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THE STATE, CHEROKEE NATION, AND SAME-SEX UNIONS: IN RE: MARRIAGE LICENSE OF MCKINLEY & REYNOLDS

Christopher L. Kannady*

I. Introduction

Legal issues surrounding marriage began to arise in the middle of the 1960s with the decision of Griswold v. Connecticut, protecting the fundamental right to privacy, including marriage.¹ Since that time, one of the issues on the forefront is the recognition of same-sex unions as marriages, which are regulated from state to state. It can be difficult to predict what turn a legal interpretation may take, especially when dealing with a controversial issue such as same-sex unions. With several same-sex marriages being challenged from Maine to California, it is still surprising that this issue would come about so soon in Oklahoma, a state traditionally seen as being deep in the “Bible belt.” Even more intriguing is the possibility of a same-sex union within an Indian tribe within the State of Oklahoma. Rather than obtaining a license directly through the State of Oklahoma, one couple has gone right to a tribe for recognition.

Thirty-eight federally recognized Indian tribes exist within the State of Oklahoma.² Not all of these tribes have the ability to issue marriage licenses for tribal custom marriage. Of those that do, most do not have a formal policy prohibiting or allowing same-sex marriages.³ Only a few tribes, including the Creek Nation and the Iowa Tribe, specify that marriage can only be between a man and a woman.⁴

Currently, issuances of tribal marriage licenses are relatively rare. Most Indians still file through the method offered by the State of Oklahoma, perhaps without knowledge of the option of filing for a tribal custom marriage license. For instance, the Sac and Fox Nation has only issued forty-one licenses in

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1. 381 U.S. 479 (1965).
3. Id.
4. Id.
The fact that Indian tribes have not been issuing licenses for long may explain this widespread ignorance. If tribes have only been in the business of administering licenses for two decades, the word may not have gotten out. Perhaps like the general public, Native Americans are simply accustomed to the traditional way of going to the local county courthouse and filing an application for a marriage license. It is only by chance that a couple decided to test the waters in Oklahoma in regards to same-sex unions through a tribal government.

II. State Recognition of Tribal Marriage Licenses

The ultimate issue is not the fact that a tribe may recognize a same-sex marriage. There is only a narrow application and affect if the license is only valid in the realm of the issuing tribe. The real issue is whether or not another sovereign should recognize the license as valid, in this case the State of Oklahoma.

In the case now presented, legal minds from the tribe and the state were quick to give a statement. The general counsel for the Cherokee Nation, Julian Fite, stated, “The State has limits on recognizing certain actions of other states, such as Oklahoma’s ban on accepting same-sex marriages from other states. It would be my assumption the same would go for tribal unions or marriages.” 6 Drew Edmondson, Attorney General for the State of Oklahoma, glossed over the issue of recognizing a same-sex union from another sovereign and viewed it as just an Oklahoma marriage license. He stated, “Oklahoma law considers marriage a contract between one man and one woman.” 7 Although the Attorney General is correct, his statement does not address the recognition issue.

In Oklahoma, the issue of same-sex marriages was addressed several years ago. The current statute on marriage in Oklahoma came into effect in 1910. 8 Since that time there has been nine changes to the statute, but nothing to do with language allowing only a man and a woman being allowed to marry. 9 The main reason may be that the statute already spoke to the issue, just not explicitly. The statute permits marriage with a person of the opposite sex. 10 This language seems to implicitly rule out “same-sex” marriages with the prerequisite of the

5. Id.
7. Id.
8. 43 OKLA. STAT. § 3 (2001).
9. Id.
10. Id. § 3A.
“opposite” sex. Even with this language, the Oklahoma State Legislature went even further to secure marriage only between a man and a woman. In 1996, the legislature added an addition to the marriage and family section of the Oklahoma Statutes. This statute reads: “A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.” Not only does this statute prohibit same-sex unions in Oklahoma, it also prohibits the recognition of such marriages from other jurisdictions.

With the Oklahoma statute in place prohibiting the recognition of same-sex marriage, this poses an interesting conundrum. The U.S. Supreme Court has stated that the word territories in 28 U.S.C. § 1738 applies to tribal governmental acts so that they are entitled to full faith and credit before those states’ courts. It may be that Oklahoma must give full faith and credit to a tribal same-sex union, if the tribal court actually ruled in the favor of the same-sex couple. Given the fact that the state firmly prohibits recognition of any (emphasis added) same-sex union, Oklahoma would not recognize it and it would more than likely be litigated further to test the Oklahoma statute on constitutional grounds. Regardless, Oklahoma does not have to automatically recognize these tribal custom marriage licenses, but does so more than likely to promote positive relations between the two sovereigns. Additionally, Drew Edmondson, Attorney General for the State of Oklahoma, also pointed out the Defense of Marriage Act of 2001 passed by the United States Congress declares that no state, territory, or possession of the United States, or Indian tribe is required to honor same-gender marriages recognized by any of the other entities.

