ARGUMENT

I. Waiver Of Sovereign Immunity By Voluntary Litigation Conduct Applies To Tribes And Subjects The Cherokee Nation To Suit In The D.C. District Court

The Cherokee Nation unequivocally invoked the jurisdiction of the federal courts by filing a brand new suit in the Oklahoma Action – for the sole purpose of protecting its Chief from litigating in the District Court in this action, which, at the time, had been pending for nearly six years. Its blatant gambit should not be rewarded. Where, as here, a sovereign files suit in a different federal court for a purpose that is so plainly tactical and designed to achieve a litigation advantage, the litigation waiver doctrine should be applied to find that the Cherokee Nation waived its immunity to suit in this action. *See Lapides*, 535 U.S. at 621

The Supreme Court's unanimous decision in *Lapides* "established in the clearest terms the continuing validity of the notion of a 'litigation waiver' based on the litigation conduct of the defendant and its implications for the fair and effective administration of justice in the federal courts." Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1038 (5th ed. 2003). In the decades following *Lapides,* the federal courts have broadly applied the litigation waiver doctrine to restrain sovereigns from using their immunity as both a sword and a shield. *See, e.g.*, *Bd.*

of Regents of the Univ. of Wis. Sys. v. Phoenix Int'l Software, 653 F.3d 448 (7th Cir. 2011).

The Cherokee Appellees argue that this well-established doctrine should not apply here because (1) "forum immunity" applies in this circumstance and includes the right to determine venue; (2) the Cherokee Nation's waiver of immunity was not clear; and (3) the voluntary invocation doctrine does not apply to Indian tribes.[1] Not one of these arguments has merit.

A. Litigation Waiver Of Immunity In The Federal Forum Is Not Inherently Limited To A Single Action Or Single Venue

The Cherokee Appellees argue that a sovereign has "forum immunity," which they define as the right to assert absolute control over venue when a sovereign chooses to invoke the jurisdiction of the federal courts. The argument rests on the statement in *Pennhurst State School & Hospital v. Halderman*, 465

[1] The Cherokee Appellees also argue that the immunity question has already been determined by this Court and is now the "law of the case." Brief of Cherokee Appellees at 24-25. However, this Court's ruling that there is "no express and unequivocal abrogation of the Cherokee Nation's immunity in the [Thirteenth Amendment and the Treaty of 1866]," *Vann v. Kempthorne,* 534 F.3d 741, 748 (D.C. Cir. 2008) ("*Vann II*"), simply did not address waiver by litigation conduct, which is distinct from both abrogation and a sovereign's voluntary waiver by statute or contract. *See Lapides*, 535 U.S. at 620; *Phoenix Software*, 653 F.3d at 470. Moreover, this Court decided *Vann II* on July 29, 2008, more than six months before the Cherokee Nation filed the Oklahoma Action. The Cherokee Nation is therefore not insulated against the litigation waiver doctrine under the "law of the case." *See Cobell v. Salazar*, 679 F.3d 909, 916-917 (D.C. Cir. 2012).

U.S. 89 (1984), that a state's "interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Id*. at 99. *Pennhurst*, however, did not address litigation waiver. Rather, it held only that a state's waiver of immunity by statute or agreement *in its own courts* will not amount to waiver *in the federal courts* unless that intention is "unequivocally expressed." *Id*. at 99-100 and n.9. This protection is premised on "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other."[2] *Id*. at 100 (citation omitted). Citing similar concerns, the United States Court of Appeals for the Second Circuit found in *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2d Cir. 2001), that a tribe's statement of consent in a tribal ordinance "to sue and be sued" was limited to suits in the tribe's own courts because consent to be sued in state or federal court could not be implied. *Id.* at 87-88.

The concerns expressed in *Pennhurst* and *Garcia* are not present when a sovereign takes offensive action through its voluntary litigation conduct, as the Cherokee Nation has done here by filing the Oklahoma Action. Accordingly, the same protections do not apply. *See, e.g., Lapides*, 535 U.S. at 620; *Phoenix Software*, 653 F. 3d at 469-70; *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 118-20 (2d Cir. 2007) (immunity protections in

[2] For similar reasons, *Pennhurst* found that a federal *Ex parte Young* action could not be sustained against a state officer to enforce a state law. *Pennhurst,* 465 US. at 106.

