CHEROKEE NATION ELECTION COMMISSION

SPECIAL MEETING

OCTOBER 17, 2012

4:00 P.M.

Amended Agenda

I. Call Meeting to Order and Roll Call of Commissioners

II. Current Agenda

1. N/A

III. Old Business

1. Discussion and possible action concerning voter registration vendors.

IV. New Business

1. Discussion and possible action concerning hiring an Election Consultant.
2. Discussion and possible action concerning hiring a Geo-Mapping Consultant.
3. Discussion and possible action concerning an updated voter registration form.
4. Discussion and possible action concerning approval for registration of business workshops, transportation, and lodging fees for Commissioner Martha Calico for November 7-11, 2012 to attend Business Conference in Las Vegas.
5. EXECUTIVE SESSION: As provided in Section 75-1-9 Paragraph A. 2. of the Cherokee Nation Code concerning pending litigation in the Cherokee Nation District Court and the United States District Court for the Northern District of Oklahoma to discuss matters covered by the Attorney Client privilege.

V. Adjournment

LDE
10/15
Posted @ 4:45

CHEROKEE NATION
ELECTION COMMISSION SPECIAL MEETING
ELECTION SERVICES OFFICE MEETING ROOM
Special Meeting
October 17, 2012
4:00 p.m.

Commission Presided by: Bill Horton

Commission Date/Time/Place: October 17, 2012/4:00 p.m.
Election Services Office Meeting Room

Commission Member Present/Absent:

Carolyn Allen	Present/Absent
Martha Calico	Present/Absent
Shawna R. Calico	Present/Absent
Lindsay Earls	Present/Absent
Bill Horton	Present/Absent

Quorum Established: YES/NO

Staff Present: Wanda Beaver Joyce Gourd Genny Scott

Visitors:

Patricia Carpenter
Stan Carpenter
Dianne Barker Harrold
Julia Coates
Harvey Chaffin
Jami Custer

Special Meeting

October 17, 2012

Visitor Sign In Sheet

Patricia E. Carpenter	
Steve Carpenter	
Dennis Barker Harrold	
Julia Coates	
James Curtis	

CHEROKEE NATION ELECTION COMMISSION
P.O. BOX 1188
TAHLEQUAH, OK 74465-1188
PHONE (918) 458-5899 FAX (918) 458-6101

MEETING ATTENDENCE RECORD

FOR THE MONTH OF October 2012

REGULAR OR SPECIAL DATE: 10/09/2012	REGULAR OR SPECIAL DATE:
Martha Calico	
COMMISSIONER Carolyn Allen	COMMISSIONER
COMMISSIONER Lindy Fowls	COMMISSIONER
COMMISSIONER Shauna Calico	COMMISSIONER
COMMISSIONER Bill W. Horton	COMMISSIONER
COMMISSIONER	COMMISSIONER

REGULAR OR SPECIAL DATE: 10/17/2012	REGULAR OR SPECIAL DATE:
Lindy Fowls	
COMMISSIONER Carolyn Allen	COMMISSIONER
COMMISSIONER Bill W. Horton	COMMISSIONER
COMMISSIONER Shauna Calico	COMMISSIONER
COMMISSIONER	COMMISSIONER
COMMISSONER	COMMISSIONER

Cherokee Nation Election Commission
Special Meeting
Election Services Meeting Room
October 17, 2012

Minutes

CALL TO ORDER/ROLL CALL:
The Special Meeting of the Election Commission was called to order at 4:07 p.m. Roll Call was taken and a quorum was established. In attendance were:

Commission –
Bill W. Horton – Chairman
Lindsay Earls – Vice-Chair
Shawna Calico – Commissioner
Carolyn Allen – Commissioner

Office Staff – Geneva Scott
Joyce Gourd

Guests - Harvey Chaffin
Patricia Carpenter Stan Carpenter
Jami Custer Julia Coates
Dianne Barker - Harrold

APPROVAL OF MINUTES:
N/A

MINUTES:

Discussion was held concerning Voter Registration vendors. A motion was made by Lindsay Earls to approve a contract of $150,000 with Maxim Consultant. The motion was seconded by Carolyn Allen. A vote was taken and the motion was approved unanimously.

Discussion was held regarding hiring an Election Consultant. A motion was made by Carolyn Allen to hire Connie Parnell as an Election Consultant on needed basis. Mrs. Parnell contract began October 1, 2012 to September 30, 2013 for $5000.00. Mrs. Parnell will be paid $30/hr for her services. The motion was seconded by Lindsay Earls. A vote was taken and the motion was approved unanimously.