One caveat to the recognition issue is that Indian tribal custom marriages are provided for under the Code of Federal Regulations. This Code has extensive requirements including the issuance of the license through the Court of Indian Offenses, the recording of the license within thirty days, age requirements, and most importantly, the requirement of a written application of an unmarried male and an unmarried female. Therefore, the only alternative for a same-sex union, as far as a tribal union goes, would only be available through the tribe itself, which is the present case in the Cherokee Nation.
III. Statement of the Case

A. Background of Couple

The case at hand deals with the application for marriage of a same-sex couple in the Cherokee Nation. The couple is Dawn McKinley and Kathy Reynolds of Owasso, Oklahoma. McKinley is thirty-two years old and is the assistant manager of a retail store. She also has one child. Kathy Reynolds is a student working on a master’s degree in criminal justice. The two of them became concerned about their legal status when Reynolds was admitted into the hospital and McKinley was not allowed to see her since she was not “family,” as defined by the hospital rules. Additionally, the couple was worried about the parsing of their possessions if something happened to one of them. Of course, McKinley and Reynolds have not always had a solid relationship.

B. Chain of Events

On May 13, 2004, when the court clerk was absent, a deputy clerk issued a marriage license to McKinley and Reynolds. A day later, Justice Darrell Dowty, Chief Judge of the Cherokee Nation highest court, the Judicial Appeals Tribunal, issued a thirty-day moratorium on any other such applications. Immediately questions arose on what authority the court had to bring such an
action on its own volition. The Oklahoma Freedom and Equality Coalition did not understand how such an order could be issued without a lawsuit being filed.25

On May 18, 2004, the Rev. Leslie Kay Penrose married the two women.26 The couple gave vows according to Cherokee Nation traditions. After the vows, Rev. Penrose pronounced them companion and cooker.27 Whether purposeful or not, the vows were performed in a genderless manner. In the Cherokee language the word for husband means “companion that I live with,” and the word for wife means “cooker.”28

After the Judicial Appeals Tribunal stopped all subsequent same-sex marriage applications, the Cherokee tribal leadership began to react. Cherokee Chief Chad Smith responded that the Nation would only recognize the traditional definition of matrimony.29 The general counsel for the tribe then provided a more concise response by the tribe. General Counsel Julian Fite said it is his opinion that Cherokee law allows for marriage only between a man and a woman.30

Direct action against this specific application did not arise until June 11, 2004, when Todd Hembree, Cherokee Tribal Council attorney, filed a complaint alleging that the application for marriage was invalid because the same-sex couple was not qualified for marriage.31 After filing the complaint, Hembree assisted the Cherokee Tribal Council in drafting an amendment to the Cherokee Code to ban same-sex unions, which was subsequently passed unanimously on June 14, 2004.32 However, there was some unrest among


27. Id.

28. Id.


30. Stogsdill, supra note 2.


council members, because the measure was not available for viewing by the Tribal Council until after the meeting started. 33

C. Cherokee Code

Prior to these events, the Cherokee Code was specific on who cannot marry. This code stated that any person (emphasis added) who shall have attained the age of eighteen years shall be capable in law of contracting marriage. 34 Actually the only persons not allowed to marry are those nearer of kin than first cousins, currently married, the insane, or "idiotic." 35 At the time of the issuance of the license, no place in the code reflected marriage as being only between a husband and a wife.

The Cherokee Code was amended by Legislative Act 26-04. 36 The amended version had three crucial elements, which included substantive changes on who may marry, a severability clause in case any parts of the act were declared unconstitutional, and a declaration of an emergency. 37 Under the Cherokee Code, no law takes effect until thirty days after passage unless an emergency is declared. 38 If an emergency clause is in place and the measure is signed by the Principal Chief, then the law becomes effective immediately. 39 Just as the original thirty-day moratorium on all marriage licenses by the Chief Justice of the Judicial Appeals Tribunal did not affect the marriage license of McKinley and Reynolds, this new legislative act cannot be retroactive and cause the marriage license to be void. The only possibility is for the court to rule as such on the merits of the law prior to the changes. It is at this point that the marriage license litigation began.