Pennhurst and other cases where sovereigns are defendants do not extend to cases where sovereigns have filed suit). When a state files suit in its own courts, that waiver extends to the federal forum. *See, e.g., In re MTBE*, 488 F.3d at 119-21 (immunity does not preclude removal to federal forum). If a sovereign that has filed suit cannot use *Pennhurst* to protect itself from the federal forum, it is difficult to imagine that the Cherokee Nation can use *Pennhurst* to limit its waiver to a single federal *venue.*

The Cherokee Appellees also rely on *A123 Systems, Inc. v. Hydro-Quebec*, 626 F.3d 1213 (Fed. Cir. 2010), in which the United States Court of Appeals for the Federal Circuit held that a patent infringement suit by the sovereign did not waive immunity as to an earlier-filed declaratory judgment action in which it was not a party involving the same patent. That case is inapposite because, among other reasons, the state brought its own lawsuit expeditiously and not in order to protect one of its officers from *Ex parte Young* jurisdiction in a pending action. In addition, *A123* is simply out of step with established precedent regarding the scope of immunity defenses available to a sovereign when it files suit, especially when it does so to obtain a tactical advantage. As discussed above, ability of a sovereign to control "where it may be sued" refers only to its right as a potential *defendant* – it does not apply where the sovereign has asserted its own claims. *See Lapides*,

535 U.S. at 620; *Phoenix Software, 653 F.3d* at 469-70; *In re MTBE*, 488 F.3d at 119-20.

The *A123* court essentially read the Federal Circuit's decisions in *Tegic Communications Corp. v. Board of Regents of the University of Texas Systems*, 458 F.3d 1335 (Fed. Cir. 2006), and *Biomedical Patent Management Corp. v. California*, 505 F.3d 1338 (Fed. Cir. 2007), as dictating that a sovereign can never, by filing suit in one federal venue, waive immunity in a separate federal action in another federal venue. Neither case establishes any such rule, and, as discussed above, Supreme Court and other federal authority do not support it. In *Tegic*, the state filed the initial action; its resulting waiver was found not to extend to a later-filed suit by a third party in another venue on the same patent. A year later, in *Biomedical*, the Federal Circuit stated unequivocally that it did *not* "mean to draw a bright-line rule whereby a State's waiver of sovereign immunity can never extend to a re-filed or separate law suit" – it merely found that waiver does not *always* extend to a separate action, and that, under the circumstances, it was not appropriate to extend the waiver. *Biomedical,* 505 F.3d at 1339.

This case demonstrates why a bright-line rule holding that a sovereign's waiver can never extend to a separate lawsuit is not appropriate. Where, as here, a sovereign brings a separate lawsuit in federal court in order to achieve the

dismissal of a long-standing suit against one of the sovereign's officers, waiver to suit in the first-filed forum should be found.

B. The Cherokee Nation's Waiver Was Clear

The Cherokee Appellees argue that under *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987), and *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989), the Cherokee Nation's intent to waive its immunity to suit in this action was not sufficiently clear. Brief of Cherokee Appellees at 26. Yet the Supreme Court has explained that "[t]he relevant clarity must focus on the litigation act that the [sovereign] takes that creates the waiver[,]" and does not depend upon the sovereign's "actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides*, 535 U.S. at 620. Here, the Cherokee Nation waived its immunity in the federal forum by filing suit.[3] Under the circumstances, its waiver should be construed to extend to this action. Under neither *Jicarilla* nor *McClendon* was the Cherokee Nation's waiver here not sufficiently "clear."

[3] "Waivers by litigation conduct depend on whether the [sovereign] has made a voluntary change in behavior that demonstrates it is no longer defending the lawsuit and is instead taking advantage of the federal forum." *Phoenix Software,* 653 F.3d at 462. Waiver is effected by an "affirmative decision to place a dispute in the federal court's hands," such as when a sovereign voluntarily files a claim in federal court. *Id*. at 463-64.

In *Jicarilla*, a tribe brought a federal suit to cancel certain oil and gas leases on reservation lands; several years later, a third party, Dome, filed a separate federal action relating to those leases, and still later moved to intervene in the tribe's action. *Jicarilla*, 821 F.2d at 538. Dome's motion to intervene was denied and its case was dismissed. There was no suggestion that the tribe gained any strategic advantage either by filing the initial action or by its assertion of waiver in the second action. Indeed, the court observed that Dome *could* have intervened much earlier in the tribe's original suit but chose for strategic reasons not to do so for several years after learning of the litigation. *Id.* at 539. Under the circumstances, the United States Court of Appeals for the Tenth Circuit declined to find that the tribe waived its immunity to Dome's later action – a finding that would have, after all, rewarded Dome's gamesmanship at the expense of the tribe.