Discussion was held regarding hiring a GEO-Mapping Consultant. A motion was made by Lindsay Earls to sign a contract with OU Center for Spatial Analysis to help with the GEO-Mapping Consultant. The contract should not exceed $200,000. The motion was seconded by Carolyn Allen. A vote was taken and the motion was approved unanimously.

IN THE DISTRICT COURT OF THE CHEROKEE NATION

2012 OCT 10 AM 9:39

COUNCIL OF THE CHEROKEE NATION,	)	
	)	
Plaintiffs,	)	
	)	
Vs.	)	Case No. CV-12-403
	)	
CHEROKEE NATION ELECTION COMMISSION,	)	
	)	
Defendant.	)	

OCT 15 2012

ORDER

There comes before this Court Defendant's Motion to Extend Time to Answer or Otherwise Plead.

The Court having considered Defendant's Motion, and for good cause shown, hereby grants Defendant's Motion extending the time within which to answer the Petition or otherwise plead to October 30, 2012.

Dated this 10th day of October, 2012.

JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

The foregoing Order was mailed, postage prepaid, on this 10th day of October, 2012, to the following:

Dianne Barker-Harrold
Attorney for Plaintiffs
7308 W. 805 Rd.
Ft. Gibson, OK 74434

Bill W. Horton
Cherokee Nation Election Commission Chairman
P.O. Box 1188
Tahlequah, OK 74965

FILED
2012 OCT 12 PM 4: 13
CHEROKEE NATION
DISTRICT COURT
KRISTI NORCROYEA
COURT CLERK

IN THE DISTRICT COURT OF THE CHEROKEE NATION

BUEL ANGLEN, JACK D. BAKER, JULIA COATES, LEE KEENER, and CARA COWAN WATTS, In their Official Capacity as Council Members and as Individual Cherokee Nation Citizens.	)	
Plaintiff,	)	
vs.	)	**Case No. CV-2012-410**
CHEROKEE NATION,	)	
Defendant	)	

RESPONSE TO MOTION TO DISMISS

Plaintiffs Buel Anglen, Jack D. Baker, Julia Coates, Lee Keener, and Cara Cowan Watts, in their Official Capacities as Tribal Council Members and in their Individual Capacities as citizens of the Cherokee Nation ("Plaintiffs"), represented by Attorneys John E. Parris, Bill M. Shaw, and Jeff M. Stephens, respond to the Motion to Dismiss filed by Defendant Cherokee Nation, October 2, 2012, for the reasons set out below and set out previously filed Petition for Declaratory and Injunctive Relief.

Defendant's first issue is whether LA-06-09 is the basis of this case, and by implication whether Plaintiff's have complied with the statute. Plaintiff's case is filed under the authority of the Constitution, Article VIII, Section 6, because it is one of the "disputes arising under the laws or Constitution of the Cherokee Nation." Defendant cites LA-06-09 but does not give any fact or reason why this case is inconsistent with that Act. However, Plaintiff submits that the Petition complies with LA-06-09 because Plaintiffs have named the appropriate party, have filed in the proper venue, and, because the Petition challenges the constitutionality of a statute, the Attorney

General has been served. Plaintiffs do not believe that there are any municipalities within Cherokee Nation, or that there are any other county courts within the Cherokee Nation Judiciary. Defendant makes no argument why LA-06-09 is a basis for dismissing the case and so this is not an issue or reason to dismiss.

Defendant's also mention a parallel case, *Council vs. Election Commission*, CV-12-03, but give no argument why this case should be dismissed based on that case. Plaintiff's submit that *Council* should be dismissed because neither party has standing and the case presents no "controversy." The Council cannot be a proper plaintiff to challenge a statute they passed, and the Election Commission is not a proper defendant.

In *Watts v. Principal Chief*, SC-10-05, the Election Commission was properly found to have no standing and was omitted from the appeal. The Election Commission, as with any administrative board, only has the powers delegated in its organic statute. Nothing in the Election law, LA-09-85, as amended through LA-26-12, gives the Election Commission power to defend a legislative districting plan that was produced by the Council. The Election Commission merely administers the laws. Constitution Article IX, Section 1.

The Constitution and laws assign the duty to write law to the Council and the duty to defend laws to the Attorney General. The Attorney General should have been served in that case as required by LA-06-09, and should be arguing for its dismissal. If CV-12-03 is not dismissed it should be consolidated with this case and Plaintiffs herein given opportunity to argue for the dismissal of the Council and Election Commission.

