

No. 07-5024

ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARILYN VANN, *et al.*,
Appellees,

v.

**DIRK KEMPTHORNE, Secretary of the United States Department
of the Interior, *et al.*,**

CHEROKEE NATION,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INITIAL BRIEF OF APPELLEES MARILYN VANN, *et al.*

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs/Appellees Marilyn Vann, Ronald Moon, Donald Moon, Hattie Cullers, Charlene White, and Ralph Threat file this Certificate as to Parties, Rulings, and Related Cases as follows:

A. Parties and Amici

1. District Court Parties

The Parties to the District Court action are Plaintiffs Marilyn Vann, Ronald Moon, Donald Moon, Charlene White, Ralph Threat, Faith Russell, Angela Sanders, and The Freedmen Band of the Cherokee Nation of Oklahoma; Defendants Dirk Kempthorne, Secretary of the United States Department of the Interior, and the United States Department of the Interior; and Defendants/Intervenors Cherokee Nation, Principal Chief Chadwick Smith of the Cherokee Nation, and unnamed officials of the Cherokee Nation.

2. Parties in the Court of Appeals

The parties to this appeal are the Cherokee Nation, on its own behalf and on behalf of Principal Chief Smith of the Cherokee Nation and John Doe Tribal officials, Appellants; Marilyn Vann, Ronald Moon, Donald Moon, Hattie Cullers, Charlene White, and Ralph Threat, Appellees. There are no known *amici* participating in this appeal.

B. Rulings Under Review

The Order appealed from is the Order of the United States District Court for the District of Columbia, *Vann v. Kempthorne*, No. 03-01711 (D.D.C. Dec. 19, 2006).

C. Related Cases

There are no pending related cases of which counsel is aware. There are several pending related cases in the District Court of the Cherokee Nation captioned *Raymond Nash v. Cherokee Nation* (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-07-56, CV-07-65 and CV-07-66) (D. Cherokee Nation 2007).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Plaintiffs/Appellees in this case hereby certify as follows:

1. Plaintiffs/Appellees Marilyn Vann, Ronald Moon, Donald Moon, Hattie Cullers, Charlene White, and Ralph Threat are not incorporated entities.
2. Plaintiffs/Appellees Marilyn Vann, Ronald Moon, Donald Moon, Hattie Cullers, Charlene White, and Ralph Threat do not have any parent companies.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellees respectfully request that oral argument be granted in the present appeal. Cherokee Nation Appellants have also requested oral argument.

Plaintiffs/Appellees, known as the Freedmen, are descendants of slaves held by Cherokee Nation members prior to the Civil War. For approximately 150 years, the rights of the Freedmen have been recognized by the Cherokee Nation and the United States based on the Treaty of 1866. In 2003, the Cherokee Nation denied to the Freedmen the right to vote in a Cherokee election to amend the Cherokee Constitution, solely due to the fact that the Freedmen are the descendents of former slaves.

This case involves the important and fundamental rights of Plaintiffs/Appellees – the right to vote in the Cherokee Nation elections and to run for office in the Cherokee Nation. The just adjudication of these rights is a matter of sufficient importance that oral argument should be granted so that the Court may have the benefit of all the information necessary to render a decision on the appeal. If this case is dismissed, Plaintiffs'/Appellees' civil rights will be subject to continuing and direct harm. Before rendering a decision, Plaintiffs/Appellees respectfully request that the Court grant oral argument to consider the important fundamental rights at issue in this appeal.

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Treaty of 1866	Treaty with the Cherokee, July 19, 1866, 14 Stat. 799
Act of 1970	October 22, 1970 Act to authorize each of the Five Civilized Tribes of Oklahoma to popularly select their principal officer, and for other purposes, Pub. L. No. 91-495, 84 Stat. 1091
ADA	Americans With Disabilities Act, 42 U.S.C. § 12181 <i>et seq.</i>
Curtis Act	June 28, 1898 Act For the protection of people of the Indian Territory, and for other purposes, 30 Stat. 495
Federal Defendants	Dirk Kempthorne, Secretary of the U.S. Department of the Interior, and U.S. Department of the Interior, collectively
ICRA	Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 <i>et seq.</i>
Freedmen	Slaves formerly held by Cherokee citizens, free blacks living in the Cherokee Nation, and their descendants as listed on the Dawes Roll of Cherokees under the Freedmen designation
Op.	District Court Memorandum and Order, Dec. 19, 2006, Docket Number 41

PERTINENT STATUTES AND REGULATIONS

All applicable pertinent statutes, regulations, etc., are contained in the Brief for Appellant Cherokee Nation.

INTRODUCTION

The history of the Cherokee Nation, like that of the United States, includes the ugly chapter of slavery. The United States in the past 60 years has taken major strides towards racial equality. The Cherokee Nation, unfortunately, has moved in the opposite direction. Most recently, it stripped the Plaintiffs, the descendants of its slaves, of all “rights of native Cherokees.”

Prior to the Civil War, the Cherokee Nation, like its Southern neighbors, exercised its inherent sovereign right by enacting slave codes, regulating the slave industry within its territory. At the time of the Civil War, Cherokee Nation citizens owned more slaves than any other Indian tribe. The Cherokee Nation signed a treaty with the Confederacy and waged war against the United States in defense of the institution of slavery.

By joining the Confederacy, the Cherokee Nation severed its relationship with the United States. At the conclusion of the Civil War, the United States entered into a treaty with the Cherokee Nation to re-establish its government-to-government relationship. The re-establishment of that relationship was conditioned upon the Cherokee Nation’s acceptance of the terms of the Treaty of 1866, which embodied the principals in the Thirteenth Amendment and the Civil Rights Act of 1866. Therefore, although the Cherokee Nation’s initial

incorporation into the United States did not abrogate its sovereign right to hold slaves, its decision to ratify the Treaty of 1866 did.

The Plaintiffs, six descendants of individuals listed on the Dawes Roll of Cherokees under the Freedmen designation (known collectively as the Freedmen), initiated this lawsuit after the Cherokee Nation denied them the fundamental right to vote in Cherokee Nation elections, based solely on the fact that the Freedmen are descendants of former slaves and free blacks living among the Cherokees in 1866. The Cherokee Nation argues that it has the authority to deprive the Freedmen of their fundamental civil rights, despite the terms of the Treaty of 1866 and the Thirteenth Amendment, because Congress did not expressly abrogate the Tribe's sovereign immunity from suit. The Cherokee Nation is wrong. Tribal sovereignty can be abrogated by implication if exercise of that sovereignty would be inconsistent with the overriding interest of the United States.