McClendon involved the question of whether a tribe's earlier federal lawsuit to assert its claim for certain land rights, which had settled years before, implicitly waived the tribe's immunity in a later federal action filed by a third party relating to a lease agreement for those same lands. The court, citing *Jicarilla*, found that it did not. *McClendon*, 885 F.2d at 630. Again, there was no suggestion that the tribe had engaged in gamesmanship. The court acknowledged that a tribe's waiver was at least broad enough to encompass the issues necessary to decide an action brought by the tribe. *Id.* (citing *Jicarilla*, 821 F.2d at 539).

At most, *Jicarilla* and *McClendon* indicate that voluntary waiver does not *necessarily* extend to later-filed cases by third parties with closely related subject matter; they say nothing at all about a tribe's attempt to wrest jurisdiction over a pending action involving identical issues and parties from one federal court by filing a more limited later suit in another federal court.[4]

The Cherokee Appellees also argue that the Oklahoma Action was not filed in an attempt to secure a more favorable forum, but in response to pressure from Congress. Brief of Cherokee Appellees at 14-15, 33. However, the "threats of adverse Congressional action" were nothing new in 2009; a bill seeking to sanction the Cherokee Nation was introduced in June 2007, at the same time the Cherokee Nation was in the midst of its appeal to this Court.[5] It was not until after this Court held that the Principal Chief could be sued pursuant to *Ex parte Young* that the tribe decided to file suit in "a federal court of its choosing." *Id*. at 33.

But even if the Cherokee Appellees' arguments regarding the timing of the Oklahoma Action were credible, a benign motive does not alter the straightforward application of the voluntary waiver doctrine. As the Supreme Court explained:

---

[4] Although the Cherokee Appellees argue that the D.C. Action is "a different case … with different parties," Brief of Cherokee Appellees at 33, the Northern District of Oklahoma found otherwise. *The Cherokee Nation v. Nash*, 724 F. Supp. 2d 1159, 1169-70 (N.D. Okla. 2010).

[5] A Bill to Sever United States' Government Relations with the Cherokee Nation of Oklahoma, H.R. 2824, 110th Congress (2007).

> A benign motive … cannot make the critical difference[.] Motives are difficult to evaluate, while jurisdictional rules should be clear. To adopt the State's Eleventh Amendment position would permit States to achieve unfair tactical advantages, if not in this case, in others.

Lapides, 535 U.S. at 621 (internal citations and quotations omitted).

C. The Litigation Waiver Doctrine Should Apply To Tribes

The Cherokee Appellees argue that *Lapides* is limited to its facts and cannot apply to the litigation conduct of a tribe. There is no reason to so limit the scope of the litigation waiver doctrine.

The litigation waiver doctrine is not limited to the circumstances of the *Lapides* case. As the United States Court of Appeals for the Fifth Circuit explained, "throughout its opinion, the [*Lapides*] Court's reasoning, rule-making, and choice of precepts were derived from generally applicable principles serving 'the judicial need to avoid inconsistency, anomaly, and unfairness' in states' claims of immunity in all types of federal litigation." *Meyers v. Tex.*, 410 F.3d 236, 244 (5th Cir. 2005) (quoting *Lapides*, 535 U.S. at 620). These principles are equally compelling in the context of tribal immunity. *See generally Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 757 (9th Cir 1999) ("The integrity of the judicial process is undermined if a party, unhappy with the trial court's rulings or anticipating defeat, can unilaterally void the entire proceeding and begin anew in a different forum.").

Here, the Cherokee Nation filed suit in federal court for the purpose of protecting its officers from defending a case that had been pending for nearly six years. The Cherokee Appellees argue that "any such unfairness 'must be accepted in view of … overriding federal and tribal interests' in preserving sovereign immunity and tribal self-governance." Brief of Cherokee Appellees at 34 (quoting *Three Affiliated Tribes v. World Eng'g*, 476 U.S. 877, 893 (1986)). Such an exemption, however, would permit tribes to "game the system" by giving a unique weapon to tribes.[6] While the Freedmen respect the sovereignty of the Cherokee Nation and understand the policy reasons for protecting tribes *from* suit, those concerns simply do not apply when a tribe *files* suit. The Cherokee Nation's egregious actions here demonstrate precisely why no sovereign ought to be allowed special advantages after invoking federal jurisdiction. *See Lapides*, 535 U.S. at 620 ("clear" jurisdictional rules are necessary to preclude actual and potential unfairness).

