UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RHONDA LEONA BROWN FLEMING, et al.	:	
	:	CASE NO.
PLAINTIFFS,	:	
	:	JUDGE _____
VS.	:	
	:	
THE CHEROKEE NATION, et al.	:	
	:	
DEFENDANTS.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF PLAINTIFF RHONDA LEONA BROWN FLEMING FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

At issue in this dispute is whether the requirement in the Constitution of the Cherokee Nation that a candidate for election to the office of principal Chief of the Cherokee Nation be a so-called "blood Cherokee" is lawful.

The election of Principal Chief of the Cherokee Nation is scheduled for June 1, 2019. Under Section 2 of Article VII of the Cherokee Constitution, a candidate for the Office of Principal Chief must be domiciled within the geographic bounds of the Cherokee Nation at least 270 days prior to the election, in this case by September 6, 2018, and must be a so-called blood Cherokee. An immediate order that suspends enforcement of Section 2 of Article VII is requested here in order to enable the Court to determine whether the "blood Cherokee" provision of Article VII is lawful. Unless a Temporary Restraining Order is issued, non-blood Cherokees, such as Plaintiff, who timely filed to run for office of Principal Chief but do not reside within the geographic

limits of the Cherokee Nation will denied the right to seek this office due to the uncertainty caused by the failure of the Cherokee Nation to amend its constitution.

This is another example of the continuing policy of electoral measures being imposed by the Cherokee Nation to discriminate between its members based on repugnant unlawful racial discrimination. This history is well-documented.

During the Civil War, the Cherokee Nation sided with the Confederacy. The Nation signed a treaty with the Confederacy and declared war against the United States. In 1863, slavery was abolished under the Thirteenth Amendment of the United States Constitution.

The Cherokee Nation reestablished its relationship with United States through a Treaty that provides: the Cherokee Nation hereby covenants and agrees that never hereafter shall either slavery or involuntary servitude exist in the Cherokee nation and that all freedmen who have been liberated…as well as all free colored persons…and their descendants, shall have all the rights of native Cherokees. Article 9 of the 1866 Treaty. The Treaty of 1866 also guarantees ex slaves, Freedmen, the right to elect officials and to representation according to numbers on the national council and the right to sue in federal court if an action arose between a Freedman and another member of the Cherokee Nation. The Treaty of 1866 guarantees Freedmen that laws "shall be uniform throughout said nation" and provides that if any law, either in its provisions of in the manner of its enforcement, in the opinion of the President of the United States, operates unjustly in the Freedmen district, he is hereby authorized and empowered to correct such evil. The 1866 Treaty provides that 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.

In 1893, the United States established the Dawes Commission to create authoritative membership rolls for all Native American tribes in Oklahoma, including the Cherokee Nation. See, Index and Final Rolls of Citizens and Freedmen of the Cherokee Tribe in Indian Territory approved by Act of Congress dated June 21, 1906 (34 Stat. 325) ("Dawes Rolls"). The Dawes Commission enrolled persons formerly held in bondage by the Cherokee Nation on a "Freedmen Roll." Tribal members with no slave ancestry were enrolled on a separate "Blood Roll."

In 2018 this Court stated the citizenship and voting rights of Cherokee Freedmen are coextensive and equal with those of blood Cherokees. The question in this action is whether that equality extends to the right to seek election as Principal Chief of the Cherokee Nation. This motion requests immediate suspension of the blood eligibility requirement, pending a ruling on the motion for a preliminary injunction in order to prevent irreparable harm to Plaintiff.

