

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MARILYN VANN, DONALD MOON,)
 RONALD MOON,)
 HATTIE CULLERS,)
 CHARLENE WHITE,)
 And RALPH THREAT,)
)
 Plaintiffs,)
)
 v.)
)
 DIRK KEMPTHORNE, Secretary of the)
 United States Department of the Interior;)
 UNITED STATES DEPARTMENT OF)
 THE INTERIOR,)
)
 CHEROKEE NATION OF OKLAHOMA)
)
 CHADWICKE SMITH, Individually and)
 in His Official Capacity)
)
 John Does, Individually and in their)
 official capacity)
)
 Defendants,)
)

Case No.: 1:03cv01711 (HHK)
Judge: Henry H. Kennedy
Docket Type: Civil Rights
(non-employment)

**CHEROKEE NATION DEFENDANTS’ OPPOSITION
TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

Defendants Cherokee Nation, Principal Chief Chadwick Smith and other Cherokee Nation officials (collectively referred to herein as the “Cherokee Nation Defendants”), by and through their counsel, respectfully submit this Opposition to Plaintiffs’ Motion for Preliminary Injunction (“Plaintiffs’ Motion”).¹

¹ Because the questions of this Court’s subject matter jurisdiction and the Cherokee Nation Defendants’ sovereign immunity are now pending on appeal before the Court of Appeals for the District of Columbia Circuit, it would be appropriate for this Court to defer consideration of Plaintiffs’ Motion and defer further proceedings in this action, until those issues are decided by the Court of Appeals. In presenting this Opposition, the Cherokee Nation Defendants do not waive those defenses.

INTRODUCTION

Plaintiffs' Motion is a remedy in need of a wrong and asks this Court to order relief Plaintiffs have already obtained. Plaintiffs are today citizens of the Cherokee Nation (the "Nation"). Their full citizenship rights have been temporarily reinstated, and they are eligible to vote in the upcoming June 23, 2007 General Election. This is a direct result of two judicial orders that the Nation's own tribal District Court has issued since the filing of Plaintiffs' Motion. While the Motion would also fail on its merits, there is no remaining case or controversy and there is nothing for this Court to consider.

As we demonstrate below, Plaintiffs' Motion fails for a variety of reasons: (1) the absence of a case or controversy divests the Court of jurisdiction to hear the Motion; (2) the Court has no jurisdiction to consider injunctive relief not rooted in Plaintiffs' Second Amended Complaint; (3) Plaintiffs lack standing to obtain the injunctive relief they seek, which deprives the Court of subject matter jurisdiction; (4) Plaintiffs' Motion is moot by virtue of the tribal District Court's order; (5) Plaintiffs' Motion does not meet the substantial standards necessary to justify the extraordinary relief of enjoining a tribal election; (6) Plaintiffs have not made a clear and convincing showing that the balance of the four critical factors warrants intruding on the Nation's sovereignty, including the fact that they have not exhausted their tribal remedies, and therefore cannot prove irreparable harm.

Plaintiffs' attempt to stop an election in which they and all other Cherokee Freedmen descendants have the right to vote should be rejected, and their motion denied.

CORRECTION OF FACTUAL AND HISTORICAL BACKGROUND

As with their previous filings, Plaintiffs' Motion is filled with misleading statements that distort both the Nation's history as well as current events. The apparent intent of the "Background" section of the memorandum in support of Plaintiffs' Motion is to prejudice this Court as well as public opinion. Consequently, it is necessary to consider important facts that place Plaintiffs' rhetoric in historical context.

It is unnecessary to recount for this Court all that which the Nation has suffered throughout the history of the United States, and we do not do so here. Like all other tribes in the United States, the Nation has suffered greatly, from the forced "Trail of Tears" to federal policies aimed at "civilizing" its members. The Treaty of 1866 itself, on which Plaintiffs wrongly rely in the current action, stands as its own testament to this fact. After all, had the United States honored that treaty, the Nation would control much of Oklahoma, the Federal government would have to remove all non-Indians from Cherokee territory, and all businesses located in Cherokee territory would have to be licensed by the Cherokee Tribal Council.

Contrary to what Plaintiffs' relate as "background," the true history that has led us to this Court is well documented. For more than 40 years, the Cherokee Nation has worked diligently to rejuvenate its heritage and restore a cultural identity, healing damage done by more than a century of federal policy aimed at assimilating Native Americans and stripping their identities as communal nations. Notably, it was in the midst of this effort that the Nation thoughtfully considered what it means to be an Indian and a Cherokee.

As a result of this process, the Nation determined that it should now be what it was before settlers arrived in this country: an Indian tribe comprised of Indians. The Nation sees itself as part of a community of other Indian nations in the United States, with a common history and

bond of overcoming federal efforts to erase their heritage. Many in the Nation believe that they codified this decision in a new constitution in 1976. Most recently, on March 3, 2007, the Nation passed a constitutional amendment (the “March Amendment”) to codify its will in a special referendum. About 77% of all the Cherokee citizens who voted in the referendum favored restoring citizenship solely to Indians. The Freedmen descendants voted in this referendum.

As a result of the referendum, a group known as “inter-married whites” and the Freedmen descendants were no longer to be citizens of the Nation. As explained below, a Cherokee Nation District Court has stayed the effects of the constitutional amendment while it considers a challenge by Freedmen descendants, who are citizens today.

For the Nation, this issue has nothing to do with race and everything to do with who has Indian lineage. Indeed, the Cherokees are a diverse nation. Many of those citizens who can trace their lineage to an Indian ancestor on the Dawes Cherokee “Blood Roll” are Indians who can also trace their lineage to many different heritages.² As a result, the Nation proudly includes members of African, Asian, Latino and Caucasian descent who also have Indian ancestors. Indeed, approximately 1,900 descendants of Freedmen also have ancestors on the Cherokee Blood Roll and will remain citizens regardless of what happens in this litigation and the litigation in the Nation’s courts.

² As this Court already is aware, the Dawes Commission rolls are the lists compiled by the U.S. Government between 1898 and 1907 to determine who would receive an allotment of land and receive per capita payments as a member of the Five Civilized Tribes in expectation that the tribal governments would be abolished and a new territorial government would be put into place. To receive the land, those who alleged they were eligible for membership had to apply to and be accepted as eligible by the Dawes Commission, which was an administrative body with a quasi-judicial role. The Commission was named after U.S. Senator Henry Dawes, who led the effort to negotiate with the tribes, allot the land, and conduct the censuses. In the case of the Cherokee Nation, names were recorded on various rolls, including the Cherokee Blood Roll (which included Shawnee Indians), the Delaware Indians Roll, the Freedmen Roll, and the Inter-Married Whites Roll. For the purpose of the March Amendment, citizenship was limited to the Cherokee Blood and Delaware Rolls.

The Nation recognizes it shares with the Freedmen descendants a similar history of pain and suffering, some of which wrongfully came at the hands of a very small minority of the Nation's forebears. In contrast to the picture that Plaintiffs have painted, however, the Nation was not united in support of the Confederacy and slavery. Indeed, a majority of the Cherokee Nation supported the Union and fought with it against slavery. The Nation lost 2,500 members in the Civil War and 4,000 became widows or orphans.

Because of the Nation's empathy for the Freedmen descendants and their shared history, the Nation has sought ways to ease the Freedmen descendants' transition should the March Amendment become effective. For example, the Nation requested the tribal District Court to hire legal counsel at the Nation's expense to represent the Freedmen descendants to appeal their disenrollment. The Cherokee Nation also made special arrangements to ensure that Freedmen descendants with health-care benefits who faced loss of citizenship, and who were undergoing courses of medical treatment at the time, would be able to complete those treatments before losing their health-care benefits.