Slavery was the most important and divisive issue in the history of the United States. Years of conflict over slavery led to a war that split the nation and resulted in more bloodshed than any other war before or since. At the conclusion of the Civil War, the United States resolved to forever abolish slavery, and its vestiges, in every state and territory of the United States, including Indian Country. Allowing the Cherokee Nation to violate the Treaty of 1866 and Thirteenth

Amendment would be inconsistent with the fundamental interest of the United States.

The District Court held that the Thirteenth Amendment, together with the Treaty of 1866, is a clear indication that Congress intended to abrogate the Cherokee Nation's sovereign immunity. The Cherokee Nation appeals the District Court order and claims that sovereign immunity can only be abrogated through express language by Congress. Tribal sovereign immunity, however, did not exist in 1866. Further, tribal sovereign immunity can be implicitly abrogated when, as here, it conflicts with the overriding interest of the United States. Based on the unique facts of this case, the Thirteenth Amendment and the Treaty of 1866 demonstrate the requisite interest and operate to abrogate the Cherokee Nation's sovereign immunity for this limited class of claims brought by Freedmen who are denied fundamental rights as Cherokee citizens.

The Cherokee Nation characterizes the District Court's opinion as a "hard case" making "bad law." Initial Brief of Appellant Cherokee Nation ("Appellant's Brief") at 2 n.1. To the contrary, the District Court's opinion instead demonstrated that "[g]reat nations, like great men, should keep their word." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court correctly held that the Cherokee nation does not have sovereign immunity from Plaintiffs' claims arising under the Thirteenth Amendment and the Treaty of 1866.
2. Whether the District correctly held that the Cherokee Nation's officers are not immune from Plaintiffs' claims.

STATEMENT OF THE FACTS

Prior to the Civil War, slaves of Cherokees, as well as free intermarried Blacks or children of mixed racial families, lived in the Cherokee Nation. Complaint ("Compl.") ¶ 20.¹ In 1861, the Cherokee Nation entered into a treaty with the Confederate States of America, thereby severing its relationship with the United States. The Cherokee Nation received seats in the Confederate House of Representatives and Senate and rank in its military. The Cherokee Nation passed legislation enacting slave codes, regulating slavery within its borders.

In 1863, slavery was abolished and the Black Cherokees were emancipated by virtue of the Thirteenth Amendment of the United States Constitution. *Id.* ¶ 21. Following the Civil War, the United States and Cherokee Nation entered into the Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. L. 799 ("Treaty of

¹ All citations to the Complaint refer to Plaintiffs' Second Amended Complaint, filed December 19, 2006, Dkt. No. 42.

1866”), which, among other things, granted the freed Cherokee slaves (the “Freedmen”) full citizenship in the Cherokee Nation. *Id.* ¶ 22.

In 1907, the Dawes Commission completed its rolls of citizens of the Cherokee Nation. *Id.* ¶ 34. The Dawes Commission created two separate categories of Cherokee citizens: the “Freedmen Roll” for the Black Cherokee who were Cherokee slaves and descendants of Cherokee slaves, and the “Blood Roll” for the other Cherokees. *Id.*

The Cherokee Constitution, ratified in 1976, contained a provision requiring that the U.S. Secretary of the Interior approve any future amendments to the Cherokee Constitution. *Id.* ¶¶ 1, 39. On May 24, 2003,² the Cherokee Nation held a special election to amend its constitution to remove the provision requiring secretarial approval of future constitutional amendments. *Id.* ¶ 1. On July 26, 2003, the Cherokee Nation held a general election for Principal Chief and other officials.³ Plaintiffs and other Freedmen were not permitted to vote in either of the 2003 elections. *Id.* ¶ 1.

² Plaintiffs’ Second Amended Complaint incorrectly stated the election date as May 24, 2002. The election occurred on May 24, 2003, and is correctly identified in Plaintiffs’ Third Amended Complaint, filed on July 17, 2007, Dkt. No. 94.

³ Since the Cherokee Nation filed its notice of appeal, Plaintiffs have filed a Third Amended Complaint, which was cited by the Cherokee Nation. Appellant’s Brief at n.23. Plaintiffs filed the Third Amended Complaint to update the record to reflect that the Cherokee Nation ratified an amendment to its constitution stripping

SUMMARY OF THE ARGUMENT

Tribal sovereign immunity is a modern judicial concept. Although the doctrine developed “almost by accident,” as a general matter, courts require abrogation of sovereign immunity to be clearly expressed by Congress. Where, as here, abrogation occurred long before the development of tribal sovereign immunity, that modern standard cannot apply.

Tribal sovereign immunity can be implicitly abrogated when exercise of that sovereignty would conflict with the overriding interests of the United States. In the current case, the overriding interest of the United States was the eradication of slavery and the protections expressly granted to the Freedmen through the Treaty of 1866. The broad sweep of the Thirteenth Amendment makes it applicable throughout the United States, including Indian Country. No entity is immune from the Thirteenth Amendment. Because the Fourteenth and Fifteenth Amendments, which only limit state action, are not applicable to the Cherokee Nation, the Thirteenth Amendment must protect the Freedmen.

The doctrine of tribal sovereign immunity was first announced by the U.S. Supreme Court almost fifty years after the ratification of the Thirteenth Amendment and the Treaty of 1866. The cases cited by the Cherokee Nation involve modern statutes passed after Congress had clear notice of the tribal

the Freedmen of their Cherokee Nation citizenship. A Cherokee Nation court stayed implementation of the amendment pending further action in that court.

immunity doctrine. *Santa Clara Pueblo v. Martinez*, 435 U.S. 49 (1978), involved the Indian Civil Rights Act (“ICRA”), which was passed in 1968. *Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999), dealt with the Americans with Disabilities Act (“ADA”), which was passed in 1990. The Cherokee Nation’s argument that the modern doctrine of tribal sovereign immunity applies here and required an express abrogation of the Tribe’s sovereign immunity in 1866 is not supported by the historical circumstances unique to this case. To conclude otherwise, would “deny effect to the Thirteenth Amendment as well as Congress’s *repeated* enactments to protect the Freedmen’s rights to full membership in the Cherokee Nation, which includes the fundamental right to vote.” Op. at 20 (emphasis added).