Plaintiffs reserve the right to challenge consolidation of those parties because due to their lack of standing they should not be parties to this controversy, and Plaintiffs are unsure how they would be aligned. The Council cannot be a plaintiff if they are defending their own law. The

Election Commission cannot be a defendant regarding a law that they have not had time to administer and have no part in enacting. Conversely, the Council cannot be a defendant regarding a law of the Nation, no longer a Council matter, and which they have no power to enforce. The Election Commission cannot be a plaintiff where they are not directly harmed, and where they are only allowed to administer the laws in existence. Also, they are each part of the Cherokee Nation and any interest they may have is fully represented by the Attorney General in this case. The existence of CV-12-03 is no reason to dismiss this true adversarial case and Defendant has made no such argument in the Motion to Dismiss.

Defendant also argues that the Plaintiffs have no standing because they have not demonstrated a specific particularized harm. However the face of the Petition details the loss of representative capacity due to larger and inequitable sized districts, the illegal addition of at-large voters to the At-Large District, and the loss of a seat by at least one Plaintiff. These and other harms to be shown at trial are even greater than those claimed in *Watts, supra*, wherein some of these same plaintiffs were found to have standing on the same issue, election redistricting. On this issue even individual voters have been found to have standing. *See e.g. United States v. Hays, 515 U. S. 737, 744-745 (1995)*: "Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." This case alleges other harms than racial gerrymandering, but the principle that illegal districts give residents and representatives of those districts standing remains.

Also note Justice Stevens concurrence, stating "The term "gerrymander" has long been understood to mean "any set of districts which gives some advantage to the party which draws the electoral map." P. Musgrove, General Theory of Gerrymandering 6 (1977). As Justice Powell

noted, "a colorable claim of discriminatory gerrymandering presents a justiciable controversy under the Equal Protection Clause." *Davis v. Bandemer*, 478 U. S. 109, 185 (1986) (dissenting opinion); see also *Gomillion v. Lightfoot*, 364 U. S. 339 (1960)." Plaintiffs herein clearly have alleged and at trial will prove that they were the minority vote and the majority's drawing of the districts has given the majority "some advantage" that gives the minority standing.

Plaintiffs also have standing as individual voters, independent of their official status. Plaintiffs Anglen, Keener, and Watts reside in relatively large districts and so as individual voters have suffered vote dilution. Plaintiff Coates lives in Tahlequah, and due to the lack of accurate definition of districts cannot ascertain what would be her district. And even if the Cherokee County districts could be discerned, Plaintiff Coate's community of Tahlequah is divided between three representatives. Plaintiffs have alleged and will prove at trial individual harm and thus standing as individual voters.

This case does not present racial gerrymandering, but Plaintiffs do claim otherwise illegal gerrymandering on several other grounds. Residency, and representation of, such districts justifies standing. Adjusting the population and boundaries of districts affects every voter and representative by shifting power. Smaller districts exercise proportionately more power than larger districts. More work and expense by representatives is required for larger districts than smaller districts. Defendant does not dispute that three plaintiffs reside within districts that have significantly larger populations than other legislators. The two At-Large Representatives stand to gain additional constituents because of the illegal removal of district residents to the at-large group. Clearly plaintiffs have Constitutional standing to ask for an election law that will "afford a reasonably equal division of citizenship among the districts" and a fair opportunity for each eligible voter to cast a vote within his or her district.

Defendant's assertion in the "Brief in Support" that the whole Council filing suit somehow deprives individual Council members standing is contrary to the case law. *Cherokee Nation Tribal Council v. Principal Chief Chadwick Smith*, SC-09-03, and its companion case SC-09-02, merely held that the District Court did not abuse its discretion by dismissing two individual Council members whose filings were untimely. Those Council members filed a motion to intervene very late in the case and were denied based upon timeliness. No discussion of standing was held in the District Court or Supreme Court. Note particularly Judge Fite's Order in CV-09-65, July 7, 2009, affirmed in SC-09-02, Nov. 2, 2009, wherein the District Court states:

> It has further been suggested to the Court that in its ruling granting the motion to dismiss the individual councilors that the Court has ruled that they were not proper parties. This is not the Court's ruling as the Court is of the opinion, upon proper application, that the individual Council members may in fact intervene individually because of differing interests in the issues presented.