[6] The statement in *Lapides* "that the issue resolved was different from 'an effort to protect an Indian tribe'" is inapposite. *See* Brief of Cherokee Appellees at 32 (quoting *Lapides*, 535 U.S. at 623). There, the Supreme Court was merely distinguishing cases in which *the United States* was permitted to intervene in certain actions without waiving its immunity, pointing out that each of those cases involved "special circumstances" such as "an effort [by the United States] to protect an Indian tribe." *Lapides*, 535 U.S. at 624. It says nothing about tribal sovereignty or litigation waiver.

II. This Action Can Proceed Without The Cherokee Nation

If the Cherokee Nation has waived its immunity to be re-joined to this action through its litigation conduct, the Court need not address the Rule 19 question. Even if the Cherokee Nation has not waived its immunity, this action can proceed against the Principal Chief in the absence of the tribe under this Court's ruling in *Vann II* and under a straightforward application of *Ex parte Young*. The Federal Appellees agree that the Cherokee Nation is not required to be joined under Rule 19(a), and that even if it were, this action should not be dismissed under Rule 19(b). *See* Brief of Federal Appellees at 12-13. Only the Cherokee Appellees contend that this action must be dismissed under Rule 19.

A. Standard Of Review

While the parties agree that this Court should apply a *de novo* standard to Rule 19(a)(1)(B)(ii) determinations and the Federal Appellees agree that this standard applies generally to Rule 19(a) determinations, the Cherokee Appellees contend that an abuse of discretion standard applies to Rules 19(a)(1)(A) and 19(a)(1)(B)(i) determinations. Even if the Cherokee Appellees were correct as a general matter, this appeal must still be reviewed *de novo* because it turns on legal conclusions relating to sovereign immunity and *Ex parte Young*. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001).

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

1. The Cherokee Nation Has No Legally Cognizable Interest In This Action And Will Not Be Prejudiced In Its Absence

The Cherokee Appellees' assertion that the tribe has a legally cognizable interest in this case ignores the fundamental holding of *Ex parte Young*, 209 U.S. 123, 159 (1908), which is that an official's act in violation of federal law is "without the authority of and one which does not affect the State in its sovereign or governmental capacity." As this Court has already held:

> The Cherokee Nation *has no interest* in protecting a sovereignty concern that has been taken away by the United States.. . . [T]he Thirteenth Amendment and the 1866 Treaty whittled away the tribe's sovereignty with regard to slavery and left it powerless to discriminate against the Freedmen on the basis of their status as former slaves.

Vann II, 534.F 3d at 755-56 (emphasis added) (internal citation omitted).

Moreover, the Cherokee Nation is not a required party because the presence of the Principal Chief protects the Cherokee Nation's alleged interests with respect to all of the causes of action. *See Salt River Project Agric. Improvement & Power Dist. v. Lee,* 672 F.3d 1176, 1180-81 (9th Cir. 2012) (tribal officials can be expected to adequately represent tribe's interests); *see also* Brief of Federal Appellees at 24-27 (arguing same). Not one of the cases cited by the Cherokee Appellees finds that an absent sovereign had a legally protected interest under Rule

19 *despite* the presence of the sovereign's officials in the suit under *Ex parte Young*.[7]

The Principal Chief would not be subject to inconsistent obligations in the tribe's absence. *Ex parte Young* relief by definition may require an official to comply with court rulings at odds with the laws of the sovereign, but this fact does not mean that the official is exposed to inconsistent obligations. The official is obligated to abide by federal law. Tellingly, the Cherokee Appellees cite no Rule 19 case where a court found a sovereign to be at risk of incurring inconsistent obligations, despite being represented by an official under *Ex parte Young*.[8]

2. The Court Can Accord Complete Relief Despite The Tribe's Absence

The Cherokee Appellees also misconstrue *Ex parte Young* in arguing that the Court cannot accord complete relief in the tribe's absence. Brief of Cherokee Appellees at 37-38. They rely on Article IX, § 1 of the 1999 Cherokee