IV. Court Pleadings

The court pleadings in this case are extraordinary. McKinley and Reynolds represented themselves pro se; therefore, many of their legal arguments are not based on legal precedence. Both parties thus far have filed an extensive amount of pleadings including multiple responses as well as a plethora of motions. Needless to say, both parties are continuing the debate on same-sex marriages.

33. Id.
34. 43 CHEROKEE CODE § 2 (1892).
35. See id. § 3.
37. Id.
39. See id § 24.
through these court pleadings, while at times the redundancy within these pleadings can be somewhat hard to follow.

A. Ex Parte Temporary Injunction

Todd Hembree, General Counsel for the Cherokee Tribal Council, filed an objection on June 11, 2004, to the marriage license of McKinley and Reynolds as a private citizen of the Cherokee Nation. The objection essentially asked for two things. First, Hembree claimed that the individuals being of the same gender do not qualify for a marriage license under the Cherokee Nation Code, specifically the section regarding marriage. He also requested that a moratorium continue on the filing of any marriage licenses, more than likely to prevent an influx of requests for marriage applications for same-sex unions.

John Cripps, Judge of the District Court of the Cherokee Nation, was quick to respond, granting on the same day an Order restraining the issuance of same-sex marriage licenses until further order of the court. The Judge also set the matter for a hearing in regards to the marriage license of McKinley and Reynolds, exactly one week from the day of the order, signaling a desire for a rapid expedition of the issue.

B. Application for Temporary Injunction

On June 16, 2004, Hembree filed an Application for Temporary Injunction. Arguing that if McKinley and Reynolds were allowed to register their marriage certificate, then irreparable harm would occur to the Cherokee Nation and would make the Declaratory Judgment he filed on the same day moot without having an opportunity to be heard. Hembree appeared to be arguing that he technically had standing as a member of the Cherokee Nation, and the Cherokee Nation as a whole would be harmed if the marriage certificate was registered.

On June 18, 2004, Judge Cripps issued an Order Granting Temporary Injunction on the basis that both parties agreed to the injunction at least until such time a hearing on the merits is heard or a dispositive order is entered.

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41. *Id.*
42. *Id.*
44. *Id.*
46. *Id.*
C. Petition for Declaratory Judgment

On the same day as the Application for Temporary Injunction, Hembree filed a Petition for Declaratory Judgment. Hembree was quick to jump to the black letter of the law, turning to *Black's Law Dictionary* to define certain terms. Hembree claimed that Title 43 of the Cherokee Code refers to the gender specific terms "husband and wife." However, the specific portion of Title 43 pertaining to who may marry is noticeably absent of gender specificity. In his petition it states that *Black's Law Dictionary* defines a husband as "a married man; one who has a lawful wife living," while a wife is defined as "a woman united in marriage to a man."

After clarifying the legal meaning of the words important to this issue, Hembree then made a case for why the court should rely on the plain meaning of the language and the original intent of the drafters. When determining the meaning of language in any statute, it is proper to look at the statute as a whole and apply the plain language of society in the time it was written. "As in all cases of statutory construction, it is the task of this Court to interpret the words of these statutes in light of the purposes the legislature sought to serve." Hembree focused a great deal on what the legislative intent may have been. He believed Title 43 of the Cherokee Nation Code was based upon the Constitution of the Laws of the Cherokee Nation in 1892. "Same sex marriages were not part of Cherokee history or tradition. Cherokee society in 1892 did not allow nor contemplate same-sex marriage. This Court should determine that same sex marriage is not allowed under today's laws." The root of his Petition for Declaratory Judgment was that the Cherokee Nation did not believe in same-sex unions then and does not now.

Respondents' actions are an attempt to have the Courts redefine the traditional concept of marriage within the Cherokee Nation. Simply put Respondents are seeking to take advantage of a perceived "loop hole" in our statute that if successful would fly in the face of the traditional definition and understanding of marriage of the Cherokee people.

49. *Id.*
50. 43 CHEROKEE CODE § 2 (1892).
52. Eggers v. Olson, 231 P. 483, 486 (Okla. 1924).
54. *Id.*
55. *Id.*
On June 17, 2004, Judge Cripps set a hearing for the Petition for Declaratory Judgment for July 16, 2004. The Respondents, McKinley and Reynolds, answered the temporary injunction on July 12, 2004. It was a one-line response stating that the only parties who will be harmed in Petitioner’s claim, if successful, is the Respondents.