ARGUMENT

I. Congress has the power to limit the Cherokee Nation’s sovereignty.

Indian tribes are domestic dependent nations that still exercise some measure of sovereignty. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that Indian tribes are not foreign nations but “may, more correctly, perhaps, be denominated domestic dependent nations”). That sovereignty, however, is necessarily limited by their incorporation into the United States. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (“Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial

sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. “[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.”) (quoting *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823)). The sovereignty of Indian tribes “exists only at the sufferance of Congress and is subject to complete defeasance.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

Congress did not intend for the Cherokee Nation to have sovereign immunity against claims brought by the Freedmen for violations of their rights under the Thirteenth Amendment and the Treaty of 1866. The Cherokee Nation’s tribal immunity has been abrogated by implication with respect to the Freedmen’s claims in this case because the exercise of tribal sovereignty would be inconsistent with the overriding interests of the United States. Congress intended that the Thirteenth Amendment and the Treaty of 1866 would apply to limit the sovereignty of the Cherokee Nation with respect to the fundamental rights of the Freedmen. Further, the doctrine of tribal sovereignty did not exist in 1866 and would not have been a consideration for the drafters of the Thirteenth Amendment and the Treaty of 1866.

A. The Cherokee Nation’s sovereign immunity has been abrogated by implication because it is in conflict with the overriding interests of the United States.

Although they are pseudo-sovereign entities, Indian tribes’ exercise of inherent sovereign powers is limited in nature. *Wheeler*, 435 U.S. at 322. Indian tribes no longer possess the “full attributes of sovereignty” due to their incorporation into the United States. *Id.* at 323; *United States v. Kagama*, 118 U.S. 375, 381 (1886). The Supreme Court has recognized that tribal sovereign immunity can be abrogated “by implication as a necessary result of their dependent status.” *Wheeler*, 435 U.S. at 323 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

The Cherokee Nation argues for an absolute standard: “Congress must unequivocally express an intent to abrogate sovereign immunity. Courts may not *infer* such abrogation.” Appellant’s Brief at 14. The Cherokee Nation is wrong.

First, the Thirteenth Amendment abrogates the Cherokee Nation’s sovereign immunity by implication. “The Thirteenth Amendment ‘is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.’” *Op.* at 14 (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)). Although American Indian nations are generally not constrained by most of the limitations of the United States Constitution, which only apply to federal or state governments, *see*

Talton v. Mayes, 163 U.S. 376, 382 (1896), the Thirteenth Amendment applies to private actors as well, including Indian tribes, *see, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-39 (1968). Accordingly, the Cherokee Nation is not protected by sovereign immunity against claims brought against it for violations of the Thirteenth Amendment.

Second, the Supreme Court has found an implicit abrogation of sovereign immunity in at least three instances: (1) Indian tribes may no longer freely alienate the land they occupy, *Wheeler*, 435 U.S. at 326 (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 (1974); *Johnson*, 21 U.S. (8 Wheat.) at 574)); (2) they cannot enter into direct commercial or governmental relations with foreign nations, *Wheeler*, 435 U.S. at 326 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810)); and (3) they cannot try non-Indians in tribal courts. *Wheeler*, 435 U.S. at 326 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

Abrogation by implication occurs when exercise of tribal sovereignty would be “inconsistent with the overriding interests of the National Government.” *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980). Although the Supreme Court in *Wheeler* examined areas in which the tribes deal with nonmembers, the unique circumstances of the current case make

the reasoning applicable. A situation where the Cherokee Nation is denying fundamental citizenship rights, including the right to vote, to the Freedmen, whose full rights to citizenship are protected in the Treaty of 1866, *as an express condition of the Cherokee Nation's existence in the United States*, is such an instance in which the exercise of sovereignty would be inconsistent with the Cherokee Nation's status and the interests of the United States. *See e.g. Oliphant*, 435 U.S. at 208.

The Thirteenth Amendment and the Treaty of 1866 abrogate the Cherokee Nation's sovereign immunity with respect to the fundamental rights of the Freedmen to full citizenship in the tribe. The Supreme Court in *Wheeler* recognized that tribal sovereignty could be abrogated by treaty. *Wheeler*, 435 U.S. at 322. Specifically, the Court noted that unless limited by treaty, tribes were free to determine their own membership. *Id.* at 322 n.18. The Court cited the *Cherokee Intermarriage Cases* for the proposition that treaties could limit a tribe's ability to determine its own membership. In the *Cherokee Intermarriage Cases*, the Court stated:

As to the freedmen, their participation in property distribution was secured by the terms of the treaty of 1866 (the result of the Civil War), and of the constitutional amendments thereupon adopted. The Court of Claims referred to them thus: 'These constitutional amendments were brought about by the action of the United States at the close of the Civil War in dictating that the slaves or freed persons of color in the Cherokee country should not only be admitted to the rights of citizenship, but to an equal participation in the communal or

common property of the Cherokees. The Cherokees seem to have veiled their humiliation by these general declarations of the persons who should be taken and deemed to be citizens. But, be that as it may, the overthrow of the Cherokee Nation and the treaty of peace, 1866, and the terms dictated by the United States, whereby their former slaves were made their political equals and the common property of the Cherokees was to be shared in with their servants and dependents, was in effect a revolution.

Red Bird v. United States (Cherokee Intermarriage Cases), 203 U.S. 76, 84 (1906).

Not only did Congress limit the authority of the Cherokee Nation to determine its citizenship by the Treaty of 1866, Congress also empowered the Dawes Commission to determine the citizens of the Cherokee Nation and to make out the Dawes Commission Rolls accordingly. *See Stephens v. Cherokee Nation*, 174 U.S. 445, 488 (1899) (finding that Congress, in its paramount authority over Indian tribes, had the power to appoint the Dawes Commission to determine who were entitled to citizenship in each of the tribes). There is no question that Congress has acted to limit the sovereignty of the Cherokee Nation with respect to the Freedmen.