---

[7] For example, in *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999), no tribal official was joined, and the plaintiffs argued that the defendants had no "legally protected interest" in the action under Rule 19 because the Tribe's position was legally wrong. *Id*. at 958. The court ruled that the argument "inappropriately presuppose[d] Plaintiffs' success on the merits." *Id.*

[8] The Cherokee Appellees cite to *Confederated Tribes of the Chehalis Indian Res. v. Lujan,* 928 F.2d 1496 (9th Cir. 1991), to support their argument that "resolving the action without the Nation may leave the Principal Chief subject to inconsistent obligations." Brief of Cherokee Appellees at 41. *Lujan* is inapposite, however, because the plaintiffs in *Lujan* only sued federal officials and did not bring an *Ex parte Young* action against tribal officials. *See Lujan,* 928 F.2d at 1498.

Constitution to argue that the Cherokee Nation Election Commission is an independent body, such that relief against the Principal Chief would not control its actions. But the validity of the 1999 constitution is questionable – the Freedmen were not permitted to vote on ratification, and the Federal Defendants have not approved it as required. *See* A-493. Even if the 1999 Constitution were valid, the Freedmen are not required to seek every possible source of relief that they could theoretically obtain. *See Salt River,* 672 F.3d at 1180.

The Cherokee Appellees' argument that the Cherokee citizens' power to amend the Cherokee Constitution without being subject to the Principal Chief's veto power could render the relief requested inadequate is also without merit. This *Ex parte Young* suit would prohibit the Principal Chief from enforcing any amendments that violate the Thirteenth Amendment or the Treaty of 1866.

3. The Relief Sought In The Current Complaint Is Not Substantially Different From That Sought In *Vann II*

The Cherokee Appellees attempt to avoid this Court's holding in *Vann II* by arguing that the relief the Freedmen now seek exceeds the scope of *Ex parte Young*, while the Second Amended Complaint requested more limited relief. Brief of Cherokee Appellees at 43-44. However, as this Court noted, the Cherokee Nation argued in *Vann II* that the Second Amended Complaint "would restrain the Nation from holding its elections and require the Nation to *take action to amend its constitution and voting laws to include Plaintiffs as citizens with voting rights*."

Vann II, 534 F.3d at 751 (emphasis added). Even after considering the tribe's broad characterization of the relief requested in the Second Amended Complaint, this Court held that the tribe has no sovereign interest in discriminating against the Freedmen on the basis of their status as former slaves. *Id.* at 755-56. The Fourth Amended Complaint also seeks declaratory and prospective injunctive relief to prevent a tribal official from enforcing discriminatory laws. As before, such relief "would not oblige the tribe's officer to use his discretionary authority to comply with the injunction. To the contrary, it would prevent the officer from exercising any such authority in violation of the Thirteenth Amendment or the 1866 Treaty." *Id*. at 754. Accordingly, there is no reason for this Court to reconsider its prior *Ex parte Young* determination.[9]

[9] The Cherokee Appellees also cite a statement made in passing by the Freedmen's counsel at the previous oral argument before this Court to argue that the Freedmen have conceded that the Cherokee Nation is a required party to this action. Brief of Cherokee Appellees at 36 and n.12. That statement was not, in context, a definitive assertion of the Freedmen's position as to whether the Cherokee Nation was a necessary party, but merely was an assertion that its presence was not required and that the Freedmen could obtain relief under *Ex parte Young*. The Cherokee Appellees also note that "the District Court's holding that the Nation was a required party to this case was unchallenged until the instant appeal." *Id.* No challenge was required, because the Freedmen prevailed in *Vann I* and because this Court discourages cross-appeals that are simply focused on making an argument in support of the judgment. *Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009); *see also Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C. Cir. 1995).

C. This Action Can Proceed In Equity And Good Conscience Without The Tribe Under Rule 19(b)

Even if the tribe is a required party, this action can still proceed in its absence. The Cherokee Appellees argue that the tribe would be prejudiced by a judgment in its absence and that this prejudice cannot be lessened. Brief of Cherokee Appellees at 45-47. However, as noted, the Cherokee Nation has no legally-protected interest in violating the federal rights of the Freedmen and, even if it did, those interests are fully represented by the Principal Chief.[10] *See Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (no prejudice to tribe where tribal officials sued); *Salt River*, 672 F.3d at 1180 (finding "no reason to believe the Navajo official defendants cannot or will not make any reasonable argument that the tribe would make "). The Cherokee Appellees do not cite any case in which an officer was joined pursuant to *Ex parte Young*.[11]

The Cherokee Appellees also argue "that Plaintiffs do not enjoy an absolute right to pursue this action in the forum of their choice[,]" (Brief of Cherokee Appellees at 48), but at the same time assert their own right to dictate not only the

---

[10] The Cherokee Appellees again fail to cite a single case holding that a sovereign's legitimate interests were prejudiced when its official was sued under *Ex parte Young*. *See* Brief of Cherokee Appellees at 46-47.