Plainly individual Council Members can be proper parties when timely entering the case. Here Plaintiffs filed the case and so are unquestionably timely.

Anglen v. *McKinney*, JAT-05-11 concerned the constitutionality of same-sex marriage, and Council member plaintiffs there could not show a personal injury if the defendants were allowed to marry in Cherokee Nation Courts. *Mayes v. Thompson*, JAT-95-15 concerned six challenges to the tribal appropriations process. Because plaintiff Mayes was unaffected by the budget, he could not show harm. In this case harm to Plaintiffs is clearly alleged in their petition, and will be proven at trial.

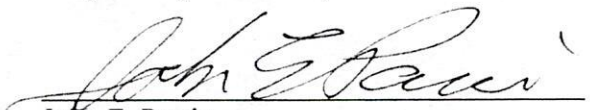
The legislative districts of Plaintiffs herein have been drastically altered in several un-constitutional aspects. Power has inequitably shifted, resources unfairly reallocated, district boundaries obfuscated, voters have been disenfranchised and communities divided. All these harms are present but without any explanation or rationale given in the legislative record. With

only one of these harms, apportionment, being litigated in *Watts v. Smith*, SC-2010-05, most of these same litigants never questioned standing. (Council Member Baker being dismissed on procedural grounds.) Standing should be affirmed here to allow the Cherokee Nation Courts to remedy these constitutional insults striking at the very roots of our tribal democracy.

Oral argument is requested on this motion because of the complex legal arguments involved in this case.

Dated: October 12, 2012

Respectfully submitted,



John E. Parris
1423 S. Indianapolis Ave.
Tulsa, Oklahoma 74112
jeparris@gmail.com
918-931-8928
Attorney for Plaintiffs

/S

Jeff M. Stephens
Stephens Law Firm
323 East Rogers Blvd.
Skiatook, OK 74070
(918) 396-0404
(918) 396-0406 - Fax
stephenslawfirm@sbcglobal.net
Attorney for Plaintiffs

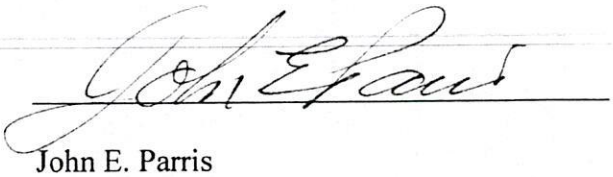
/S

Bill M. Shaw
319 West 1st Street
Claremore, OK 74017
(918)343-2468
Attorney for Plaintiff

Certificate of Service

I, the undersigned, do hereby certify that on the 12th day of October 2012, I personally delivered or caused to be delivered via first class mail, electronic mail, or facsimile a true and correct copy of the above Motion to the following:

Todd Hembre
P. O. Box 948
Tahlequah, OK 74465
Attorney General



John E. Parris

2012 OCT 12 PM 4: 13

IN THE DISTRICT COURT OF THE CHEROKEE NATION

DISTRICT COURT
MUSKOGEE
COURT CLERK

BUEL ANGLEN, JACK D. BAKER, JULIA COATES, LEE KEENER, and CARA COWAN WATTS, In their Official Capacity as Council Members and as Individual Cherokee Nation Citizens.	)	**Case No. CV-2012-410**
Plaintiff,	)	
vs.	)	
CHEROKEE NATION,	)	
Defendant	)	

MOTION FOR PRELIMINARY INJUNCTION.

Plaintiffs Buel Anglen, Jack D. Baker, Julia Coates, Lee Keener, and Cara Cowan Watts, in their Official Capacities as Tribal Council Members and in their Individual Capacities as citizens of the Cherokee Nation ("Plaintiffs"), represented by Attorneys John E. Parris, Bill M. Shaw, and Jeff M. Stephens, moves for a preliminary injunction as set out below and for the reasons set out in the accompanying Memorandum and previously filed Petition for Declaratory and Injunctive Relief. Fed. R. Civ. P. 65(a).

As set out more fully in the Memorandum and Petition for Declaratory and Injunctive Relief, Plaintiffs challenge the constitutionality of LA 26-12, the "Voter District Amendment Act of 2012" ("Act"). The Act has an emergency clause that placed it into immediate effect. However the Act has numerous constitutional flaws and if it is allowed to continue in effect, it will cause substantial harm. The most obvious and present harm is the placement of two Council members in one district while leaving another district without a representative. Plaintiffs submit that the facts meet the standards for a preliminary injunction, i.e., there is probable success on the

merits, there will be irreparable harm, others will not be substantially harmed, the public interest will be served, and there is no adequate remedy at law.