The Cherokee Nation argues that absent an express abrogation of sovereign immunity in the Thirteenth Amendment or the Treaty of 1866 it can deny the Freedmen the fundamental right to vote. Treaty and statutory provisions that are not clear on their face, however, may “be clear from the surrounding circumstances and legislative history.” *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975) (internal citation and quotations omitted); *See also Krystal Energy Co. v.*

Navajo Nation, 357 F.3d 1055, 1058 (9th 2004) (“Congress, therefore, need not make its intent to abrogate ‘unmistakably clear’ in a single section of a statute.”) (citation omitted). The circumstances surrounding the ratification of the Thirteenth Amendment and the Treaty of 1866 make clear that Congress intended to abrogate the Cherokee Nation’s sovereignty with respect to claims such as those brought by the Freedmen in this case.

The District Court recited the historical factors that provide the backdrop for interpretation of the Treaty of 1866. *Op.* at 17-18. At the time of the Civil War, Cherokees owned more slaves than any other tribe in Indian Territory, and the majority of Cherokees were sympathetic to the Confederacy, leading the Cherokee Nation to sign a treaty of alliance with the Confederacy. *Id.* at 17 (internal citation omitted). By aligning itself with the Confederacy, the Cherokee Nation forfeited previous treaty rights. *Id.* Although the United States was willing to reestablish relations with the Cherokee Nation, the reestablishment was conditioned upon acceptance of the Freedmen into the Tribe on an equal footing with other members. *Id.* at 17-18 (citing *United States ex rel. Lowe v. Fisher*, 223 U.S. 95, 98 (1912) (stating that the United States was “willing to renew relations with them, stipulating, among other things, that the institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their

incorporation into the tribes on an equal footing with the original members, or suitably provided for.”); *Seminole Nation v. United States*, 90 Ct. Cl. 151, 152 (1940) (recounting how in a similar treaty with Seminole Nation federal government officials informed tribal leaders of one of the conditions of their semi-independent status within the United States: “Slavery to be abolished, and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.”).

The history leading up to ratification of the Thirteenth Amendment and the Treaty of 1866 indicates that Congress intended to abrogate the Cherokee Nation’s sovereign immunity with respect to the Freedmen’s claims in this case. Allowing the Cherokee Nation to assert sovereign immunity to avoid answering for its unconstitutional and morally repugnant actions is “inconsistent with the overriding interests of the National Government.” *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980).

Although abrogation through implication is disfavored, Indian sovereign immunity does not enjoy the same Constitutional protection that state sovereign immunity enjoys and “can be more freely limited by Congressional enactment.” *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034 (11th Cir. 2001). The present case is one instance in which the exercise of sovereignty by the

Cherokee Nation would be “inconsistent with their status.” *Oliphant*, 435 U.S. at 208.

The Cherokee Nation’s invocation of sovereign immunity to escape consequence for its attempts to disenfranchise the Freedmen conflicts with the ideals and principles of the Thirteenth Amendment and the Treaty of 1866. As the Court of Claims noted, “[a]n examination of the treaties made immediately after the close of the Civil War with the tribes who had entered into treaties with the Confederacy, unmistakably discloses that the predominant purpose and intent of the Government as to preexisting slavery was to protect and care for the freedmen.” *Seminole Nation v. United States*, 78 Ct. Cl. 455, 466 (1933) (holding that Seminole Freedmen were entitled to full membership in the tribe based on the Treaty with the Seminole of 1866).

B. Tribal sovereign immunity did not exist in 1866 and would not have been considered by the drafters of the Treaty of 1866 or the Thirteenth Amendment.

Tribal sovereign immunity is a modern judicial concept that developed “almost by accident.” *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (citing *Turner v. United States*, 248 U.S. 354 (1919)). It simply was not, and could not have been, a consideration of Congress in 1866. The Cherokee Nation, however, is attempting to take this modern doctrine, one that developed “almost by accident,” and retroactively apply its precepts to the Thirteenth

Amendment and the Treaty of 1866. According to the Cherokee Nation, without an explicit statement abrogating the tribe's sovereign immunity, Congress could not have intended to abrogate tribal sovereignty for violating the Thirteenth Amendment or the Treaty of 1866. This argument sets up a straw man. Congress can only be expected to express its intention to abrogate tribal sovereignty in modern statutes or treaties, after the concept of tribal sovereign immunity was established. But the modern requirement of an express statement of abrogation does not mean that Congress intended for Indian tribes to be immune from suit in federal court for violations of the Freedmen's fundamental rights under the Thirteenth Amendment and the Treaty of 1866.

The Cherokee Nation cites only modern cases dealing with statutes passed after the doctrine of tribal immunity had been established in support of its position. For example, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), dealt with the ICRA, which was passed in 1968, 50 years after the doctrine of sovereign immunity for Indian tribes was established. *Turner v. United States*, 248 U.S. 354 (1919). In *Santa Clara*, the Supreme Court found that the ICRA only abrogated tribal immunity with respect to writs of habeas corpus. In doing so, the Court examined the legislative history of the ICRA, which extended over more than three years, and observed that Congress had considered "numerous alternatives for review of tribal convictions" and apparently had "decided that review by way of

habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.” *Santa Clara*, 436 U.S. at 66-67. The Court noted that early drafts of the ICRA allowed for federal court review of tribal court decisions and also for the United States Attorney General to bring an action to enforce the ICRA. *Id.* at 68. The fact that Congress considered abrogation of tribal sovereign immunity and eventually rejected it in the final bill heavily influenced the Supreme Court’s decision. *Id.* at 71. Tribal immunity was an established doctrine when Congress passed the ICRA. Therefore, in enacting the ICRA, Congress knew that abrogation of sovereign immunity must be clearly expressed and chose instead to provide only habeas corpus review in federal court. The situation here is completely different. Congress passed the Thirteenth Amendment and the Treaty of 1866 at a time when tribal sovereign immunity did not yet exist. *Santa Clara* would not be overruled or even challenged by a finding that the Cherokee Nation does not have sovereign immunity for violation of the fundamental rights of the Freedmen under the Thirteenth Amendment and the Treaty of 1866.

Florida Paraplegic Ass’n v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir. 1999), likewise cannot apply here. That case dealt with the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12181 *et seq.*, another modern statute. In holding that the ADA did not abrogate tribal immunity, the Eleventh Circuit

relied on the fact that Congress passed the ADA with full knowledge of the fact that such abrogation must be unequivocally stated in the statute:

Although the Supreme Court has continued to emphasize, in cases such as *Potawatomi Tribe* and *Kiowa Tribe*, the rule that Congress must unequivocally express its intent to abrogate tribal sovereign immunity, the Court decided the landmark cases setting down this standard- *USF&G* and *Martinez*-in 1940 and 1978, respectively. Congress therefore had notice of the need to express its intent clearly when it enacted the ADA in 1990.