[11] The Cherokee Appellees also claim that judgment rendered in the absence of the tribe would be inadequate because it would bind only the Principal Chief. Brief of Cherokee Appellees at 48, but by definition this is inherently true of all *Ex parte Young* relief.

forum, but also the scope of the case. The Freedmen seek only to litigate this action in a forum where this Court has *already held* that they may bring an *Ex parte Young* claim against the Principal Chief, and in which they can pursue all of the relief they seek. Although the Cherokee Nation filed the Oklahoma Action, it recently moved to dismiss all of the Freedmen's counterclaims not directly related to the tribe's claim for declaratory relief under the Treaty of 1866. *See* Cherokee Nation's and Counter-Defendants, Cherokee Officers' Motion to Dismiss Certain Claims and Brief in Support (SSA 1-15).[12] The Cherokee Appellees seek to have it both ways. They claim that there is an alternative forum and at the same time attempt to deprive the Freedmen of that forum for a number of their claims. Tribal courts are similarly insufficient because they do not provide a forum for the Freedmen's claims against the Federal Appellees, as the District Court noted in *Vann I*. *See Vann v. Kempthorne*, 467 F. Supp. 2d. 56, 73 (D.D.C. 2006).

Furthermore, this Court and the District Court have become familiar with this case over years of litigation in the District of Columbia Circuit, and thus the efficiency interests that this Court must consider under Rule 19(b) cut sharply against starting over in another court. *See Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 111 (1968).

---

[12] "SSA[]" refers to the Second Supplemental Appendix, attached to Appellants' motion to supplement the record filed on August 30, 2012.

Finally, the public interest exception to Rule 19 applies here, because the litigation is needed to vindicate a public right, but joinder may be infeasible. *See, e.g., Louisiana v. Lee*, 596 F. Supp. 645, 650 (E.D. La. 1984), *vacated on other grounds*, 758 F.2d 1081 (5th Cir. 1985); *Swomley v. Watt*, 526 F. Supp. 1271, 1273 (D.D.C. 1981); *Sansom Comm. v. Lynn*, 366 F. Supp. 1271, 1280-81 (E.D. Pa. 1973). The Freedmen seek judicial enforcement of important public rights – their constitutional rights and the citizenship rights that lie at the core of their identity. Further, the Principal Chief's presence will ensure that "adjudication does not destroy the legal entitlements of the absent parties." *Shermoen v. United States.*, 982 F.2d 1312, 1319 (9th Cir. 1992) (internal citation and quotations omitted).

D. It Is Inappropriate to Affirm the District Court's Dismissal Under Rule 12(b)(6)

1. *Ex parte Young* Allows An Implied Right Of Action For Injunctive Relief To Enforce Federal Rights

The Cherokee Appellees argue that this Court could affirm the District Court's ruling "on the alternative basis that Plaintiffs failed to state a cognizable claim under Rule 12(b)(6)" because neither the Thirteenth Amendment nor the Treaty of 1866 gives rise to a private right of action against Indian tribes. Brief of Cherokee Appellees at 51-52. This argument ignores this Court's prior ruling that the Freedmen can sue the Principal Chief for prospective injunctive relief under *Ex parte Young*. *Vann II*, 534 F.3d at 750.

Ex parte Young suits for prospective injunctive relief often proceed against officials where the federal law in question does not create an express private right of action that would abrogate state sovereign immunity. *See, e.g., Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 819, n.3 (D.C. Cir. 2004) (finding no jurisdictional flaw where plaintiffs sought injunctive relief under *Ex parte Young* based on the preemptive effect of a federal Spending Clause statute); *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1265 (10th Cir. 2002) ("Appellants' suit is based on an implied cause of action against state officials under *Ex parte Young,* which is available to enjoin state officials from the violation of the Constitution or other federal law."); *Guar. Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 511-12 (9th Cir. 1990) (*Ex parte Young* suit for due process clause violation).[13]