It was the duty of DOI to assure the Cherokee Constitution to be amended to comport with this Court's February 20, 2018 Order. It was the duty of the Cherokee tribe to amend its Constitution and remove any uncertainty concerning eligibility to seek the office of Principal Chief. The failure to amend caused confusion and uncertainty concerning whether Freedmen were eligible. It is unreasonable to expect a person such as Ms. Fleming to relocate from California to Oklahoma, when the eligibility requirements were unclear. Uncertainty concerning eligibility requirements was further increased by the Tribe accepting the filing fee of Ms. Fleming, but then declaring her candidacy unlawful. If it was known when Ms. Fleming, a California resident, filed that candidates must reside within the boundaries of the Cherokee reservation, the Tribe should not have

accepted her filing fee. Instead the Tribe accepted her filing fee while fully cognizant that the deadline for relocation had passed. Ms. Fleming relied to her detriment on the actions of the Tribe which implied she was eligible.

In light of the failures of both DOI and the Tribe, an order should issue that permits non resident Cherokee Freedmen, such as Ms. Fleming who timely filed for election to appear on the June 1, 2019 ballot or the June 1, 2019 election should be delayed in order to provide Freedmen candidates an opportunity to relocate. Accordingly, an injunction as outlined above is respectfully requested. An oral hearing is respectfully requested.

A TRO is appropriate here.

II. LEGAL STANDARD FOR A TEMPORARY RESTRAINING ORDER

"The same standard applies to both temporary restraining orders and to preliminary injunctions." Hall v. Johnson, 599 F.Supp. 2d 1, 6 n.2 (D.D.C. 2009). To obtain a temporary restraining order or a preliminary injunction, a plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and[4] that an injunction is in the public interest." Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting Winter v. Natural Res.Def. Council, Inc., 555 U.S. 7 (2008)). Because it is "an extraordinary remedy," a temporary restraining order or preliminary injunction "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006).

A. Likelihood of Success on the Merits

Plaintiff in this case is likely to succeed on the merits. There is no authority whatsoever for continued observance of the racially based requirement that candidates for Principal Chief be blood Cherokees. Judge Hogan made it very clear in his February 20, 2018 Opinion in The Cherokee Nation, et al. v. Raymond Nash, Civil Action No. 13-01313(TFH) that the 1866 Treaty guarantees that extant descendants of Cherokee Freedman shall have all the rights of native Cherokees including that right to citizenship in the Cherokee Nation.

Given the express language of Article 9 of the 1866 Treaty and the recent declaration of Judge Hogan concerning the equal civil status of blood Cherokees and Freedmen, it is likely that Plaintiff will prevail on the merits of whether the racial eligibility requirement in Section 2, Article VII of Cherokee Constitution is enforceable.

The arbitrary racial classification in Section 2 Article VII violates equal protection. The United States Supreme Court held on June 24, 2013, "decisions based on race or ethnic origin… are reviewable under the (Fifth) Amendment." Id., at 287 (separate opinion). See, Bakke v. California, 438 U.S. 265 (1978). The principle of equal protection admits no "artificial line of a 'two-class theory'" that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others." Id., at 295. This is exactly what Section 2 does. Any racial classification must meet strict scrutiny, for when government decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." Id., at 299. The eligibility requirement here by the Cherokee Nation has not been subjected to

strict scrutiny, nor has a judicial determination been made that the requirement has been narrowly tailored.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," Rice v. Cayetano, 528 U. S. 495, 517 (2000) (internal quotation marks omitted), and therefore "are contrary to our traditions and hence constitutionally suspect," Bolling v. Sharpe, 347 U. S. 497, 499 (1954). "'[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment," Richmond v. J. A. Croson Co., 488 U. S. 469, 505 (1989) (quoting Fullilove v. Klutznick, 448 U. S. 448, 533-534 (1980) (Stevens, J., dissenting)), "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'." Loving v. Virginia, 388 U. S. 1, 11 (1967).