D. Response and Motion to Quash

In addition to the answer to the temporary injunction, the Respondents, McKinley and Reynolds, filed their response to the Petition for Declaratory Judgment four days before the hearing scheduled for July 16, 2004. The Respondents understood the Cherokee Code as “empower[ing] every person to contract marriage, not restricting their choice of spouse.” Respondents even conceded the Black’s Law Dictionary definition as husband being a male and wife being a female, which is in some portions of Title 43. Their crucial argument was that the black letter of the section describing who can marry under the Cherokee Code says that “a couple take each other as husband and wife, not that they be (emphasis added) husband and wife.”

In a somewhat confusing part of the response, McKinley and Reynolds actually concede that “Black’s Law Dictionary does (emphasis added) define wife as female, and husband as male,” just not in this instance. However, on August 12, 2004, the Respondents filed a Motion to Amend to Make Correction to correct their previous statement in the Response and Motion to Quash. In that correction, the Respondents said they do not concede that Black’s Law Dictionary “defines husband as male and wife as female in portions of the Cherokee Code.” The argument that the Cherokee Nation Constitution should supercede Black’s Law Dictionary is also set forth in the Response and Motion to Quash.

57. Response to Application for Temporary Injunction, McKinley & Reynolds (No. CV-04-36).
58. Id.
59. Response and Motion to Quash, McKinley & Reynolds (No. CV-04-36).
60. Id.
61. Id.
62. Id.
63. Motion to Amend to Make Correction, McKinley & Reynolds (No. CV-04-36).
64. Id.
65. Response and Motion to Quash, McKinley & Reynolds (No. CV-04-36).
Respondents next make a broad stroke argument. They say the Cherokee Nation Constitution embraces the Indian Civil Rights Act of 1968, stating that "the laws of the Cherokee Nation must be applied equally among its citizens and if a law purports to restrict marriage as only [between] a male and female the law is unequal and is therefore unconstitutional." 66

The Response and Motion to Quash then turned to the court itself. "If the [District] Court finds that this law is so restrict[ing], [i.e., being unconstitutional,] then the Court lacks subject matter jurisdiction because the case then rises to [a] constitutional question [that] is reserved for the Judicial Appeals Tribunal," the highest Cherokee court. 67 Other than the supposed subject matter jurisdiction conundrum, the Respondents also claimed that the court did not have enough information to decide this case.

This court has had no opportunity to hear evidence on whether or not same sex marriages have ever existed in the Cherokee Nation. . . . Further, the Court has not heard, nor received, any information regarding the use of Cherokee language and the interpretation of husband and wife as it is spoken in the Cherokee language. 68

McKinley and Reynolds then digress into nontraditional quasi-equitable arguments. One issue raised was the fact that the Petitioner, Hembree, "ha[d] access to legal documents, resources, [the] internet, and Black's Law Dictionary that Respondents do not have." 69 For these reasons, they allege that "it would be unfair to give Declaratory Judgment to Petitioner when Respondents have not had equal opportunity to provide legal history that would provide guidance," thus irreparably harming Respondents. 70 Ultimately Respondents appear here to believe that Petitioner was attempting to use his position as general counsel for the Tribal Council to railroad a baseless claim against the marriage. 71

Respondents then addressed the issue of the supposed loophole in Title 43. They argue that "a black letter reading of the enabling and prohibiting sections of that code are clear that every person, with only the four previously mentioned

66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
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exceptions, may contract a civil Cherokee marriage.” The Respondents strongly argue against any notion of a loophole in the Cherokee Code. “The re-adoption of the Cherokee Marriage Act in 1993 came [seventeen] years after the state of Oklahoma amended its marriage act [defining] marriage between a man and a woman.” Ironically, the principle Chief of the Cherokee Nation at this time was also involved in the re-adoption of the Cherokee Marriage Act. “It was well known in 1976 and 1993 that same sex couples were seeking legal civil marriage.” Essentially, the Respondents were claiming that if the lawmakers feared the prospect of same-sex unions that laws would have been changed to address this perceived problem. Of course, Respondents see the reason why the issue was ignored in a different light. “[T]he Cherokee Nation and its officials are bound by a Constitutional oath to protect, defend, and promote the heritage, language, and culture of the People.” In this instance, the claim is that Cherokee law regarding civil marriages does promote the traditions of the Cherokee people, because it does not, at the least, prohibit same-sex marriages.

Finally, Respondent’s also challenge Petitioner’s argument, saying that the “Petitioner could have filed an appeal of the marriage license of the minister who performed the ceremony per the wording of Title 43.” Petitioner had thirty days to appeal the license and, by not filing, missed the opportunity to appeal, while Title 43 provides for no other appeal neither of ministers’ license, nor marriage certificates. With no other outlet to appeal the marriage certificate, Respondents believe Petitioner has no standing, because there is no other means to bring such an action. Even with standing, Petitioner has shown no harm, according to the Respondents. “In order for the Court to entertain an appeal, the Petitioner would be required to show that some great irreparable harm would occur if the marriage were finalized by the filing of the certificate.”