Equally important, the Nation expressly agreed to and approved the Freedmen descendants' successful May 14, 2007 motion in tribal District Court to stay the effectiveness of the March Amendment while it is challenged in the tribal courts. As a result, all of the more than 2,800 Freedmen descendants (including Plaintiffs) who had been disenrolled have been reinstated with their citizenship rights in the Nation. The Nation also expressly agreed to and approved a May 17, 2007 order in tribal District Court reopening the period for voter registration and requesting absentee ballots for two weeks before the upcoming election. *See* Affidavit of Melanie Knight ("Knight Aff.") ¶¶ 5, 12, 14; Ex. 1 at 2. To be clear, all of the more than 2,800 Freedmen descendants who have been reinstated, who are of voting age, and who are registered

to vote will have the opportunity to vote in the June election – just like all other Cherokee citizens of the Nation. Plaintiffs and their counsel would prefer to make this case about opening Cherokee Nation citizenship and the right to vote in Cherokee elections to all those who claim to be Freedmen descendants and who can trace their lineage to the Dawes Commission Freedmen Roll and not to an Indian ancestor on the Cherokee Blood Roll. However, that issue is not before this Court. Those individuals were not citizens before the March 13 constitutional amendment vote (the “March Special Election”). They are a group that is distinct from the more than 2,800 Freedmen descendants who have been reinstated to citizenship. If any of these non-citizen individuals wish to apply for citizenship today and can trace their lineage to an Indian ancestor on the Cherokee Blood Roll, the Cherokee Nation would welcome them into the tribe, just like anyone else who could do the same.

If the tribal courts rule that the Freedmen descendants (including Plaintiffs) must remain citizens regardless of any referendum, then such will be the case. The Nation has fought hard to be a tribe governed by constitutional and judicial review principles, and the Nation will respect its own courts. Ironically, although Plaintiffs deride the Nation’s tribal courts, it is those courts that have now twice reinstated their citizenship.

Beyond the fundamental principle that only Indians can be citizens of the Nation, the other central issue at stake in this litigation is for Indians to be able to decide for themselves who can and cannot be members of their tribes. The ability to define tribal membership lies at the core of tribal identity and self-governance. This case and Plaintiffs’ Motion are nothing less than an attack on these fundamental principles of tribal sovereignty.

PROCEDURAL BACKGROUND

The claims against the Cherokee Nation Defendants that serve as a basis for Plaintiffs' current application for injunctive relief are contained in Plaintiffs' Second Amended Complaint ("Complaint"), filed August 3, 2006. In a single, three-paragraph Count,³ the Complaint alleges violations by the Cherokee Nation Defendants "without limitation [of] the United States Constitution, the 1970 Principal Chiefs Act, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians, March 21, 1866, 14 Stat. 755, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301, et seq. 1866 Treaty, and the Indian Civil Rights Act." The Complaint seeks to enjoin the Cherokee Nation (i) from recognizing the results of the May 24, 2003 election "until such time as a lawful election that includes all citizens of the Nation," Sec. Am. Compl. ¶ 73; (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.* ¶ 75.

Subsequent to the filing of the Amended Complaint, the Cherokee Nation announced the March Special Election, scheduled for March 3, 2007, to vote on the March Amendment, which limited citizenship in the Cherokee Nation to those with Indian ancestors on the Dawes Commission rolls of the Cherokee people. Knight Aff. ¶ 6.

The March Amendment established criteria for membership, limiting it to "original enrollees or descendants of Cherokees by blood, Delawares by blood, or Shawnees by blood as

listed on the . . . Dawes Citizenship Rolls.” Ex. 2, Cherokee Nation Special Election Ballot (March 3, 2007). Under the Cherokee Supreme Court’s decision in *Allen v. Cherokee Nation Tribal Council*, No. JAT 04-09 (Cherokee Nation Jud. App. Trib., Mar. 7, 2006), the Plaintiffs and other Freedmen descendants who were enrolled as Cherokee citizens and registered to vote had the right to vote in the March Special Election. Nevertheless, Plaintiffs moved to enjoin the March Special Election. Mem. In Supp. Pls.’ Mot. For Prelim. Inj., Feb. 1, 2007 (hereinafter “Pls.’ Feb. 1, 2007 Mot.”). This Court denied that motion, *inter alia*, because Plaintiffs “failed to establish irreparable harm.” Ex. 3, Tr. Prelim. Inj. Hr’g, 40:14-15, Feb. 21, 2007 (hereinafter “Hr’g Tr.”). Rather than arguing that “the election itself [was] illegal,” this Court held that Plaintiffs relied on the argument that “the possible results of the election would result in . . . a violation of both the Treaty of 1866 and the 13th Amendment.” *Id.* at 40:20-23. Because Plaintiffs were “seeking to enjoin an election because they fear its result,” *Id.* at 40:15-16, the alleged harm was “pure speculation.” *Id.* at 40:07. Consequently, the alleged harm did “not rise to the level of an immediate and irreparable violation of constitutional rights that could not otherwise be prevented.” *Id.* at 40:14-15.

After this Court denied Plaintiffs’ Feb. 1, 2007 motion, the March Special Election proceeded with the Freedmen descendants’ participation. The March Amendment passed with 77 percent of the vote, and it took effect on March 13, 2007. Knight Aff. ¶ 6. The Cherokee Nation made special arrangements to ensure that citizens with health-care benefits who faced

³ See Sec. Am. Compl. ¶¶ 20-21 (“As And For A Third Cause Of Action”), asserting claims against “the CNO and Smith Defendants.” *Id.* ¶ 67. The remaining counts of the Complaint, while purporting to assert claims against “Defendants” collectively, are directed exclusively to the Federal Defendants. In Court I (“As And For First Cause Of Action – Violation of United States Constitution/Federal Law”), Plaintiffs allege that “[t]he BIA has breached its fiduciary duty to protect the voting rights of the Freedmen” *Id.* ¶ 55 (emphasis added). Count II (“As And For A Second Cause Of Action – Judicial Review of Agency Action Under the APA”) begins with the allegation that “Defendants are responsible for *protecting the interests of the Cherokee Nation*, including the Freedmen” and goes on to allege breaches of fiduciary duty to protect the interests of the Freedmen – allegations which plainly lie against the Federal Defendants, not the Cherokee Defendants. *Id.* ¶¶ 60-65.

loss of citizenship and who were undergoing courses of medical treatment at the time would be allowed to complete those treatments before losing their health-care benefits. *Id.* ¶ 10.

Plaintiffs and all other Freedmen descendants affected by the March Amendment received letters dated March 21, 2007 informing them that they had 90 days from receipt to appeal their disenrollment as citizens from the Cherokee Nation. *Id.* ¶ 9. To date, more than 270 individuals have taken this opportunity and filed suit in the District Court of the Cherokee Nation challenging the amendment and their removal of their status as citizens in the Cherokee Nation. *Raymond Nash, v. Cherokee Nation Registrar*, Nos. CV-07-40, CV-07-41, CV-07-42, CV-07-43, CV-07-44, CV-07-45, CV-07-46, CV-07-47, CV-07-48, CV-07-49, CV-07-50, CV-07-53, CV-07-56, CV-07-65, and CV-07-66 (D. Cherokee Nation); Knight Aff. ¶ 9. One of the Plaintiffs, Mr. Ronald Moon, joined this group but later withdrew his appeal. *Id.* ¶ 9. None of the other Plaintiffs chose to file such appeals to their disenrollment in Cherokee Nation District Court. *Id.*

On May 8, 2007, Plaintiffs filed their current Motion to enjoin the general election in the Cherokee Nation scheduled for June 23, 2007 (the “June General Election”). *Id.* ¶ 11; Mem. In Supp. Pls.’ Mot. for Prelim. Inj., May 8, 2007, at 15 (hereinafter “Mem. In Supp. Pls.’ Mot.”). In addition, Plaintiffs moved to enjoin the Cherokee Nation “from denying Plaintiffs their full citizenship rights.” Mem. In Supp. Pls.’ Mot. at 15.

On May 14, 2007, however, the Cherokee Nation District Court issued a Temporary Order and Temporary Injunction in *Nash* (the “May 14 Tribal Order”) ordering the Cherokee Nation Registrar to:

immediately reinstate to full citizenship within the Cherokee Nation the Plaintiffs and all similarly situated persons commonly known as the “Cherokee Freedmen.” This order shall remain in effect until the Court reaches a decision on the merits of Plaintiffs’ claims in these actions, or until further order.