To implement these canons, judicial review must begin from the position that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." Fullilove, supra, at 523 (Stewart, J., dissenting); McLaughlin v. Florida, 379 U. S. 184, 192 (1964). Strict scrutiny is a searching examination, and it is the government that bears the burden to prove "'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate," Croson, supra, at 505 (quoting Fullilove, 448 supra, at 533-535 (Stevens, J., dissenting)). See, Fisher v. University of Texas, at p. 8. The classifications imposed here have not been subjected to strict scrutiny

The Equal Protection Clause guarantees every person the right to be treated equally by the [government] without regard to race. "At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." Missouri v. Jenkins, 515 U. S. 70, 120-121 (1995)

(THOMAS, J., concurring). "It is for this reason that we must subject all racial classifications to the strictest of scrutiny." Id., at 121.

Under strict scrutiny, all racial classifications are categorically prohibited unless they are "'necessary to further a compelling governmental interest' and "narrowly tailored to that end." Johnson v. California, 543 U. S. 499, 514 (2005) (quoting Grutter, supra, at 327). This most exacting standard "has proven automatically fatal" in almost every case. Jenkins, supra, at 121 (THOMAS, J., concurring). And rightly so. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." Adarand Constructors, Inc. v. Pena, 515 U. S. 200, 240 (1995) (THOMAS, J., concurring in part and concurring in judgment). "The Constitution abhors classifications based on race" because "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." Grutter, supra, at 353 (THOMAS, J., concurring in part and dissenting in part

Discrimination of the nature alleged in the Complaint was addressed by the Supreme Court in Fullilove v. Klutznick, 448 U.S. 448 (1980) as follows:

> When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the…general Welfare of the United States" and "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment…

> Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant…Congress may employ racial or ethnic classifications in exercising its Spending or other legislative Powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective or remedying the present affects of past discrimination is narrowly tailored to the achievement of that goal.

Id.

In reviewing an Act that relies upon ethnic and racial classifications, Courts should engage in a City of Richmond v. Croson, 488, U.S. at 500 type analysis.

A Court should "undertake the same type of detailed, skeptical, non-deferential analysis undertaken by the Croson Court… Id. Although Congress is entitled to no deference in its ultimate conclusion that race-based relief is necessary, "the fact-finding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." Id. at 1322 n. 14 (citing Croson, 488, U.S. at 500). In Adarand v. Pena, 515 U.S. 200 (1995) it was held that strict scrutiny applies to federal affirmative action programs.

As was noted by Spencer Overton in "Voices from the Past: Race, Privilege and Campaign Finance" 79 N.C. L. Rev. 1541 (2000-2001)

> Governmental entities have long used racial identity to define and allocate property rights. Official government action in the form of proclamations, statutes, and court decisions took land from Native Americans based on their racial and cultural identity, and reallocated this property to private actors who were white. The law contemplated and enforced the appropriation of labor from African Americans through slavery, which primarily benefited white private actors. The law promoted immigration from European countries, essentially determining the racial makeup of those who would count as full citizens in the United States. As white Americans moved west in the 1800s, the law tolerated discriminatory practices in southwestern states that stripped Mexican Americans of the any opportunities to own property. In addition to conquest, slavery, and

> immigration policy, well-known public and private racial barriers in education, employment, and business have disadvantaged people of color while enuring to the benefit of others through artificially reduced competition.
>
> Other, less apparent factors also contribute to the perpetuation of economic disparities between whites and people of color. The benefits given by facially discriminatory government policies may be multiplied by facially neutral government policy and economic markets, and may thus have a greater impact today than they did when originally enacted and enforced.
>
> Id.

No compelling governmental reason exists for the differing eligibility requirement in Section 2 Article VII of the Cherokee Constitution

These principles are well-settled in American jurisprudence. In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). The Supreme Court stated:

> 1) The equal-protection clause…does not take… the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2) classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because, in practice, it results in some inequality. 3) When the classification in such a law is called in question, if state of facts reasonably can be conceived that would sustain it, the existence of state of facts at the time the law was enacted must be assumed. 4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36; Louisville & N. R. Co. v. Melton, 218 U. S. 36; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 207 U. S. 256; Munn v. Illinois, 94 U. S. 113, 94 U. 132; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 173 U. S. 615.