This case is different from *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978), where the Supreme Court dismissed a suit against a tribal official because the federal statute at issue contained a detailed remedial scheme. As this Court recognized in *Vann II*, no such remedial scheme exists to vindicate appellants'

[13] *See also* Stephen I. Vladeck, *Douglas and the Fate of Ex parte Young*, 122 Yale L.J. Online 13, 14-15 (2012), http://yalelawjournal.org/2012/04/30/vladeck.html (*Ex parte Young* has "routinely been cited for the proposition that the Supremacy Clause authorizes equitable relief against state officers for prospective violations of federal law . . . regardless of whether the underlying federal law is itself privately enforceable.. . . [I]t is now generally understood that injunctive relief for constitutional violations does not require a freestanding statutory cause of action (and instead arises under the relevant constitutional provision).")

rights under the United States Constitution or the Treaty of 1866. *Vann II*, 534 F.3d at 755.

The Supreme Court has recently reiterated that an implied right of action for equitable relief directly under the Constitution "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001), and citing *Ex parte Young*). Indeed, *Ex parte Young* would lose much of its vitality if such claims could be dismissed for lack of an expressly stated private right of action under the federal law in question. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."); *Burgio and Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir.1997) ("[T]he best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws." (quoting 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 3566, at 102 (1984)).

2. The Treaty Of 1866 Incorporates The Thirteenth Amendment To Create An Implied Private Right Of Action For Equitable Relief.

Even if a private right of action is required, the Treaty of 1866 incorporates the Thirteenth Amendment and provides an implied private right of action for the enforcement of the Freedmen's citizenship rights. The Thirteenth Amendment prohibits not just slavery, but also empowers Congress to pass laws to eradicate the "badges and incidents of slavery." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-41 (1968); *Runyon v. McCrary*, 427 U.S. 160, 170 (1976). Congress did just that in the Treaty of 1866.

Acting within its Thirteenth Amendment power, Congress passed the Civil Rights Act of 1866, but did not directly apply this law to citizens of Indian tribes. *Civil Rights Cases*, 109 U.S. 3, 22 (1883); *Elk v. Wilkins*, 112 U.S. 94, 103 (1884) (stating that Native Americans were not United States citizens). The same Congress that passed the Civil Rights Act also ratified the Treaty of 1866,

> which granted the Freedmen 'all the rights of native Cherokees,' guaranteed the Freedom that laws 'shall be uniform throughout said Nation, and provided that '[n]o law shall be enacted inconsistent with the Constitution of the United States, or the laws of Congress, or existing treaty stipulations with the United States.[14]

[14] Notably, in 1866, Congress's primary exercise of authority over Indian tribes was accomplished through treaties, not legislation. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903); Act of Mar. 3, 1871, Pub. L. No. 41-120, 16 Stat.

Vann I, 467 F. Supp. 2d at 68 (quoting Arts. IX, VI and XII) . Congress exercised its Thirteenth Amendment power to eradicate the badges and incidents of slavery for the Freedmen by imposing these limitations on the sovereignty of the Cherokee Nation. *Id.* ("The Treaty of 1866 not only incorporated the principles of the Thirteenth Amendment and the Civil Rights Act of 1866, but it made such principles a *condition* of the Cherokee Nation's existence within the United States.") (emphasis in original).

The Freedmen accordingly have an implied cause of action for equitable relief to remedy violations of their unique rights under the Thirteenth Amendment and the Treaty of 1866, similar to that available to enforce other civil rights violations. *See Santa Clara Pueblo*, 436 U.S. at 61 (courts have "frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms").

Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457 (10th Cir. 1989), and *Richardson v. Loyola College in Maryland., Inc.*, 167 F. App'x 223 (D.C. Cir. 2005), do not hold otherwise. Neither case considers the intersection of the Treaty of 1866 with the Thirteenth Amendment and neither case involves *Ex parte Young* claims. *Nero* does not consider Thirteenth Amendment claims and only analyzes

---

544 (1871) (officially ending Congressional practice of making new treaties with Indian tribes).

the Treaty of 1866 in the context of the abrogation of tribal sovereign immunity, reaching the same conclusion as this Court in *Vann II*. *See Vann II* 534 F.3d at 748. Although *Richardson* held that the Thirteenth Amendment "does not provide an independent cause of action for discrimination," *Richardson* 167 F. App'x at 225, it did so because Congress provided a statutory scheme for redress in the Civil Rights Act. *Richardson* does not address the unique, enforceable rights provided to the Freedmen under the Treaty of 1866, incorporating the Thirteenth Amendment.[15]