Ex. 4 at 2; Knight Aff. ¶ 12. By virtue of the May 14 Tribal Order, Plaintiffs and all Freedmen descendants have had their citizenship reinstated pending a resolution on the merits of the disenrolled Freedmen descendants’ challenges to the amendment, or further order of the Cherokee Nation District Court. *Id.* Reinstatement included the right to vote in the June General Election for those who are eligible to vote. Knight Aff. ¶ 12. To be clear, reinstatement to citizenship applies to all of the more than 2,800 Freedmen descendants (including Plaintiffs) who had been citizens before the March Amendment passed. *Id.* ¶ 13. Reinstatement does not extend to those Freedmen descendants who have never applied for citizenship and who have never been citizens previously. *Id.* ¶ 13.

On May 17, 2007, the Cherokee Nation District Court issued a second order to reopen voter registration to all reinstated citizens who had not previously registered to vote for a two-week period from May 21, 2007 through June 1, 2007 (the “May 17 Tribal Order”). Knight Aff. ¶ 14. Those reinstated citizens who had previously registered to vote will not have to register again. *Id.* During the same period of May 21, 2007 through June 1, 2007, reinstated citizens will be able to request absentee ballots, and those who have previously registered to vote and requested absentee ballots will receive them directly in the mail. *Id.* ¶ 15. The Cherokee Nation District Court also ordered that absentee ballots requested by those who have been reinstated shall be mailed no later than June 11, 2007. *Id.* ¶ 16. This means that, like other citizens of the Cherokee Nation, all Freedmen descendants who have been reinstated and who reside within the boundaries of the Cherokee Nation may vote, if they are of voting age, if they are registered, and

if they so desire, in their districts or by absentee ballot in the June General Election for Tribal Council members running to represent their respective Districts and for Principal Chief and Deputy Principal Chief. *Id.* Again, like other citizens of the Cherokee Nation, Freedmen descendants who have been reinstated and who reside outside a District of the Cherokee Nation may vote for at-large Tribal Council candidates and Principal Chief and Deputy Principal Chief if they are registered to vote and timely request an absentee ballot. *Id.* ¶ 17. In sum, reinstated Freedmen descendants are being afforded precisely the same opportunities to register and vote (whether in person or by absentee ballot) as those citizens who can trace an Indian ancestor to the Cherokee Blood Roll. *Id.* ¶ 20.

Plaintiffs in this action have requested, among other relief, that this Court “enjoin the Cherokee Nation Defendants from denying Plaintiffs their full citizenship rights and from holding any election as to which Plaintiffs are denied the right to vote or run for office based solely upon their status as Cherokee Freedmen.” Mem. In Supp. Pls.’ Mot. at 15. As the preceding facts demonstrate, however, Plaintiffs already have obtained the relief of reinstated citizenship rights in the Cherokee Nation courts.⁴ Under the terms of the May 14 Tribal Order, Plaintiffs and all Cherokee Freedmen descendants have had their citizenship rights reinstated, including the right to vote in the June General Election. Knight Aff. ¶¶ 5, 20. Yet, Plaintiffs have refused to withdraw their Motion. The effect of their refusal is that the Court is being asked

⁴ With respect to the claimed right to “run for office”, as explained more fully in the Argument section of this Memorandum, both the 1976 and 1999 Cherokee Nation Constitutions preclude anyone other than original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls from running for the offices of Principal Chief, Deputy Principal Chief, and the Council of the Cherokee Nation. Thus, the May 14 Tribal Order's restoration of those citizenship rights the Freedmen had prior to the March 3, 2007 Amendment did not include the right to run for office. The Tribal Order reinstated the Freedmen descendants’ “rights that they previously held as citizens [prior to the March 3, 2007 Constitutional Amendment], including the right to vote in the upcoming Cherokee national election.” May 14 Tribal Order at 1-2. Similarly, Delawares and Shawnees who are not descendants of original enrollees are also not eligible to run for office.

to *change* rather than *preserve* the status quo by enjoining an election in which Plaintiffs and all Cherokee Freedmen have the right to participate.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIMS IN THIS MOTION AND THE CLAIMS PLAINTIFFS HAVE BROUGHT AGAINST THE CHEROKEE NATION IN THEIR COMPLAINT

This Court does not have subject matter jurisdiction over the claims in Plaintiffs' Complaint and their Motion for three independent reasons. First, the May 14 Tribal Order reinstating the Freedmen descendants' citizenship status to that which existed prior to the March Amendment conferred the right to vote in the June General Election. That order eliminated any case or controversy with regard to the claims in Plaintiffs' Complaint and the injunctive relief requested in Plaintiffs' Motion. Second, the election that Plaintiffs are attempting to enjoin in their Motion (the June General Election) is an action wholly distinct from actions challenged in the Complaint (recognition of the results of *the May 24, 2003* election). Third, Plaintiffs do not have standing to sue under the Treaty of 1866, the Thirteenth Amendment to the United States Constitution, or the Indian Civil Rights Act.

A. The May 14 Tribal Order eliminated any case or controversy

Article III, § 2 of the United States Constitution limits the subject matter jurisdiction of federal courts to actual cases and controversies. U.S. Const. art. III, § 2. To satisfy Article III's standing requirements, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1856 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 751(1984)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

In their Motion, Plaintiffs argue that they will “suffer immediate and irreparable harm if the Cherokee Nation strips them of their citizenship rights.” Mem. In Supp. Pls.’ Mot. at 11. However, any case or controversy once brought by the Plaintiffs in their Motion has been eliminated by the May 14 Tribal Order reinstating their citizenship rights, including their right to vote. Plaintiffs are permitted to vote in the June General Election and they therefore have suffered no injury-in-fact. Knight Aff. ¶ 12. Plaintiffs cannot show imminent injury because they do not know how the *Nash* case will be resolved. Plaintiffs also cannot demonstrate that a favorable ruling on their Motion will redress their injuries because the May 14 Tribal Order reinstating their full citizenship rights has already provided them with the relief they seek in their Motion. Thus, without a case or controversy, this Court does not have subject matter jurisdiction to adjudicate these claims.

B. The Court lacks subject matter jurisdiction over Plaintiffs’ Motion because it raises issues outside the scope of the Complaint

Plaintiffs’ Complaint and the injunctive relief requested in their Motion are not sufficiently related to confer subject matter jurisdiction on this Court. For this Court to have jurisdiction over Plaintiffs’ Motion, “the motion must be closely related to the facts, legal issues, and parties addressed in the plaintiffs’ amended complaints.” *Adair v. England*, 193 F. Supp. 2d 196, 201 (D.D.C. 2002) (“Even when a motion for a preliminary injunction is predicated on a complaint, if the motion raises issues different from those presented in the complaint, the court has no jurisdiction over the motion.”); *LeBoeuf, Lamb, Green & Macrae, LLP v. Abraham*, 180 F. Supp. 2d 65, 69 (D.D.C. 2001) (same). In particular, Plaintiffs “must necessarily establish a relationship between the injury claimed in the party’s motion and the conduct asserted in the complaint.” *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994). As the Fourth Circuit observed in *Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997):

The purpose of interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends it was or will be harmed through the illegality alleged in the complaint. Thus, a preliminary injunction may never issue to prevent an injury or harm which not even the moving party contends was caused by the wrong claimed in the underlying action.

In such a situation, “the court has no jurisdiction over the motion.” *Adair*, 193 F. Supp. 2d at 200.

The conduct challenged in the Complaint – the Cherokee Nation Defendants and Federal Defendants’ recognition of the results of the May 24, 2003 election (“2003 Election”) – is not the conduct that will allegedly harm Plaintiffs during the June General Election. Plaintiffs allege that the Cherokee Nation Defendants’ actions with respect to the 2003 Election and the events immediately surrounding it violate “the United States Constitution, the 1970 Principal Chiefs Act, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians, March 21, 1866, 14 Stat. 755, and the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.” Sec. Am. Compl. ¶ 67. Plaintiffs’ Motion, by contrast, seeks to enjoin the Cherokee Nation “from holding *any* election as to which Plaintiffs are denied the right to vote or run for office” Mem. In Supp. Pls.’ Mot. at 15 (emphasis added). To say nothing of the impropriety of such open-ended relief (an injunction against *any* future election), the current claim is entirely different from the claim asserted in the Complaint. Plaintiffs seek to enjoin a different election from the one complained of in their Complaint, to be held some four years later, in which the Plaintiffs have the right to vote. When, as here, a “motion is based on new assertions of mistreatment that are entirely different from the claim raised and the relief requested in” the previous lawsuit, they “cannot provide the basis for a preliminary injunction.” *Devose*, 42 F.3d at 471.