However, when suspect classification, such as race or ethnicity, or fundamental rights are at stake, Equal Protection analysis requires the use of the strict scrutiny standard This level of review is far more stringent than either rational basis review or intermediate scrutiny. Strict scrutiny has always been applied in cases of laws which

discriminated on the basis of race or national origin, but this exclusivity has been tested at times and might not persist indefinitely. This level of review, however, will not be applied simply because a law is, in its effect, prejudicial against a suspect classification or regarding a fundamental right. Rather, this high standard is intended to be a means by which particularly invidious or prejudicial discriminatory purposes, if it exists, can be brought to light. See U.S. v. Carolene Products Co., 304 U.S. 144, 153 (1938).

In order for a law to survive strict scrutiny under the Equal Protection Clause, the interest involved must be more than "important" - it must be compelling . And the law itself must be necessary in order to achieve the objective - if there is any less discriminatory means of achieving the goal, the law will be struck down. See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967). The requirement of necessity manifests itself in that courts require that the law be narrowly tailored meet the objective. See, Nunez v. City of San Diego, 114 F. 3d 935, 946 (9th Cir. 1997). As a practical matter, it is rare for a law to survive strict scrutiny review, and the last time a law involving discrimination on the basis of national origin or race survived strict scrutiny was in 1944. See Korematsu v. U.S., 323 U.S. 214 (1944). There is no legitimate reason for the blood Cherokee eligibility requirement for service as Principal Chief.

B. Irreparable Harm

The Supreme Court has stated "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1440-41 (2014) (Roberts, C.J., plurality opinion). Because the right to vote is a precondition of participation in or democracy, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v.

Sanders, 376 U.S. 1, 17 (1964). Restrictions on the right to vote therefore "strike at the heart of representative government" and warrant the closest attention from courts. Reynolds v. Sims, 377 U.s. 533, 555 (1964); see also, Obama for Am. V. Husted, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote thereof constitutes an irreparable injury" (citin Williams v. Salerno, 792 F.2d 323, 326 (2nd Cir. 1986)). Deprivation of a fundamental right, even for brief periods of time, constitutes irreparable injury. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1976) (Brennan, J., plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") Ezell v. City of Chicago, 651 F.3d 684, 699-700 (7th Cir. 2011) (violation of Second Amendment rights caused irreparable harm because of the "intangible nature of the benefits" of those rights and the fear persons would be deterred from exercising those rights, "even if imperceptibly" (quoting Miles Christi Religious Order v. Twp. Of Northville, 629 F.3d 533, 548 (6th Cir. 2010))).

C. Balance of Equities

Unfortunately the blood Cherokee eligibility requirement is a vestige of slavery and remnant of the historic campaign by certain Cherokee leaders, in concert with the United States, to disenfranchise Freedmen. It is in the interest of all Cherokee citizens to timely eliminate all vestiges of this shameful past. Accordingly, the equities tip decidedly in favor of Plaintiff.

D. Public Interest

The public has an extraordinary interest in preventing denial or abridgement of the right to vote. Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 692 (7th Cir. 1986) (internal quotation marks omitted); cf. United States v. Raines, 362 U.S. 17027 (1960)

("[T]here is the highest public interest in the due observance of all the constitutional guarantees"); Jones v. McGuffage, 921 F. Supp. 2d 888, 901 (N.D. Ill, 2013) The public's interest in preventing the disenfranchisement of eligible candidates clearly outweighs any interest that Section Article VII purports to serve. The pubic interest weighs heavily in favor of Plaintiff.

III. CONCLUSION

For the above reasons a temporary restraining order should issue.

A proposed order is attached.

Respectfully Submitted,

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A copy of the Complaint, Affidavit of Plaintiff, Motion for Temporary Restraining Order, Proposed Order, Notice of Preliminary Injunction Hearing and Bond have been provided to all parties in this action by email.

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CERTIFICATE OF SERVICE

The foregoing was served upon counsel of record via email, May 14, 2019.

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