Fla. Paralegic Ass'n, 166 F.3d at 1131 n.12. Once again, in enacting the Thirteenth Amendment and the Treaty of 1866, Congress had no “notice of the need to express its intent clearly” that the Cherokee Nation would not be immune to suit for violations of the Freedmen’s rights that the Amendment and Treaty were enacted to protect.

Finally, the Cherokee Nation misstates the holding in *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1461 (10th Cir. 1989). The Cherokee Nation contends that the Tenth Circuit considered the Thirteenth Amendment in reaching its conclusion that the Cherokee Nation’s sovereign immunity had not been abrogated. Appellant’s Brief at 21. As Judge Kennedy correctly observed, however, the Tenth Circuit failed to consider the Thirteenth Amendment in the *Nero* opinion. Op. at 20-21 (“What these courts apparently failed to consider, however, is that Congress clearly indicated its intent to abrogate the Cherokee Nation's immunity with respect to violations of the Thirteenth Amendment as

evidenced by the Treaty of 1866.”). The plaintiffs in *Nero* may have pled the Thirteenth Amendment in their complaint, but it was not a basis for the Tenth Circuit’s opinion. *Nero*, 892 F.2d at 1466 n.13 (stating that federal constitutional protections extend to individual Indians only to the extent incorporated by the ICRA but not addressing the Thirteenth Amendment). As the Supreme Court has held, if a court in reaching a decision does not consider a particular point, then as to that point, the decision is not valid authority. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (noting that stare decisis is not applicable unless the issue was “squarely addressed” in the prior decision); *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”); *Honeywell v. Int’l, Inc. v. EPA*, 374 F.3d 1363, 1374 (D.C. Cir. 2004) (quoting *Webster*, 266 U.S. at 511).

Consideration of the Thirteenth Amendment is the difference between Judge Kennedy’s opinion and the Tenth Circuit’s opinion in *Nero*. Judge Kennedy held the “Cherokee Nation is not protected by sovereign immunity from the Freedmen's claims arising under the Thirteenth Amendment and the Treaty of 1866.” Op. at 20. Unlike the decision in *Nero*, Judge Kennedy discussed the limitations placed on the Cherokee Nation’s sovereignty with respect to the Freedmen by the Thirteenth Amendment.

C. Treaty articles cited by the Cherokee Nation indicate that Congress intended to abrogate the Cherokee Nation's sovereign immunity.

The provisions of the Treaty of 1866 examined by the District Court provide evidence of Congress's intent to abrogate the Cherokee Nation's sovereignty with respect to the Freedmen. After years of slavery, the end of the Civil War and the Thirteenth Amendment limited the Cherokee Nation's sovereignty with respect to former slaves. Through the Treaty of 1866, Congress intended to prohibit discrimination against the former slaves at the hands of the Cherokee Nation.

As discussed above, the doctrine of tribal sovereign immunity did not exist in 1866. Therefore, Congress would not spend time crafting express language abrogating the Cherokee Nation's immunity. The articles of the Treaty of 1866, however, lead to no other conclusion but that Congress intended to abrogate the Cherokee Nation's immunity with respect to the Freedmen. Article Nine of the Treaty states that the Freedmen "shall have all the rights of native Cherokees." Article Six states that the "[a]ll the laws of the Cherokee Nation shall be uniform throughout said nation." The laws of the government contemplated in Article 12, which would consist in part of Cherokee Nation representatives, could not pass laws in opposition to the Constitution of the United States. No matter what form the Cherokee Nation government took, Congress intended its laws to comply with the laws of the United States.

Congress placed these limitations on the Cherokee Nation to protect the Freedmen. *Seminole Nation v. United States*, 78 Ct. Cl. at 466 (“An examination of the treaties made immediately after the close of the Civil War with the tribes who had entered into treaties with the Confederacy, unmistakably discloses that the predominant purpose and intent of the Government as to preexisting slavery was to protect and care for the freedmen.”). The District Court did not examine the Treaty in isolation to determine the Cherokee Nation’s sovereignty had been abrogated. Instead, the District Court held that the repeated limitations placed upon the Cherokee Nation, beginning with the Thirteenth Amendment and the Treaty of 1866, indicated Congress’s intent to abrogate the Cherokee Nation’s sovereignty. *Op.* at 20 (holding that allowing the Cherokee Nation to assert sovereign immunity as a defense to the Freedmen’s claims would “deny effect to the Thirteenth Amendment as well as Congress's *repeated* enactments to protect the Freedmen's rights to full membership in the Cherokee Nation, which includes the fundamental right to vote”) (emphasis added).

The Cherokee Nation, immediately after ratification of the Treaty of 1866, understood the terms of the of Treaty to be a limitation on its sovereignty. In *United States ex rel. Lowe v. Fisher*, 223 U.S. 95 (1912), the Supreme Court noted that the Cherokee Nation accepted the terms of the Treaty of 1866, albeit reluctantly. The Court stated:

It is further contended that the Cherokees acted upon the treaty practically in accordance with this construction of it, and that it was not until many years after that they 'sought to refine it away and abrogate it in effect.' They accepted it reluctantly, it is said, and subsequently contended that it conferred civil, not property, rights, and passed what was known as the 'Blood Bill,' by which they sought to exclude all but native Cherokees by blood from participation in a large payment of funds which was about to be made.

Id. at 99. In an almost identical treaty provision protecting the Seminole Freedmen, the Supreme Court held that the treaty provision granted the Seminole Freedmen citizenship in the Seminole Nation. *Goat v. United States*, 224 U.S. 458, 468 (1912) ("Indeed, [the Seminole Nation] is essentially a nation of full bloods, save as to its colored citizens, who, *under treaty provision*, are on an equal footing with the citizens by blood.") (emphasis added). The issue was so settled that in 1914, the Court of Appeals for the District of Columbia stated the issue was no longer open to question. *Keetoowah Soc'y v. Lane*, 41 App. D.C. 319, 322 (App. D.C. 1914) ("In view of these adjudications, we do not think the right of these freedmen to participate in the lands and funds of the Cherokee Nation longer open to question.").