C. This case is not justiciable because Plaintiffs do not have standing to sue the Cherokee Nation Defendants under the Treaty of 1866, the Thirteenth Amendment to the Constitution, or the Indian Civil Rights Act

Finally, this Court does not have subject matter jurisdiction over Plaintiffs' claims against the Cherokee Nation Defendants because Plaintiffs do not have standing to sue under the Treaty of 1866, the Thirteenth Amendment, or the Indian Civil Rights Act ("ICRA"); Congress never created a private right of action against Indian tribes under these laws. "Standing to sue is part of the common understanding of what it takes to make a justiciable case," *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 102 (1998), and is an essential and unchanging part of the case-or-controversy requirement of Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

The Supreme Court has found that Indian tribes are a separate people, with the power to regulate their internal and social relations; they have the power to make their own substantive law in internal matters, including membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citing *Roff v. Burney*, 168 U.S. 218 (1897)). Nevertheless, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. *Id.* at 56. Congress may abrogate a sovereign's immunity "only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Without unequivocal congressional authorization, Indian Nations are exempt from suit under statutes that apply to them. *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999).

Under *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116-20 (1960), statutes of "general applicability" apply to all persons, including Indians. (A general statute presumptively governs Indian tribes and will apply to them absent some superseding

indication that Congress did not intend tribes to be subject to that legislation.).⁵ However, “whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions.” *Fla. Paralegic Ass’n*, 166 F.3d at 1130. The 1866 Treaty, the 13th Amendment, and the ICRA may apply to the Cherokee Nation, but Congress has not created a remedy for Plaintiffs under these laws.

1. Plaintiffs do not have standing to sue the Cherokee Nation under the 1866 Treaty

Article XIII of the Treaty with the Cherokee Indians, March 21, 1866, 14 Stat. 755 (the “1866 Treaty”) unambiguously establishes that the tribunals of the Cherokee Nation should retain exclusive jurisdiction for cases arising within their country in which members of the nation are the only parties:

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...shall be the only parties, or where the cause of action shall arise in the Cherokee nation.

Ex. 5. The events in this case all transpired within tribal land and solely involve members of the Cherokee Nation. Accordingly, the Cherokee Nation retains exclusive jurisdiction over this matter and Plaintiffs have no standing to bring this action in this forum.

Moreover, Congress never authorized a private right of action to enforce the 1866 Treaty. Courts have found that the ICRA and the Americans with Disabilities Act (“ADA”) apply to Indian Tribes, but have held that Congress did not abolish tribal sovereign immunity or explicitly

⁵ A general statute applies to Indian tribes unless its application would (1) abrogate rights guaranteed under an Indian treaty, (2) interfere with purely intramural matters touching exclusive rights of self-government, or (3) contradict Congress’s intent. *Donovan v. Coer d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

subject tribes to suit under either of those statutes. *Santa Clara Pueblo*, 436 U.S. at 56 (finding that the ICRA only provided a remedy for habeas corpus); *Fla. Paralegic Ass'n*, 166 F.3d at 1128-31. Similarly, while the 1866 Treaty applies to the Cherokee Nation, Congress never explicitly authorized a private right of action to enforce its terms.

Also, the express language of the 1866 Treaty created a private right of action for certain groups of people, but not the Freedmen descendants, which evidences that a private right of action was never intended for this group. *See* Ex. 5, 1866, art. VII (providing a private right of action for inhabitants residing in the district described in article IV).

Even if the treaty was ambiguous about who may assert private causes of action, the Indian canons of construction mandate that ambiguities in federal statutes and treaties are to be resolved in favor of the Indians. *See Albery v. United States*, 162 U.S. 499, 500-01 (1896) (“While this article of the treaty gave him the rights of a native Cherokee, it did not, standing alone, make him an Indian.”) FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 119 (2005), *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (noting that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”); *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *City of Roseville v. Norton*, 348 F. 3d 1020, 1032 (D.C. Cir. 2003).

Furthermore, when Congress wanted to subject the Cherokees to suits by Cherokee Freedmen in federal courts under the Treaty of 1866, it passed an Act for that specific purpose. In 1890, Congress authorized the U.S. Federal Court of Claims to hear suits by the Freedmen against the Cherokee Nation for recovery of federal funds. Sec. Amend. Compl. ¶ 26. These Plaintiffs cannot sue the Cherokee Nation without a similar Act of Congress subjecting the tribe to private suits.

2. Plaintiffs do not have standing to sue the Cherokee Nation under the Thirteenth Amendment

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. *Santa Clara Pueblo*, 436 U.S. at 56; *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (stating that the Fifth Amendment to the U.S. Constitution did not “operate upon” “the powers of local self-government enjoyed” by the tribes). Federal courts extended the *Talton* holding to other Constitutional Amendments, including the First, Fifth, and Fourteenth. *See Santa Clara Pueblo*, 436 U.S. at 56 (citations omitted).

When it passed the ICRA, Congress exercised its authority to impose restrictions upon tribal self-government with Title I of the statute. 25 U.S.C. § 1302. It contains similar, but not identical, provisions to the Bill of Rights and Fourteenth Amendment. However, the only remedial provision expressly supplied by Congress was the privilege of the writ of habeas corpus, made available to any person in a U.S. court to test the legality of his detention by order of an Indian Tribe. *Id.* at § 1303. Title I of the ICRA did not contain language analogous to that of the Thirteenth Amendment, nor did anything on the face of the ICRA purport to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. *See Santa Clara Pueblo*, 436 U.S. at 59. Congress never created an explicit private right of action to subject Indian Nations to suit under the Thirteenth Amendment on its face or in any other statute. Therefore, Plaintiffs do not have standing to sue the Cherokee Nation under the Thirteenth Amendment to the U.S. Constitution, and cannot move to enjoin the Nation’s elections on these grounds.

3. Plaintiffs do not have standing to sue the Cherokee Nation under the ICRA

Plaintiffs also lack standing to sue under the ICRA. In *Santa Clara Pueblo v. Martinez*, the Supreme Court held that suits against Indian tribes under the ICRA are barred by the absence of an explicit provision subjecting Indian tribes from suit under the statute. 436 U.S. at 59 (finding that the only remedial provision in the statute, explicitly provided by Congress, was the privilege of the writ of habeas corpus). The Court reasoned that “the structure of the statutory scheme and the legislative history of Title I of the ICRA suggest that Congress’ failure to provide remedies other than habeas corpus was a deliberate one.” *Id.* at 61 (citations omitted).

II. AS A RESULT OF THE MAY 14 TRIBAL ORDER, PLAINTIFFS’ MOTION IS MOOT

Plaintiffs’ entire motion for a preliminary injunction has been mooted by the May 14 Tribal Order. “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citations omitted). However, as a result of the Tribal Order, Plaintiffs’ requested relief has been granted; the status quo has been preserved. When, as here, “there is no available remedy” for Plaintiffs’ claim, it is “nonactionable and moot.” *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 773-774 (7th Cir. 2002) (holding that plaintiff’s suit relating to the elimination of his job and his transfer to another job was mooted when the plaintiff was subsequently discharged).⁶

⁶ See also *Palumbo v. Deposit Bank*, 758 F.2d 113, 116 (3d Cir. 1985) (affirming that a suit to set aside the election of a board of directors as contrary to the bylaws was mooted by a valid vote of the shareholders to change the bylaws and merge the defendant bank with another firm); *Levin v. Attorney Registration & Disciplinary Comm’n*, 74 F.3d 763, 767 n. 5 (7th Cir. 1996) (affirming that an attorney’s suit challenging attorney disciplinary rules was mooted when the attorney was subsequently disbarred.); *Alexander v. City of Minneapolis*, 928 F.2d 278, 280 (8th Cir. 1001) (granting motion mooting that a Plaintiff bookstore owner’s challenge to a zoning ordinance was mooted when Plaintiff’s bookstore was seized upon his conviction for racketeering).