Because a preliminary injunction presents no monetary risks to the Cherokee Nation, Plaintiffs request that bond not be required.

For the reasons stated in the accompanying Memorandum and Complaint, Plaintiffs pray that the Court grant this motion and preliminarily enjoin the Cherokee Nation from enforcing the Act until a final hearing and judgment on the merits.

Oral argument is requested on this motion because of the complex legal arguments involved in this case.

Respectfully submitted,

Dated: October ____, 2012

John E. Parris
1423 S. Indianapolis Ave.
Tulsa, Oklahoma 74112
jeparris@gmail.com
918-931-8928
Attorney for Plaintiffs

Jeff M. Stephens
Stephens Law Firm
323 East Rogers Blvd.
Skiatook, OK 74070
(918) 396-0404
(918) 396-0406 - Fax
stephenslawfirm@sbcglobal.net
Attorney for Plaintiffs

Bill M. Shaw
319 West 1st Street
Claremore, OK 74017
(918)343-2468
Attorney for Plaintiff

Certificate of Service

I, the undersigned, do hereby certify that on the 12th day of October 2012, I personally delivered or caused to be delivered via first class mail, electronic mail, or facsimile a true and correct copy of the above Motion to the following:

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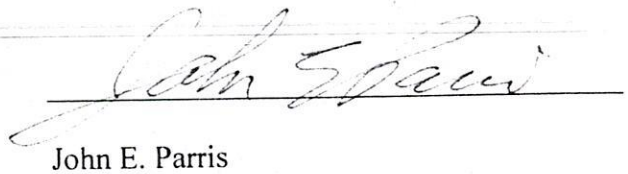
P. O. Box 948
Tahlequah, OK 74465
Attorney General



John E. Parris

FILED
2012 OCT 12 PM 4: 14
CHEROKEE NATION
DISTRICT COURT
TAHLEQUAH, OKLAHOMA
COURT CLERK

IN THE DISTRICT COURT OF THE CHEROKEE NATION

BUEL ANGLEN, JACK D. BAKER, JULIA COATES, LEE KEENER, and CARA COWAN WATTS, In their Official Capacity as Council Members and as Individual Cherokee Nation Citizens.	)	
Plaintiff,	)	
vs.	)	**Case No. CV-2012-410**
CHEROKEE NATION,	)	
Defendant	)	

Memorandum in Support of Preliminary Injunction Motion

I. A party seeking a preliminary injunction must establish that: (1) it is likely to succeed on the merits of the underlying litigation; (2) it is likely to suffer immediate, irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in its favor; and (4) an injunction is in the public interest. Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008);

II. Plaintiffs are likely to succeed on the Merits.

A. Plaintiffs are likely to succeed on the merits of the underlying litigation because four of the five counts are self-evident from the four corners of the Act in question. The Cherokee Nation, in Lay v. Cherokee Nation, JAT 97-05, and Watts v. Smith, SC-2010-05, established the rule of "one Cherokee, one vote." The Cherokee Nation Constitution contains some of the same guarantees of rights that the United States Constitution contains, notably for this case, equal protection, and no deprivation of life, liberty, or property without due process of law. Reynolds v. Sims, 377 U.S. 533 (1964), summarized the standards for similar American fair and constitutional election districting:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, Ex parte Yarbrough, 110 U.S. 651, and to have their votes counted, United States v. Mosley, 238 U.S. 383. In Mosley the Court stated that it is "as equally unquestionable that the right to have one's vote counted is as open to protection ... as the right to put a ballot in a box." 238 U.S., at 386. The right to vote can neither be denied outright, Guinn v. United States, 238 U.S. 347, Lane v. Wilson, 307 U.S. 268, nor destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, nor diluted by ballot-box stuffing, Ex parte Siebold, 100 U.S. 371, United States v. Saylor, 322 U.S. 385. As the Court stated in Classic, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted..." 313 U.S., at 315. Racially based gerrymandering, Gomillion v. Lightfoot, 364 U.S. 339, and the conducting of white primaries, Nixon v. Herndon, 273 U.S. 536, Nixon v. Condon, 286 U.S. 73, Smith v. Allwright, 321 U.S. 649, Terry v. Adams, 345 U.S. 461, both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

377 U.S. 533, 555-556. The problems noted in Plaintiff's Petition combine to debase and dilute citizen's free exercise of the franchise, effectively denying the right of suffrage. Following is law and argument demonstrating the likelihood of success on the merits of each count.