Congress provided important protections for the Freedmen in the Treaty of 1866. The Treaty provisions cited by the Cherokee Nation provide context to the clear intent of Congress to abrogate the Cherokee Nation's sovereignty with respect to the Freedmen. Despite the numerous cases upholding the rights of the Freedmen under the Treaty of 1866, the Cherokee Nation Defendants continue to

assert the right of the Cherokee Nation to abrogate the Treaty and strip the Freedmen of all rights secured by the Treaty. Congress through the Thirteenth Amendment and the Treaty of 1866 sought to prevent that from happening.

D. Special canons of construction that Indian treaties are to be liberally construed in favor of Indians do not apply here.

The Cherokee Nation's argument that the Treaty of 1866 must be liberally construed in its favor is incorrect. The argument ignores the purpose of the liberal canons of construction and the purpose of the Treaty of 1866.

Treaties with Indian tribes are liberally construed in their favor because of the unique relationship between the United States and the Indian nations. *See County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985) (“The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”); *Hagen v. Utah*, 510 U.S. 399, 422-23 n.1 (1994). The trust relationship, however, extends beyond the tribal governments to the individual members of the Indian tribes. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (“Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.”).

As previously stated, the purpose of the Treaty of 1866 was “to protect and care for the freedmen.” *Seminole Nation*, 78 Ct. Cl. at 466. The Cherokee Nation argues that the Court should apply the special canons of construction in the Cherokee Nation’s favor, to the detriment of the Freedmen, for whose special protection the Treaty of 1866 was ratified. Such a conclusion conflicts with the purpose and intent of the Treaty of 1866. The special canons of construction are to benefit Indians, not to give tribal governments the power to oppress others. If anything, the Treaty of 1866 should be liberally construed in favor of the Freedmen.

II. The Cherokee Nation’s sovereign immunity was abrogated by the Thirteenth Amendment and the Treaty of 1866.

A. The Thirteenth Amendment applies to private actors, including Indian Tribes.

The Thirteenth Amendment is different in both its language and its reach from all other constitutional amendments. The Cherokee Nation Defendants cannot claim that it is not bound by the broad and sweeping language of the Thirteenth Amendment. The Amendment states in unequivocal terms that slavery shall forever end as a means of relegating a race to a status of second-class citizenship:

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

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

The Thirteenth Amendment is applicable throughout the entire United States to actions by both government and private individuals. *Jones*, 392 U.S. at 438-39.

As the District Court held, “there is no dispute that the broad sweep of the Thirteenth Amendment applies to Indian tribes as well.” *Op.* at 15 (citing *United States v. Choctaw Nation*, 193 U.S. 115, 124 (1904); *In re Sah Quah*, 31 F. 327, 330 (D. Alaska 1886); Felix S. Cohen, *Handbook of Federal Indian Law* 918 (2005 ed.)). If the Cherokee Nation were holding the Cherokee Freedmen as slaves in actual physical bondage, no court would seriously entertain the notion that sovereign immunity protects the tribe from suit to enjoin the practice. No entity can claim sovereign immunity for claims under the Thirteenth Amendment.

B. The Thirteenth Amendment and the Treaty of 1866 protect the Freedmen from disenfranchisement by the Cherokee Nation.

The Cherokee Nation argues that denial of the right to vote is not a badge of slavery. Appellant’s Brief at 42-44. In support of this bizarre proposition, the Cherokee Nation argues that Congress has not defined denial of the right to vote as a badge of slavery, and therefore, that the District Court was not free to interpret the Cherokee Nation’s actions as such. *Id.* The argument, however, ignores the unique circumstances of this case. The District Court recognized that the Freedmen are not able to pursue their claims under either the Fourteenth or

Fifteenth Amendment. Op. at 20 ("That the Freedmen are not protected by the Fourteenth or Fifteenth Amendment, under which voting rights are usually enforced, further emphasizes that they must be protected by the Thirteenth Amendment and the Treaty of 1866.") The Supreme Court in *Nixon v. Herndon*, 273 U.S. 536 (1927), did not need to look to the Fifteenth Amendment to strike down laws denying the right to vote. *Id.* at 540-41 ("We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.").

Based on the unique facts of this case, the Freedmen have a right to seek relief under the Thirteenth Amendment. The current case is different from cases cited by the Cherokee Nation that deal with discrimination more generally. Because the Freedmen are not protected by the Fourteenth and Fifteenth Amendments, they must be protected by the Thirteenth Amendment based on the facts of this case.

Although the Thirteenth Amendment does not mention the right to vote explicitly, "there can be no doubt that the right to vote is fundamental" and "the denial of the right to vote is nothing if not a badge and incident of slavery." Op. at 19 (internal citation and quotations omitted). Accordingly,

"[t]hat the Freedmen are not protected by the Fourteenth or Fifteenth Amendment, under which voting rights are usually enforced . . . emphasizes that they must be protected by the Thirteenth Amendment and the Treaty of 1866. To conclude

otherwise would be to deny effect to the Thirteenth Amendment as well as Congress's repeated enactments to protect the Freedmen's rights to full membership in the Cherokee Nation, which includes the fundamental right to vote."

Id. at 20.

Acting within its Thirteenth Amendment power to eradicate badges and incidents of slavery, Congress passed the Civil Rights Act of 1866. *Civil Rights Cases*, 109 U.S. 3, 22 (1883). The original text of the Civil Rights Act of 1866, however, did not apply to Indian tribes. *See* Carol Tebben, Symposium: *Native Americans And The Constitution: An American Trifederalism Based Upon The Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 340 (2003); *see also Elk v. Wilkins*, 112 U.S. 94, 103 (1884) (stating that Native Americans were not United States citizens). In 1866, Congress's primary exercise of authority over Indian tribes was through treaties, not legislation. *See* Tebben, *supra*, at 340 (explaining that in 1866 the United States was still making treaties with tribes as sovereigns); Act of March 3, 1871, Pub. L. No. 41-120, 16 Stat. 544 (1871) (officially ending Congressional practice of making new treaties with Indian tribes).