In their current Motion, Plaintiffs are seeking an injunction preventing the Cherokee Nation from “denying Plaintiffs their full citizenship rights and from holding any election as to which Plaintiffs are denied the right to vote or run for office based solely upon their status as Cherokee Freedmen.” Mem. In Supp. Pls.’ Mot. at 15. However, in light of the May 14 Tribal Order, an order by this Court enjoining the Cherokee Nation “from denying Plaintiffs’ their full citizenship rights” would afford Plaintiffs’ no relief they do not currently have. Plaintiffs can hardly argue that, without injunctive relief, they will be deprived of their “most sacred right of citizenship – the right to participate in government,” Mem. In Supp. Pls.’ Mot. at 14, when the May 14 Tribal Order explicitly reinstates this right and they may vote in the next election. Because the Tribal Order reinstated Plaintiffs’ status as citizens, including their right to vote, preserving “relative positions of the parties” here provides no possible relief for the Plaintiffs.

III. BECAUSE PLAINTIFFS SEEK TO ENJOIN A TRIBAL ELECTION, THE RELIEF THEY SEEK IS BEYOND “EXTRAORDINARY”

Plaintiffs face the same procedural obstacles they did in their unsuccessful attempt to enjoin the March Special Election. Even under normal circumstances, preliminary injunctions are a “drastic and unusual judicial measure” requiring a “clear and convincing” showing by the moving party. But this is no ordinary injunction case: Plaintiffs are seeking to enjoin the election of the Cherokee Nation, a tribal sovereign. Beyond making a “clear and convincing” showing that they warrant such “extraordinary” relief, Plaintiffs must also show that their complained-of harm outweighs the harm of interfering with the fundamental manifestation of tribal sovereignty: the right of the Cherokee Nation to determine its own membership. In seeking to prevent citizens of the Cherokee Nation from exercising their sovereign right to self-government, Plaintiffs must shoulder the heaviest burden imaginable to prove that a preliminary injunction is warranted. They cannot do so.

A. Preliminary injunctions are “extraordinary,” “drastic and unusual relief” that should be “sparingly exercised”

Under any circumstances, preliminary injunctions are considered “extraordinary” relief, *Sociedad Anonima Vina Santa Rita v. U.S. Dep’t of the Treasury*, 193 F. Supp. 2d 6, 13 (D.D.C. 2001) (citations omitted), a “drastic and unusual judicial measure,” *Marine Transp. Lines, Inc. v. Lehman*, 623 F. Supp. 330, 334 (D.D.C. 1985) that “should be sparingly exercised.” *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969). Such “extraordinary,” “drastic,” and “unusual” relief should not be granted “absent a clear and convincing showing by the moving party.” *Role Models America, Inc. v. White*, 193 F.Supp. 2d 76, 80 (D.D.C. 2002) (citations omitted).

B. Because Plaintiffs seek in part to enjoin an election, they bear a heavier burden

Although all injunctions are “drastic” relief, Plaintiffs must meet an even higher standard here: “[o]ur law recognizes that election cases are different from ordinary injunction cases. Interference with impending elections is extraordinary. . . .” *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (citations omitted). As this court observed at the February 21 oral argument, “the judicial branch of government properly hesitates to prevent citizens from voting on matters raised by an exercise of the right to petition government. To do otherwise would be to enter a political thicket studded with thorns.” Ex. 3, Hr’g Tr. at 18:16-19; *see also Burton v. Georgia*, 953 F.2d 1266, 1268 (11th Cir.1992) (“principles of federalism limit the power of federal courts to intervene in state elections. . . .”); *Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 14 (1st Cir. 2004); *Southwest Voter Registration Educ. Project*, 344 F.3d at 918 (“[A] federal court cannot lightly interfere with or enjoin a state election.”) (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Elections are so vital to the democratic process that courts will not enjoin an election even in the face of an “undisputed

constitutional violation.” *Southwest Voter Registration Educ. Project*, 344 F.3d at 918 (citing *Ely v. Klahr*, 403 U.S. 108, 113, 115 (1971); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (*per curiam*)). Because “[t]he right to vote is the very essence of democracy,” Plaintiffs can only succeed in enjoining this election if they demonstrate “an immediate and irreparable violation of constitutional rights would not otherwise be prevented.” Ex. 3, Hr’g Tr. at 36:21-25.

C. Because the injunction of a tribal election encroaches on tribal sovereignty, Plaintiffs must meet an even higher standard than that needed to enjoin a state or local election

While the injunction of any election is highly disfavored, this principle applies with greater force to tribal elections because of tribal sovereignty. Indian tribes are “distinct, independent political communities,” pre-existing the Constitution, with their own sovereign authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). They possess “inherent powers of a limited sovereignty which has never been extinguished.” *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)) (emphasis omitted). Although tribes have a protectorate relationship with the United States, it is “settled doctrine of the law of nations...that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger, and taking its protection.” *Worcester v. Georgia*, 31 U.S. 515, 560-61 (1832). Consequently, unlike state or local governments, “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependant status.” *Wheeler*, 435 U.S. at 323.

The hallmark of tribal sovereignty is “a tribe’s right to define its own membership for tribal purposes” which “has long been recognized as central to its existence.” *Santa Clara*

Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). Indeed, “tribal elections...lie[s] at the heart of the continuing right of Indian tribes to govern their own affairs...” *Boe v. Fort Belknap Indian Cmty.*, 642 F.2d 276, 279 n.7 (9th Cir. 1981) (refusing to intervene in a tribal election notwithstanding the Plaintiffs’ “attempt to involve the federal courts”); *Smith v. Babbitt*, 875 F. Supp. 1353, 1360 (D. Minn. 1995) (“The great weight of authority holds that tribes have exclusive authority to determine membership issues.”) ((citing *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir.1957), *cert. denied*, 357 U.S. 924 (1958); *Santa Clara Pueblo*, 436 U.S. at 72)). Because of their unique history and their retained sovereignty, Indian tribes have greater independence than state governments, thus requiring movants to make a stronger showing to intervene in tribal elections. *See, e.g., Wheeler v. United States Dep’t of Interior*, 811 F.2d 549, 551 (D. Okl. 1987) (“The Federal Government has. . .adopted a policy of encouraging Indian self-government [and in adopting the Indian Civil Rights Act] elected to impose less supervision on tribal administration of civil rights disputes than it imposes on federal and state governments.”) Courts have been particularly wary of interfering with tribal elections for fear of encroaching on tribal sovereignty. *Santa Clara Pueblo*, 436 U.S at 72 n.32 (“The judiciary should not rush to create causes of action that would intrude on these delicate matters”). Therefore, because Plaintiffs seek to enjoin a tribal election, they must meet a higher standard than the already “extraordinary” showing required to enjoin a normal election.

D. At a minimum, Plaintiffs must show that they have a “substantial case on the merits” and, absent an injunction, would suffer “irreparable harm”

In order to succeed on a motion for a preliminary injunction, Plaintiffs “must [demonstrate] (1) a substantial likelihood of success on the merits, (2) that [they] would suffer irreparable injury if the injunction [were] not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by

the injunction.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 (quoting *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).⁷

A court may balance weakness in one or more of the four factors against a particularly strong showing in one of the other factors. *See CityFed Fin. Corp.*, 58 F.3d at 747. Still, two of these factors – success on the merits and irreparable harm – are crucial. Although a “particularly strong likelihood of success on the merits” may entitle a movant to relief upon “a relatively slight showing of irreparable injury,” some showing of irreparable injury is always required, “since the basis for injunctive relief in the federal courts has always been irreparable harm.” *Id.*(quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)); *see also Sea Containers, Ltd. V. Stena AB*, 890 F.2d 1208, 1210-1211 (D.C. Cir. 1989) (denying preliminary injunction where the movant failed to carry the burden of showing sufficient irreparable harm). Likewise, a court may accept a showing that the movant has a “substantial case on the merits” instead of the probability of success on the merits that is ordinarily required, but only when all of “the other three factors strongly favor [the requested] interim relief.” *WMATC v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977).