B. COUNT ONE.

The admitted overall population deviation on the face of LA 26-12 is between D11 at -9.12% and D14 at +9.94%, a 19.06% overall range. Regarding the overall range of population deviation for purposes of congressional districting, the U.S. Supreme Court held in Karcher v. Daggett, 462 U.S. 725 (1983), that "there are no de minimis population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, Sec. 2, without justification." *Id.* at 734. In Karcher, the New Jersey plan had an overall difference of 0.6984%.

The plaintiffs showed that at least one plan before the Legislature had a population difference of 0.4514%. Once the plaintiffs showed a plan with a smaller difference, "the state had the burden of proving that each significant variation from the ideal was necessary to achieve "some legitimate state objective." *Id.* at 740. New Jersey could not justify the larger range and so the plan with an overall difference of 0.6984% was declared invalid.

In Abrams v. Johnson, 521 U.S. 74 (1997), the U.S. Supreme Court affirmed a plan that had an overall range of 0.35%. No other plan considered by the court had a lower overall range or was otherwise unconstitutional. The Supreme Court would have been more concerned that the 0.35% was too high but the census data was then six years old and that was probably the best that could be done.

In the case of state legislatures, United States courts have a less strict standard of "substantial equality." In Brown v. Thomson, 462 U.S. 835 (1983), the court affirmed a "maximum percentage deviation between largest and smallest number of residents per representative" safe harbor standard:

> Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. See, e.g., Connor v. Finch, 431 U. S. 407, 431 U. S. 418 (1977); White v. Regester, 412 U. S. 755, 412 U. S. 764 (1973). A plan with larger disparities in population, however, creates a prima facie case of discrimination, and therefore must be justified by the State. See Swann v. Adams, 385 U. S. 440, 385 U. S. 444 (1967).

In Watts v. Smith, SC-2010-05, the Cherokee Nation Supreme Court recognized this 10% overall range rule:

> There has been much argued about the "ten (10) percent rule." This rule is not codified in Cherokee law. Nevertheless, it is a rule of persuasive guidance established by the United States Supreme Court. Voinovich v. Quilter, 507 U.S. 146 (1993). Granted, it is not mandatory even in federal districting, nonetheless, it does afford a reasonable benchmark, any substantial deviation from which should be justified. As such, there must be a compelling governmental interest to

over-ride an otherwise unconstitutional deviation.

Voinovich v. Quilter considered "maximum total deviation" exceeding 10%, following Brown v. Thomson, *Id.* at 843-846, and Mahan v. Howell, 410 U.S. 315, 325-330. Clearly the 10% rule means the sum of the absolute value of the largest positive and negative deviations. The "maximum total deviation" on the face of LA-26-12 is 19.06%, greatly exceeding the 10% standard. Plaintiff's would challenge the "10% rule" as being contrary to the Cherokee Nation Constitution, generally on the grounds stated in "Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote," Stephanie Cirkovich, Cardozo Law Review, Vol. 31:5, 1823, http://www.cardozolawreview.com/content/31-5/CIRKOVICH.31-5.pdf. However this case does not present the opportunity as the overall range here is nearly double the "10% rule."

The Brown court also noted what may constitute justification for a state exceeding 10% overall range:

> We have recognized that some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives, such as "maintain[ing] the integrity of various political subdivisions" and "providing for compact districts of contiguous territory." Reynolds, supra, at 377 U. S. 578.

The face of the Act and the legislative history give no indication of any attempt to maintain political subdivisions. No attempt is made to explain the non-compact and non-contiguous districts. *See* "Redistricting PowerPoint," Exhibit 1. No attempt at any justification was made, as if the 19.06% range would be within a "safe harbor." Given the excessively large range of deviation and total lack of justification, Plaintiffs are likely to succeed on the merits of Count One.

C. COUNT TWO.

The four issues in Count two are unconstitutional on the face of the Act. The total

absence of legal definitions of districts, non-compact districts, non-contiguous districts, and division of communities each are fatal constitutional flaws evident within the four corners of the Act.