In accordance with that practice, the same Congress that passed the Civil Rights Act also ratified the Treaty of 1866, which guaranteed to the Freedmen "all the rights of native Cherokees." *Op.* at 17 (quoting Art. IX). "The Treaty of 1866 not only incorporated the principles of the Thirteenth Amendment and the Civil

Rights Act of 1866, but it made such principles a *condition* of the Cherokee Nation's existence within the United States.” *Id.* (emphasis in original). By imposing limitations on the sovereignty of the Cherokee Nation in order to protect the Freedmen, Congress “unequivocally indicated its intent to abrogate the tribe’s immunity with regard to racial oppression prohibited by the Thirteenth Amendment.” *Id.* at 19.

Clearly Congress thought that the Cherokee Nation had no sovereignty to oppress the Freedmen in violation of the Thirteenth Amendment and the Treaty of 1866. Congress dictated that the Freedmen would be Cherokee Nation citizens, and it made the Cherokee Nation accept that as a condition of its existence in the United States. *Op.* at 17; *Stephens*, 174 U.S. at 490. The idea that Congress would exercise its plenary authority to determine Cherokee citizenship, especially for the Freedmen, and then allow (by silence) that discriminatory conduct by the Cherokee Nation could only be addressed in the tribal court is simply absurd.

C. The Thirteenth Amendment and the Treaty of 1866 abrogated the Cherokee Nation’s sovereignty.

The Cherokee Nation asserts that the Thirteenth Amendment did not abrogate the Nation's sovereign immunity, citing cases that hold that the Thirteenth Amendment does not provide remedies beyond the statutes enacted to enforce the Thirteenth Amendment. Appellant’s Brief at 38. These cases, however, miss the mark. They do not apply here because Appellees do not assert a cause of action for

damages against a private party. They seek to block the Cherokee Nation from stripping from them their citizenship rights (including their right to vote) based solely on their status as former slaves. In fact, the Cherokee Nation admits that it is making distinction between descendants of former slaves and Cherokees listed on the Dawes Blood Roll. Such discriminatory conduct is aimed solely at the descendants of former slaves, i.e. only those listed on the Dawes Freedmen Roll. As such, this case is different – not just from the cases cited by the Cherokee Nation, but from any another case invoking Thirteenth Amendment rights.

There is no slippery slope here, no risk of exposing the federal courts to endless litigation under the Thirteenth Amendment for racial discrimination more generally.⁴ The nature of this cause of action is such that it is uniquely available to Freedmen with respect to the fundamental rights to membership in the Cherokee Nation that Congress clearly intended to provide for them. It simply cannot be compared to finding a private right of action under the Thirteenth Amendment for race discrimination.

That Appellees have a claim arising directly under the Thirteenth Amendment for the Cherokee Nation's denial of their right to vote was correctly recognized by the District Court. In its opinion, the District Court noted that

⁴ The only other groups that could possibly assert these types of claims would be Freedmen with similar rights to membership in other Indian tribes.

although the Thirteenth Amendment does not mention the right to vote explicitly, “there can be no doubt that the right to vote is fundamental” and “the denial of the right to vote based on one’s race is nothing if not a badge and incident of slavery.” *Op.* at 19 (internal citation and quotations omitted). Accordingly,

“[t]hat the Freedmen are not protected by the Fourteenth or Fifteenth Amendment, under which voting rights are usually enforced . . . emphasizes that they must be protected by the Thirteenth Amendment and the Treaty of 1866. To conclude otherwise would be to deny effect to the Thirteenth Amendment as well as Congress’s repeated enactments to protect the Freedmen’s rights to full membership in the Cherokee Nation, which includes the fundamental right to vote.”

Id. at 20.

The importance of the right to vote cannot be understated. The right to vote is a fundamental right in democracies. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). The right to vote “strike[s] at the heart of representative government,” (*id.* at 555), and all “[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). Other civil rights flow directly from the right to vote in a “free and unimpaired manner.” *Reynolds*, 377 U.S. at 562. The Supreme Court has stated that the right to vote is regarded as “a fundamental political right, because preservative of all rights.” *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

The Cherokee Nation Defendants argue that the Freedmen must bring this claim under a piece of enforcement legislation, such as the Civil Rights Act.

Appellant's Brief at 38-42. But no separate enforcement legislation is required. The Thirteenth Amendment protects the Freedmen's citizenship rights, including the right to vote in Cherokee elections in much the same way that the Fourteenth and Fifteenth Amendments protect citizenship rights, including the right to vote of other citizens in state elections. Op. at 20. For the Freedmen, the present action is akin to an action to enjoin the state from denying them the right to vote in violation of their constitutional rights. Such claims can always be brought directly under the constitution. *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1944) (bringing claim under the Fourteenth and Fifteenth Amendments against state political party for restricting party membership to white persons); *Nixon v. Condon*, 286 U.S. 73 (1932) (bringing claim under the Fourteenth Amendment for denial of right to vote in state primary election); *Nixon v. Herndon*, 273 U.S. 536 (1927) (bringing claim under the Fourteenth Amendment for denial of right to vote in state primary election).

When the Texas Democratic Party passed resolutions denying African-Americans their right to vote, the disenfranchised citizens had a claim under the Fourteenth and Fifteenth Amendments. *Herndon*, 273 U.S. at 541 (denial of the right to vote in state primary election was a "direct and obvious infringement of the Fourteenth [Amendment]"). That is exactly what the Cherokee Nation is trying to

do to the Freedmen. Compl. ¶¶ 1, 55. The Thirteenth Amendment and the Treaty of 1866 must prevent them from succeeding. *See* Op. at 20.

Even if other enforcement legislation were required to permit the Freedmen to assert claims under the Thirteenth Amendment for denial of their right to vote in Cherokee elections, the Treaty of 1866 is that enforcement legislation. The enforcement legislation that can be invoked to protect the voting rights of all other U.S. citizens is not available to protect the voting rights of the Freedmen in Cherokee elections. The Treaty of 1866 was Congress's chosen means of enforcing the Thirteenth Amendment's prohibition on badges and incidents of slavery against the Cherokee Nation vis à vis the Freedmen. The Treaty of 1866, therefore, substitutes for some other enforcement legislation with respect the Freedmen and their uniquely protected rights to full membership in the Cherokee Nation. *See* Lydia Edwards, Comment, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights Within Indian Country?* 8 BERKELEY J. AFR.-AM. L. & POL'Y 122, 149-51 (2006) (suggesting that the Treaty of 1866 is "enforcement legislation under the Thirteenth Amendment's ban on the badges and incidents of slavery").