III. Appellants Did Not Waive Appeal Of Dismissal Of Fifth Amended Complaint

Appellants have not waived their arguments regarding the District Court's denial of their motion for leave to file a Fifth Amended Complaint. The District

[15] Courts have been understandably reluctant to imply a private right of action under the Thirteenth Amendment for racial discrimination, either because an existing statutory enforcement mechanism was already in place to enforce the right at issue, *see, e.g., Jones*, 392 U.S. 409 (42 U.S.C. § 1982 provided statutory remedy for violation of Thirteenth Amendment), or out of a justifiable concern that the "badges and incidents of slavery" might be extended to a far broader range of racial discrimination than Congress had intended. *See, e.g., Memphis v. Greene*, 451 U.S. 100, 125 (1981). Here, Congress incorporated Thirteenth Amendment rights into the Treaty of 1866; the Freedmen do not have recourse to other means to enforce their citizenship rights granted under the treaty. Moreover, whatever the scope of "badges and incidents of slavery," it must surely include the Freedmen's special status, which is premised entirely on their status as the descendants of former slaves. If the Freedmen were granted a direct right of action under the Thirteenth Amendment, that right would be limited to the small number of individuals who are descended from a person on the Freedmen Roll of the Cherokee Nation.

Court denied this motion on the same erroneous grounds upon which it granted the Cherokee Appellees' motion to dismiss. *See Vann v. Salazar*, --- F. Supp. 2d. ----, No. 03-1711 (HHK), 2011 WL 4953030, at *9 (D.D.C. Sept. 30, 2011) ("*Vann III*"), available at A-769. Accordingly, Appellants' entire opening brief addresses the issues raised by dismissal of the Fifth Amended Complaint. *See Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666 (6th Cir. 2008) (holding that an appellant did not waive its arguments under the Tennessee Human Rights Act by solely addressing Title VII in its opening brief, because the analysis of the two claims was identical).

CONCLUSION

For the foregoing reasons, and those set forth in the Opening Brief of the Freedmen Appellants and the Brief of the Federal Appellees, this Court should reverse the District Court's order dismissing the Freedmen's Complaint, reverse the denial of the Freedmen's Motion to Amend, and remand the case to the District Court.

Dated: August 30, 2012

Respectfully submitted,

/s/ Jack McKay

Jack McKay
Alvin Dunn
Thomas G. Allen
Cynthia Cook Robertson
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Phone: (202) 663-8000
Facsimile: (202) 663-8007
jack.mckay@pillsburylaw.com
alvin.dunn@pillsburylaw.com
thomas.allen@pillsburylaw.com
cynthia.robertson@pillsburylaw.com

Jonathan Velie (*admitted pro hac vice*)
VELIE LAW FIRM
401 W. Main St., Ste. 310
Norman, Oklahoma 73069
Phone: (405) 310-4333
Facsimile: (405) 310-4334
jon@velielaw.com

Attorneys for Appellants Marilyn Vann, et al.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,625 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: August 30, 2012

Respectfully submitted,

/s/ Jack McKay
Jack McKay

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2012, the foregoing Reply Brief of Appellants Marilyn Vann, *et al.* was electronically filed with the Court using CM/ECF, which will automatically serve the counsel of record who are registered for CM/ECF:

Aaron P. Avila
Kurt Kastorf
Appellate Section, Environment & Natural Resource Division
U.S. Department of Justice
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, DC 20026-3795
(202) 514-1307
Fax: (202) 353-1873
aaron.avila@usdoj.gov
kurt.kastorf@usdoj.gov

Jonathan P. Guy
Mark S. Davies
Christopher M. O'Connell
Orrick, Herrington & Sutcliffe, LLP
1152 15th Street, NW
Washington, DC 20001
(202) 339-8400
Fax: (202)339-8500
jguy@orrick.com
mdavies@orrick.com
coconnell@orrick.com

I further certify that the following will be served by email and U.S. Mail:

Graydon Dean Luthey , Jr
Hall Estill (Tulsa)
320 S. BOSTON STE 200
TULSA, OK 74103-3706
(918) 594-0400
Fax: (918) 594-0505
dluthey@hallestill.com

Dated: August 30, 2012

Respectfully submitted,

/s/ Jack McKay
Jack McKay