⁷ Plaintiffs’ memorandum cites an older version of this test that is no longer widely used in the District of Columbia Circuit. Mem. In Supp. Pls.’ Mot. at 5. The majority of courts follow the stricter language of *CityFed*. *See, e.g., Carabillo v. Ullico Inc. Pension Plan and Trust*, 198 Fed. Appx. 1, 2 (D.C. Cir. 2006); *Katz v. Georgetown Univ.*, 246 F.3d 685, 687-88 (D.C. Cir. 2001).

IV. PLAINTIFFS HAVE NOT MADE A “CLEAR AND CONVINCING” SHOWING THAT THE BALANCE OF THE FOUR FACTORS WARRANTS INFRINGING ON CHEROKEE SOVEREIGNTY BY ENJOINING THE JUNE GENERAL ELECTION

A. Plaintiffs cannot demonstrate “a substantial likelihood of success on the merits”

1. The May 14 and May 17 Tribal Orders and the March Special Election moot Plaintiffs’ underlying cause of action

Plaintiffs cannot demonstrate “a substantial likelihood of success on the merits” because their underlying cause of action is moot in at least two respects. First, the relief requested by the Complaint has been mooted by the May 14 and May 17 Tribal Orders. Plaintiffs’ Complaint seeks to enjoin elections “without a vote of all citizens, including the Freedmen,” Sec. Am. Comp. ¶ 74, and to enjoin further actions “to disenfranchise or otherwise strip the membership rights of the Freedmen.” Sec. Am. Comp. ¶ 75. The May 14 and May 17 Tribal Orders, however, reinstate the Freedmen descendants’ right to vote, and the June General Election has no ballot measure that could strip the Freedmen descendants of membership rights. Therefore, because the underlying relief requested by the Complaint has already been granted, there is no harm “imminent or irreparable at law” and Plaintiffs’ Complaint is “not appropriate subject matter for injunctive relief.”

The Complaint also seeks to enjoin the Cherokee Nation (i) from recognizing the results of the 2003 Election “until such time as a lawful election that includes all citizens of the Nation,” Sec. Am. Compl. ¶ 73. By virtue of the March Special Election, this relief has already been granted. Subsequent to the contested 2003 Election, the Cherokee Supreme Court determined that Freedman descendants were entitled to vote as long as they could trace their lineage to any of the Dawes Commission Rolls. *See Allen v. Cherokee Nation Tribal Council*, No. JAT 04-09 (Cherokee Nation Jud. App. Trib., Mar. 7, 2006). The Cherokee Nation complied with that

decision and allowed Freedman descendants the right to vote until the March Special Election (in which the Freedman descendants voted) determined through the March Amendment that Freedman descendants are not citizens unless they can trace their lineage to the Cherokee Blood Roll. Moreover, this relief will be granted again in the June General Election, a “lawful election that [will include] all citizens” of the Cherokee Nation.

Even if the Freedman descendants should have been allowed to vote in 2003, injunctive relief is no longer possible because the March Special Election changed the requirements for Cherokee citizenship. As Plaintiffs themselves have argued, it was the March Special Election that had the potential to – and in fact did – eliminate their citizenship rights, at least until issuance of the May 14 Tribal Order, which has reinstated them temporarily. Pls.’ Repl. In Supp. Of Their Mot. For Prelim. Inj., Feb. 19, 2007, at 1 (“the proposed ballot measure, if passed and enacted, would disenfranchise the Cherokee Freedmen...”). Indeed, Plaintiffs had argued that if this Court did not enjoin the March Special Election, the results would be “fatal” to their claims. Pls.’ Feb. 1, 2007 Mot. at 5. The Court denied that motion; the March Special Election occurred; Plaintiffs voted in that election; and the citizens of the Cherokee Nation voted to amend the Cherokee Constitution. The effect of the amendment was to remove Plaintiffs’ citizenship rights. Although the Tribal Order has reinstated such rights pending disposition of the merits of the *Nash* plaintiffs’ claims, or until further order of the District Court of the Cherokee Nation, the claim that Plaintiffs were denied the right to vote in the 2003 Election is moot. Moreover, the 2003 Election will be superseded by the upcoming June General Election. As of that time, no aspect of the 2003 Election will still be operative.

2. The plain language of the 1866 Treaty cannot confer citizenship upon Freedmen descendants because it has been superseded by the Five Tribes Act

Plaintiffs argue they are likely to succeed on the merits because the “March 3 amendment constitutes a blatant violation of both the Thirteenth Amendment and the Treaty of 1866.” Mem. In Supp. Pls.’ Mot. at 9. In particular, Plaintiffs hinge their alleged rights to citizenship on the Dawes Rolls and the language of Article IX of the Treaty of 1866 between the Cherokee Nation and the United States (“Article IX”). Article IX provides:

They [the Cherokee Nation] 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

Treaty with the Cherokee Indians, July 19, 1866, U.S.-C.N., art. IX. (emphasis added).

Plaintiffs’ core argument is that the phrase “and their descendants” conferred a right of citizenship in the Cherokee Nation on anyone who can show lineage to the referenced freedmen and free colored persons *ad infinitum*. On the basis of this single clause, Plaintiffs conclude that the 1866 Treaty “requires no interpretation; its plain text provides that the Cherokee Freedmen are granted ‘all the rights of native Cherokees.’” Mem. In Supp. Pls.’ Mot. at 10.

But Plaintiffs’ expansive interpretation of “and their descendants” is unequivocally contradicted by the policy reasons for the initial passage of Article IX. Federal courts, including the Supreme Court, have emphasized that Article IX was intended to protect the Cherokee Nation from unlimited claims. *See Whitmire v. U.S.*, 46 Ct. Cl. 227, 236 (Ct. Cl. 1911), *overruled on other grounds by Cherokee Nation v. Whitmire*, 223 U.S. 108 (1912); *see also Lowe v. Fisher*, 223 U.S. 95, 99 (1912). In *Whitmire*, the Court noted that it had previously decided in its February 18, 1896 decree that Article IX’s words were “intended for the protection

of the Cherokee Nation as a limitation upon the number of persons who might avail themselves of the provisions of the treaty, and consequently that they referred to both the freedmen and the free colored persons previously named in the article; that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree..." *Id.* Thus, the protectionist impetus for Article IX is inconsistent with Plaintiffs' overly broad interpretation of the "and their descendants" clause.

Furthermore, Plaintiffs cannot rely on the "plain text" of Article IX because it is no longer viable. To clarify Article IX's obvious ambiguity, Congress enacted The Five Tribes Act, which changed the very language upon which Plaintiffs' argument turns.⁸ Congress moved the term "and their descendants" from the end of the paragraph, thereby changing the term it modified to "slaves of Cherokee citizens" rather than modifying all of those individuals who could come within the definition of Freedmen.⁹ By moving the time-sensitive qualifiers to the end of the paragraph, the descendant beneficiaries were now limited such that only descendants who were either residents of the Nation on August 11, 1866, or who returned to the Nation by February 11, 1867, would be considered Freedmen.

Controlling federal case law supports the interpretation that Article IX was superseded by the Five Tribes Act. In *United States ex rel. Garfield, v. Lowe*, 34 App. D.C. 70, No. 1913 1909 WL 21538 at *4 (D.C. Court of Appeals 1909), *aff'd. sub nom, United States ex rel. Lowe v.*

⁸ The Five Tribes Act provides, in pertinent part: "The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of Interior." The Five Tribes Act, ch. 1876, § 3, 34 Stat. 137, 138 (1906) (hereinafter "The Five Tribes Act").

Fisher, 223 U.S. 95 (1912), the court found that the Five Tribes Act eliminated any doubt about the proper construction of Article IX because “it constitutes a legislative interpretation of, and supersedes *pro tanto*, the [1866] treaty.” *Id.* The court went on to determine that:

[T]he benefits of citizenship were conferred only upon free colored persons, or the slaves of Cherokee citizens and their descendants, who were actual bona fide residents of the Cherokee Nation August 11th, 1866, or who actually returned and established such residence in the Cherokee Nation within six months from that time.