D. Other legislation provides historical evidence that Congress intended to abrogate the Cherokee Nation's sovereignty.

The Cherokee Nation mischaracterizes the District Court discussion of other congressional acts that limit the Cherokee Nation's sovereignty with respect to the Freedmen. Appellant's Brief at 31-35. The District Court held that the repeated acts of Congress *provide further evidence that the intent of the Thirteenth Amendment and the Treaty of 1866 was to limit the sovereignty of the Cherokee Nation to discriminate against the Freedmen.* Op. at 19 ("By repeatedly imposing such limitations on the sovereignty of the Cherokee Nation in order to protect the Freedmen, Congress has unequivocally indicated its intent to abrogate the tribe's immunity with regard to racial oppression prohibited by the Thirteenth Amendment.") (emphasis added).

As the District Court held, the undisputed historical facts also show that the Cherokee Nation's sovereignty has been abrogated. Congress has exercised its plenary power to limit the Cherokee Nation's ability to govern internal matters with respect to the Freedmen through the Treaty of 1866. Congress empowered the Dawes Commission to determine the citizens of the Cherokee Nation and to make out the Dawes Commission Rolls accordingly. *See Stephens*, 174 U.S. at 488 (finding that Congress, in its paramount authority over Indian tribes, had the power to appoint the Dawes Commission to determine who were entitled to citizenship in each of the tribes). To this day, the Dawes Commission Rolls are

determinative of who is entitled to membership in the Cherokee tribe – that includes all Cherokees, not just the Freedmen. Membership for all Cherokees, including the Freedmen, is dependent on being descended from a person who is included on the Dawes Commission Rolls. *Stephens*, 174 U.S. at 491 (“[T]he rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.”).

III. The statutes cited by the Cherokee Nation are not at issue in this appeal.

The Cherokee Nation argues that the ICRA, the Curtis Act, ch. 504, 30 Stat. 495 (1898), and the Act of 1970, Pub. L. No. 91-495, 84 Stat. 1091 (1970), did not abrogate the Cherokee Nation’s sovereignty. Appellant’s Brief at 45-47. The District Court did not hold that the ICRA and Curtis Act abrogated the Cherokee Nation’s sovereign immunity, and therefore these are not issues in the appeal. As to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, the Freedmen claim that the Department of Interior failed to follow its prior decision in an almost identical matter involving the Seminole Nation. *Seminole Nation v. Norton*, Civil Action No. 00-2384 (CKK) (Sept. 27, 2001, Mem. Op.) Dkt. No. 40.

IV. Cherokee Nation officials are not immune from suit.

Cherokee Nation Chief Chad Smith and other Cherokee officials' acts denying the Freedmen their fundamental rights secured by the Thirteenth Amendment and the Treaty of 1866 cannot be shielded by sovereign immunity. The District Court's holding follows established Supreme Court precedent regarding the Cherokee Nation officials: they are not immune for actions beyond the scope of their authority and for prospective, injunctive relief. Op. at 26 ("Moreover, even if the tribe were immune, tribal officials are not protected by sovereign immunity when they are acting beyond the scope of their authority, nor are they immune from suits for prospective, injunctive relief.") (citing *Santa Clara Pueblo*, 436 U.S. at 59; *Ex parte Young*, 209 U.S. 123 (1908)). In *Ex Parte Young*, the Supreme Court considered the issue of suit against a government official, and though the case related to a state official, such reasoning is applicable in suits against tribal officials. After examining previous cases, the Court concluded that, in using the name of the state to enforce an unconstitutional statute, a government official is engaging in an illegal act. *Ex Parte Young*, 209 U.S. at 159. The Supreme Court stated:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to

impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159-60. Similarly, in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949), the Supreme Court held that sovereign immunity does attach when an official's actions are unconstitutional because "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Id.*

In the current case, Chief Smith has engaged in actions that are unconstitutional and contrary to the Treaty of 1866. He took actions against the citizens of his Nation to deny them the right to vote and subsequently enjoy any rights to citizenship because they are the descendants of slaves. Thus, even if the Cherokee Nation were immune from this type of suit, the tribe could not impart immunity to Chief Smith for illegal actions committed by him while in office. He must be held responsible to "the supreme authority of the United States" for his illegal actions disenfranchising the Cherokee Freedmen. The actions of Chief Smith and other Cherokee officials were contrary to the Treaty of 1866, which guaranteed the Freedmen equal rights. Thus, they were acting outside of their authority, and therefore, cannot be protected by the tribe's sovereign immunity, if it exists in this case.

The Cherokee Nation again argues that the claims against Cherokee officials are really against the Cherokee Nation. The District Court, however, correctly held

that the Freedmen's claims against Cherokee officials are for injunctive relief, and therefore not against the Cherokee Nation. Op. at 27 n.14 ("However, actions for injunctive or prospective relief against an official 'are not treated as actions against the [sovereign].'") (citing *Hafer v. Melo*, 502 U.S. 21, 27 (1991)).

CONCLUSION

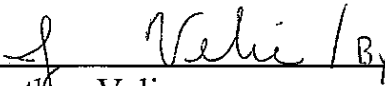
The historical facts of this case are unique. As slaves of Cherokees, the Freedmen have, since the ratification of the Treaty of 1866, held a special status protected by both the Treaty of 1866 and the Thirteenth Amendment.

Tribal sovereign immunity is not absolute. When exercise of that sovereignty would conflict with the overriding interests of the United States, courts have found that tribal immunity has been implicitly abrogated. Congress intended for the Cherokee Nation's sovereign immunity to be abrogated for the claims raised by Plaintiffs in this case. Because the doctrine of tribal sovereign immunity would not be developed for approximately fifty years, Congress in 1866 did not address the Cherokee Nation's immunity in the Thirteenth Amendment or the Treaty of 1866. As the District Court observed, allowing the Cherokee Nation to assert sovereign immunity as a shield to Plaintiffs' claims would deny effect to the Thirteenth Amendment and the repeated acts of Congress passed for the protection of the Freedmen.

Based on the foregoing, the District Court's decision should be affirmed.

Respectfully Submitted,

February 21, 2008

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CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,739 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point, Times New Roman font.

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CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Initial Brief of Appellees Marilyn Vann, *et al.*, were served as indicated, to the counsel listed below, on this 21st day of February, 2008:

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