1. **Legal definitions** – some accurate definition of the 15 voting districts should be in the legislation but is conspicuously absent. States use whole counties, cities, and census tracts to define districts. LA 12-22 only gives a minimal detail map, numbers and names. There are what appear to be county boundaries and roads, but none are identified. Even if these are county boundaries and major roads, many district boundaries do not align with these landmarks. Plaintiffs and the rest of the Cherokee Nation is left to guess what is the exact boundary. The Constitution surely requires reasonable definitions of district boundaries. No case law has been found on this point as apparently it has never been significantly litigated.

2. **Compactness** – Karcher v. Daggett, 503 462 U.S. 725, 756 (1983) (Stevens, J., concurring) stated "geographic compactness is a guard against all types of gerrymandering" and it serves "independent values; it facilitates political organization, electoral campaigning, and constitutional representation." and "Drastic departures from compactness are a signal that something may be amiss." The Court in *Bush v. Vera* used an "eyeball approach" to evaluate compactness. 517 U.S. 952, 960. Justice O'Connor wrote:

> Not only are the shapes of the districts bizarre; they also exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines. See, e.g., 861 F. Supp., at 1340 (60% of District 18 and District 29 residents live in split precincts). This caused a severe disruption of traditional forms of political activity. Campaigners seeking to visit their constituents "had to carry a map to identify the district lines, because so often the borders would move from block to block"; voters "did not know the candidates running for office" because they did not know which district they lived in. Ibid.

3. **Contiguous districts** – Two districts are not contiguous, as best Plaintiffs can discern from

the map in Exhibit A of LA-26-12. District 8 is divided by the northern point of District 7, leaving an area in northwest Adair County disconnected from the rest of District 8. District 2 has a southern portion connected only at a corner to the northern portion. There is minimal case law on this point because most states simply require contiguous districts by law and few legislatures have been brazen enough to draw non-contiguous districts. If this point becomes essential to issuing an injunction, then Plaintiffs will search further for authority on this point. Because non-contiguous districts necessarily divide communities, are prohibited by the vast majority of jurisdictions in the United States, and no justification was entered into the legislative history to justify such deviation from traditional districting principles, Plaintiffs are likely to prevail on this issue.

4. **Division of communities** – While Plaintiffs submit that they will be able to prevail on this point at trial following discovery, the absence of boundary definitions for the districts makes proving this point at this time guesswork. Nonetheless, it is apparent from Exhibit A to LA-26-12, that at least the communities of Skiatook and Tahlequah are divided.

D. COUNT THREE.

As stated in the Petition, LA-26-12 dramatically favors one political group at the expense of the other. Analyzing the numbers given in Exhibit A to LA-26-12, the new districts represented by Council Members who voted for the Act saw an average smaller size of 3.02%. Conversely, districts now represented by Plaintiffs and two others who voted against the Act have new districts that average 8.32% larger than ideal. Six of nine districts now represented by the Majority are under populated, while all four districts now represented by the Minority are over populated, with three nearly 10% larger than ideal. These numbers don't take into account the two Plaintiffs who are now in the same district, or the vacant district. No members of the

majority were placed two to a district. Plaintiffs are likely to prevail on this issue because LA-26-12 unconstitutionally favors one group over another.

E. COUNT FOUR.

As stated in the Petition, two Plaintiffs now share a district and pursuant to the terms of LA-26-12, one of them cannot hold their seat. However the Constitution guarantees both a four year term. Both cannot be true and so the Act must fall to the Constitution. Plaintiffs are likely to prevail on this issue because an Act must not be inconsistent with Constitutional guarantees.

F. COUNT FIVE.

Plaintiffs believe that this issue will be proved at trial after discovery, but if any of counts one to four are found to be likely to prevail then this will not prevent issuing the preliminary injunction.

III. PLAINTIFFS ARE LIKELY TO SUFFFER IMMEDIATE HARM.

Plaintiff's are likely to suffer immediate, irreparable harm in the absence of preliminary relief because the present Tribal Council is un-constitutionally seated, lacking equal representation given the statistics in Exhibit A, which has no accurate descriptions, having two members living in the same district, and having a district with no representation. Every vote and apportionment of resources each month is constitutionally suspect because of the un-constitutional seating of this Tribal Council. The effects of decisions of the Council often cannot be repaired. The two members who share a district have a cloud over their office because the Act requires only one in the district but their constitutional term has not expired. Equally unconstitutional is the lack of representation for the new District 10. At every vote of the Tribal Council the citizens of this district are totally unrepresented. Meanwhile the under-sized districts of the Council members who passed this Act are over-represented.