Garfield, 1909 WL 21538 at *4. Because Article IX has “undoubtedly” been superseded by the Five Tribes Act, Plaintiffs’ right to citizenship, if any, cannot possibly be derived from their status as descendants of Article IX Freedmen. Even if the Five Tribes Act was ambiguous about the proper construction of Article IX, the Indian canons of construction require that ambiguities in treaties and statutes are to be construed in favor of the Indians. *See* COHEN, HANDBOOK OF FEDERAL INDIAN LAW 119; *Montana*, 471 U.S. at 766. Because the 1866 Treaty does not confer upon Plaintiffs a right of citizenship, then this right, if it exists, must flow from Cherokee Nation law. However, it is well-settled that a sovereign nation may amend its constitution to deprive current members of citizenship. This is precisely what happened on March 3, 2007. Without some right to citizenship derived from federal law, Plaintiffs are bound, as are all Cherokee citizens, by the Cherokee Constitution.

Plaintiffs cannot demonstrate a “substantial likelihood” that they have an unequivocal right to Cherokee citizenship. Because they are unlikely to succeed on the merits, they cannot meet the criteria required for injunctive relief.

⁹ Further, new qualifiers were added to both free colored persons and the slaves of the Cherokee and the descendants of said slaves such that all three groups of individuals were now limited to those who were bona fide residents of the Nation on August 11, 1866, or who returned to the Nation by February 11, 1867. The Five Tribes Act, ch. 1876, § 3.

3. Plaintiffs are not eligible to run for office under the 1976 and 1999 Constitutions

In their current Motion, Plaintiffs request, *inter alia*, that this Court enjoin the Cherokee Defendants from “holding any election as to which Plaintiffs are denied the right to . . . run for office based solely upon their status as Cherokee Freedmen.” Mem. In Supp. Pls.’ Mot. at 15. This is beyond the harm complained of or the relief requested in their Complaint, where Plaintiffs’ merely ask that this Court enjoin the Cherokee Defendants “from taking further actions to disenfranchise or otherwise strip the membership rights of the Freedmen.” Sec. Am. Compl. ¶ 75. As noted above, this Court does not have subject matter jurisdiction where the “motion is based on new assertions of mistreatment that are entirely different from the claim raised and the relief requested in” the previous lawsuit. *Devose*, 42 F.3d at 471.

However, even assuming that this Court has subject matter jurisdiction over Plaintiffs’ Motion, Plaintiffs are not eligible to run for office because both the 1999 and 1976 Cherokee Constitutions, which control this issue, require candidates for all offices to be Cherokees by blood, *i.e.*, “original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls” Ex. 6, Cherokee Nation Const. art. IV, § 1; Cherokee Nation Const. of 1976, art. III, § 1 (amended June 20, 1987) (“all members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls. . . .” The 1999 Constitution provides, in pertinent part, that “[t]he Council shall consist of seventeen (17) members, who are citizens by blood of the Cherokee Nation,” and it provides the same requirements for Principal Chief and Deputy Principal Chief. Ex. 6, Cherokee Nation Const., art. VI, § 3; art. VII, §§ 2-3. Plaintiffs may argue that the 1999 Constitution does not control because it has not been formally recognized by the Department of the Interior – a legal contention with which the Cherokee Nation strongly disagrees. However, even assuming that the 1976 Constitution controls,

Plaintiffs still have no argument that they are eligible to run for office because the 1976 constitution contains the same requirements in this regard as the 1999 Constitution. Ex. 6, Cherokee Nation Const. of 1976, art.VI, §§ 2-3; art V, § 3. Indeed, as Plaintiffs note in their Complaint, Article VI, Section 2 of the 1976 constitution “limits the candidacy for Council to members by blood.” Sec. Am. Compl. ¶ 40. Moreover, a June, 20, 1987 constitutional amendment to the 1976 Constitution similarly provided that “the council shall consist of fifteen (15) members who are members by blood of the Cherokee Nation of Oklahoma”. Ex. 7, Cherokee Nation Const. art. V, § 3 (amended June 20, 1987). In short, under the 1999 and 1976 Cherokee Nation Constitutions, Plaintiffs are not eligible to run for any office because they are not Cherokees by blood as defined by these Constitutions.

While not relevant to Plaintiffs’ claims against the Cherokee Nation Defendants, if Plaintiffs are arguing that the *Federal Defendants* had some sort of duty to protect the Freedmen descendants’ right to run for office, they should have challenged the Federal Defendants’ role with regard to that provision of the tribal constitution when it was first passed (1976) or when it was revised (1987). The relevant statute of limitations, 28 U.S.C. § 2401(a), bars any civil action commenced against the United States unless the complaint is filed within six years after the right of action first accrues. Furthermore, as this Court recognized in its December 19, 2006 Memorandum Opinion and Order, this Court has no jurisdiction to entertain violations of the Cherokee Constitution: “Thus, to the extent that the Freedmen complain of violations of ICRA or the Cherokee Constitution, the court agrees that such claims are not properly before the court.” Finally, Plaintiffs’ belated challenge to the Constitution is barred under the doctrine of laches, as they waited over 30 years to assert this argument. *See, e.g., United States v. Philip Morris Inc.*, 300 F.Supp. 2d 61, 72 (D.D.C. 2004) (“The doctrine of laches bars relief to parties

who delay the assertion of their claims for an unreasonable time.”)(citations and quotations omitted.)

Therefore, because both the 1999 and 1976 Cherokee Nation Constitutions preclude anyone other than original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls from running for the offices of Principal Chief, Deputy Principal Chief, and the Council of the Cherokee Nation, Plaintiffs are not eligible to run for office in the upcoming election. They therefore cannot succeed on merits of their claim that because they should be able to run for office, the June General Election should be enjoined.

B. Plaintiffs cannot demonstrate irreparable harm because the May 14 Tribal Order reinstated their citizenship rights, including the right to vote in the June General Election

Preventing irreparable harm in the future is “the *sine qua non* of injunctive relief.” *Ne. Florida Chapter of Ass'n of Gen. Contractors of Amer. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978)). The District of Columbia Circuit “has set a high standard for irreparable injury”; in particular, “the injury must be both certain and great. . . .” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. (internal citations and quotations omitted). Further, even “substantial” injuries do not meet this test; “[t]he key word in this consideration is irreparable.” *Id.* (internal citations and quotations omitted). As such, if the plaintiff can seek “corrective relief” in “the ordinary course of litigation” this fact will “weigh heavily against a claim of irreparable harm.” *Id.* at 297-298 (internal citations and quotations omitted).

As discussed above, Plaintiffs cannot demonstrate irreparable injury here because the May 14 Tribal Order reinstated their citizenship rights. Therefore, not only have Plaintiffs failed

to articulate an injury that is “certain and great” – they have failed to articulate any injury whatsoever.

Moreover, because interference with impending elections is extraordinary, courts have established further tests to determine whether allowing an election to proceed will result in irreparable injury: (1) whether there is a fair and adequate state remedy, *Family Found, Inc. v. Brown*, 9 F.3d 1075, 1078 (4th Cir. 1993); *Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988); (2) whether the party seeking the injunction has availed itself of that remedy, *Rossello-Gonzalez*, 398 F.3d at 16; and (3) whether the procedures of the election will disenfranchise (or have disenfranchised when post-election relief is sought) a discrete set of voters. *Id.* Here, Plaintiffs have not met – and indeed, cannot meet – these three tests.

First, a “fair and adequate” tribal remedy exists.¹⁰ “Absent any indication of bias, we will not presume the Tribal Court to be anything other than competent and impartial.” *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1301 (8th Cir. 1994). The Cherokee courts are open and available to Plaintiffs here. The laws of the Cherokee Nation provide forums for the adjudication of disputes relating to the Nation’s elections.¹¹ Cherokee election law authorizes pre-election challenges to initiative and referendum petitions based upon the subject matter of the petition and on the procedures used to collect signatures.¹²

¹⁰ The Cherokee Nation has yet to file its Answer to Plaintiffs’ Second Amended Complaint, but anticipates moving to dismiss on multiple grounds, including, but not limited to, Plaintiffs’ failure to exhaust tribal remedies.