Because votes of the Tribal Council are difficult to reverse, resources denied are difficult to replace, and the cloud of possibly un-constitutional and criminal actions hangs over the tribal Council, irreparable harm is likely to occur in the absence of this preliminary injunction. All of these problems are immediately at issue because of the emergency clause of the Act.

IV. THE BALANCE OF EQUITITES WEIGHS IN PLAINTIFFS FAVOR.

A party seeking a preliminary injunction must establish the following: that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008). It is always the duty of a court of equity to strike a proper balance between the needs of the Plaintiff and the consequences of giving the desired relief. When balancing the equities, especially where government action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative. *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426, 68 S. Ct. 641, 92 L. Ed. 784 (1948). Given the constitutional and other flaws apparent in LA-26-12, preliminarily enjoining Defendant Cherokee Nation from enforcing and implementing LA 26-12 until a trial on the merits can be had is a much more advisable and legally prudent than allowing an unconstitutional and poorly drafted legislative act to be implemented.

Section 5 of LA-26-12 provides for fifteen districts, none of which are defined by any legally-recognized standard, other than arbitrary, un-described and un-defined lines on a map. Section 5(D) of the Act identifies separate districts for Plaintiffs Cara Cowan-Watts and Lee Keener, notwithstanding the reality of their respective residences, since Section F of the Act goes on to recite that:

> "Individuals elected to the Tribal Council for each district shall maintain their domicile within the boundaries of that district. Failure to do so shall result in forfeiture of the office and the position shall be declared vacant."

The act, as poorly-drafted as it is, apparently gives the Tribal Council the authority to declare an elected official's office vacant. In addition, a duly-elected Tribal Council Member, Plaintiff Buel Anglen, is intentionally omitted as a Tribal Council Member from the fifteen districts set forth in the Act, which harms the citizens of Rogers and Tulsa Counties who overwhelmingly elected Plaintiff Buel Anglen in his last election. Further damaging to the Act and Cherokee citizens, Seat 10, the "Delaware North" district, has no representation by any Tribal Council Member. One can only reasonably infer that it was more important to those Council Members who voted to pass and approve LA-26-12 to purport to eliminate Plaintiff Buel Anglen as a Council Member than to provide those tribal citizens in new District 10 with an actual Tribal Council Member.

If an injunction does issue, the citizens of the Cherokee Nation will continue to be represented by the currently-serving and elected Tribal Council Members within the five districts and two at-large Council Members established by LA-22-10, so there will be no harm to tribal citizens or the Cherokee Nation at large since the status quo is preserved. The status quo will provide proper representation for all Cherokee citizens, in contrast to LA-26-12, which clearly does not. Balancing the equities in this case clearly weighs in the Plaintiffs' favor due to the irreparable harm which will be occasioned is the Act is implemented. The preliminary injunction should issue as requested by Plaintiffs.

VII. AN INJUNCTION IS IN THE PUBLIC INTEREST.

The public has a right to a democratically elected representative government at all times. LA 26-12 is contrary to those basic principles and so is harming the citizens of Cherokee Nation.

An injunction will return the Nation to the status quo and a more constitutional government than what is forced by LA-26-12. For the residents of new District 10, if they know who they are, they will again be represented on the Council. Clearly an injunction is in the public interest.

Oral argument is requested on this motion because of the complex legal arguments involved in this case.

Dated: October 12, 2012

Respectfully submitted,

John E. Parris
1423 S. Indianapolis Ave.
Tulsa, Oklahoma 74112
jeparris@gmail.com
918-931-8928
Attorney for Plaintiffs

/S

Jeff M. Stephens
Stephens Law Firm
323 East Rogers Blvd.
Skiatook, OK 74070
(918) 396-0404
(918) 396-0406 - Fax
stephenslawfirm@sbcglobal.net
Attorney for Plaintiffs

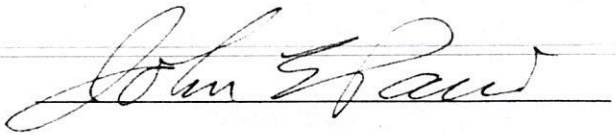
/S

Bill M. Shaw
319 West 1st Street
Claremore, OK 74017
(918)343-2468
Attorney for Plaintiff

Certificate of Service

I, the undersigned, do hereby certify that on the 12th day of October 2012, I personally delivered or caused to be delivered via first class mail, electronic mail, or facsimile a true and correct copy of the above Motion to the following:

Todd Hembre
P. O. Box 948
Tahlequah, OK 74465
Attorney General



John E. Parris