¹¹ See Ex. 8, 2003 Cherokee Nation Constitution Arts. III (Bill of Rights), VIII (establishing the Cherokee Nation’s Judiciary), IX (Elections) & XV (reserving the peoples’ power to propose laws and amendments to the Constitution by initiative and to approve or reject any act of the Council by referendum); Ex. 6, 1976 Cherokee Nation Constitution Arts. II (Bill of Rights), VII (establishing the Cherokee Nation’s Judiciary), IX (Elections), XV (Initiative, Referendum, and Amendment); Ex. 9, C.N. Leg. Act No. 39-05 (Cherokee Nation Election Code); and Ex. 11, C.N. Leg. Act No. 15-04 (The Referendum and Initiative Procedures Act). As laws of the Cherokee Nation, this Court may take judicial notice of their existence and content.

The Cherokee Nation Election Code authorizes post-election challenges.¹³ Finally, the Cherokee Nation courts exercise judicial review over Cherokee laws and are willing to strike them down when appropriate.¹⁴

Indeed, tribal courts, including the Cherokee Nation Supreme Court – formerly the Cherokee Nation Judicial Appeals Tribunal (CN JAT) – routinely hear both pre- and post-election challenges. *See Wheeler*, 811 F.2d at 552 (“any election dispute can be resolved by Cherokee tribal forums, without any Department [of Interior] involvement.”); *Byrd v. Cherokee Nation Election Comm’n*, 8 Okla. Trib. 172, 2003 WL 24313611 (CN JAT 2003) (post-election challenge to 2003 election alleging voting irregularities); *In re Referendum Petition for a Referendum Vote on Legislative Act 28-99*, 7 Okla. Trib. 382, 2001 WL 34090557 (CN JAT 2001) (pre-election review of legitimacy of subject matter of referendum and procedures used to obtain signatures prior to submission of the referendum petition to the Cherokee Nation Election Commission); *Cornsilk v. Byrd*, 6 Okla. Trib. 288, 1997 WL 33477670 (CN JAT 1997) (denying preliminary injunction to prohibit remission of Tribal funds to State pending submission of

¹² Ex. 11, C.N. Leg. Act. No. 15-04, § XVII: “Upon order of the Judicial Appeals Tribunal it shall be the duty of the Election Commission to forthwith cause to be published, in at least one newspaper of general circulation in the state, a notice of [filing of a Petition for referendum or initiative] and the apparent sufficiency or insufficiency thereof [and] a notice that any citizen or citizens of the Cherokee Nation may file a protest to the petition or an objection to the count made by written notice to the Judicial Appeals Tribunal and to the proponent or proponents filing the petition” Because Cherokee election law is based in part on Oklahoma law, the Cherokee Supreme Court looks to Oklahoma case law when interpreting its own election law, *Lay v. Cherokee Nation*, 6 Okla. Trib. 554, *5, 1998 WL 34067268 (CN JAT 1998), and generally “follow[s] the principles contained therein.” *Cornsilk v. Byrd*, 6 Okla. Trib. 288, *3, 1997 WL 33477670 (CN JAT 1997). The Oklahoma Supreme Court allows pre-election challenges based on the content of initiatives and referenda where the contents have “clear or manifest facial constitutional infirmities.” *In re Initiative Petition No. 358*, 870 P.2d 782,785-86 (Okla. 1994); *see also In re Initiative Petition No. 349*, 838 P.2d 1, 8 (Okla. 1992) (“[I]f a properly preserved constitutional challenge is leveled at a proposed law and a ruling on the issue would prevent a useless election resulting in the enactment of an unconstitutional statute, this Court has the authority, as well as the responsibility, to decide the matter.”).

¹³ Ex. 9, C.N. Leg. Act No. 39-05, §§ 101-103.

¹⁴ *See, e.g., Allen v. Cherokee Nation Tribal Council*, No. JAT 04-09 (Cherokee Nation Jud. App. Trib., Mar. 7, 2006). Perhaps ironically, given the Plaintiffs’ apparent desire to avoid adjudication by the tribal courts, the Cherokee Supreme Court ruled in *Allen* that the very Cherokee statute which disenfranchised the Freedmen in the 2003 election and which the Plaintiffs challenge here violated the 1976 Cherokee Constitution (and, by implication, the 2003 Constitution which does not change the requirements for membership in any manner relevant here). As a result, that statute is no longer in effect.

referendum to popular vote on grounds that referendum addressed matter not subject to referendum).

Second, Plaintiffs have not availed themselves of the tribal courts to challenge the March Special Election or the June General Election at issue here. In denying Plaintiffs' motion to enjoin the March Special Election, this Court reasoned that "even assuming arguendo that the outcome they fear come[s] to pass, the Freedmen have a remedy if the election results in the deprivation of their constitutional rights." Ex. 3, Hr'g Tr. 41:2-4. But Plaintiffs have not amended their Complaint to challenge the legitimacy of the March Special Election. Nor have they challenged their citizenship revocation in tribal courts, as more than 260 other Freedman descendants have done. Therefore, because Plaintiffs can seek "corrective relief" in "the ordinary course of litigation," this fact should "weigh[] heavily against a claim of irreparable harm." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 298 (citations and quotations omitted).

C. Because tribal elections are a "core governmental function" integral to tribal sovereignty, enjoining the June General Election would substantially injure citizens of the Cherokee Nation

Plaintiffs blithely claim that enjoining the June General Election will have a "minimal" impact on the Cherokee Nation. Mem. In Supp. Pls.' Mot. at 11. As discussed above, however, interference with elections is considered "extraordinary;" it is for precisely this reason that the law "recognizes that election cases are different from ordinary injunction cases." *Southwest Voter Registration Educ. Project*, 344 F.3d at 918.

The impact of enjoining a tribal election, "a core governmental function related to internal tribal affairs," COHEN, HANDBOOK OF FEDERAL INDIAN LAW 289 (2005), could never be "minimal." *See Boe*, 642 F.2d at 279 n.7 (refusing to intervene in a tribal election because any "attempt to involve the federal courts in tribal elections. . . lie[s] at the heart of the continuing

right of Indian tribes to govern their own affairs. . . .”). Because this case concerns a tribal election, “the public interest is significantly affected” and the hardship falls on all the citizens of the Cherokee Nation. *Southwest Voter Registration Educ. Project*, 344 F.3d at 919 (finding that “because this case concerns a statewide election,” the “hardship falls not only upon the putative defendant, the California Secretary of State, but on all the citizens of California. . . .”) Indeed, “an injunction. . .requiring [federal courts] to interfere with tribal membership determinations” is “a direct affront” to “the federal policy of promoting tribal governments and tribal self-sufficiency.” *Smith v. Babbitt*, 875 F. Supp. 1353, 1370-71 (D. Minn. 1995). Plaintiffs’ attempt to “intrud[e] in the Community’s electoral processes,” if granted, would be “dramatic vilification” of this policy. *Id.* (denying motion for a preliminary injunction where plaintiffs requested, *inter alia*, that the court enjoin certain tribal members from participating in tribal government). Therefore, because “there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe’s membership determinations,” the citizens of the Cherokee Nation will undoubtedly suffer substantial injury if the June General Election is enjoined. *Id.* at 1360.

D. Because public policy favors tribal self-determination, enjoining the June General Election will not further the public interest

Congress and the Executive Branch have established a firm federal policy of supporting tribal sovereignty, of which tribal elections are the most significant manifestation. Public policy favors tribal self-determination and the resolution of tribal disputes within tribal forums. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (“ambiguities in federal law have been construed generously in order to comport with . . .traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence.”); *Santa Clara Pueblo*, 436 U.S. at 59-60 (holding that federal statutes should not be interpreted to “interfere

with tribal autonomy and self-government...in the absence of clear indications of legislative intent.”) Because enjoining the June General Election would significantly infringe on Cherokee tribal autonomy and self-government, this factor also weighs against the Plaintiffs.

CONCLUSION

For all of the foregoing reasons, the Cherokee Nation Defendants respectfully request that the Court deny Plaintiffs' Motion and grant the Cherokee Nation Defendants such further relief as may be appropriate.

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Respectfully submitted,

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