E. Motion to Dismiss

The Respondents filed a motion to dismiss on the same day as the Motion to

72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id.
79. Id.
Quash. Respondents flatly claimed that Petitioner has suffered no harm and therefore no possibility of getting relief, leading to a lack of standing. Additionally, “Petitioner missed the window of opportunity to file” against the license of the minister, with no provision available for appeals regarding marriage certificates. Finally, Respondents do not believe this case belongs in the Cherokee District Court, arguing the district court lacks subject matter jurisdiction because Petitioner is asking the district court to interpret Cherokee constitutional questions reserved for the Judicial Appeals Tribunal.

McKinley and Reynolds then asked the court to force the court clerk to comply with Title 43 by filing a Writ of Mandamus on July 12, 2004. Specifically, they wanted the court clerk to comply with Title 43 and make a record of the marriage certificate in the records kept for that purpose. On the same day, however, the court filed a Minute Order finding that the Petitioner’s Petition for Declaratory Judgment and Respondent’s Response and Motion to Quash, Motion to Dismiss and Writ of Mandamus should be set for hearing on August 20, 2004. Subsequently, all were set for hearing and the case continued.

F. Motion for Enlargement of Time

The Petitioner, Hembree, had extracurricular activities outside of this lawsuit that were also taking a great deal of time but still had motives related to the lawsuit. Hembree filed a Motion for Enlargement of Time for these reasons on July 14, 2004. In that Motion he requested ten more days to respond to the pleading before the August 20th hearing.

Hembree had a few reasons for the request for extension. The most important reason was that he was running for state senate, which concluded on July 27, 2004. For this reason, Hembree felt that he did not have the required time to devote to a constitutional issue at that time. Furthermore, “the undersigned cannot, consistent with the obligation to adequately investigate, evaluate or prepare for the pending motions without being allowed this enlargement of time.”
G. Court Orders

Judge Cripps sent down two important orders that set the tone before the August 20th hearing. The first was an Order Granting Enlargement of Time filed on July 16, 2004. Judge Cripps granted Hembree’s Motion, likely because of Hembree’s state senate race, arguably his motivation for filing the suit. Judge Cripps also filed an Order on July 30, 2004, which clarified the June 18th Order Granting a Temporary Injunction. “The restraining order of June 18, 2004 extended the temporary injunction filed June 11, 2004, pertaining only to the matter in this case.” Judge Cripps thereby concentrated his focus on the same-sex marriage issue.

H. Motion for Summary Judgment

Although the preceding motions were pending, Respondents continued to fight through court pleadings. On August 12, 2004, Respondents filed a Motion for Summary Judgment. Respondents were not happy with the fact that Hembree had filed for an extension of time until August 6th and as of the day of the filing of this Motion, Hembree still had not complied with the filing deadline. Petitioner had not filed anything within the time allowed by the court. Respondents also stated that they had “been forced to endure their marriage being placed in limbo and subjected to extraordinary degrees of scrutiny not imposed on the average Cherokee citizen’s marriage.”

The Respondents still relied upon the notion that Hembree did not have the right to file and had no damages, only political motivations. Of particular concern to the Respondents, besides all enumerated points in the previous filings, was the “onerous notion that a private citizen, such as Todd Hembree, could interject himself” into their domestic affairs. The focus was also on Hembree’s personal motivations. The Motion for Summary Judgment stated Hembree was jeopardizing the “marriage of his fellow citizens to further his own sinister and bigoted agenda.” “Since losing his bid for a seat in the Oklahoma Senate Race, Hembree’s zeal for the case has obviously waned, since he did not answer Respondents’ filings within the expanded period of time.”

89. Order Granting Enlargement of Time, McKinley & Reynolds (No. CV-04-36).
90. Order of Clarification, McKinley & Reynolds (No. CV-04-36).
91. Id.
92. Motion for Summary Judgment, McKinley & Reynolds (No. CV-04-36).
93. Id.
94. Id.
95. Id.
Respondents even took an indirect shot at the court by alluding to the notion that this decision should be easily made due to the simplicity and clarity of the black letter of the Cherokee Code. "Respondents are not lawyers and have not had the luxury of being represented by one. However, even a casual study of Cherokee law was all that was necessary to discover that Petitioner's claims . . . were faulty in reasoning and inconsistent with Cherokee law." 96

I. Response to Motion to Dismiss

On August 20, 2004, Hembree finally filed a Response to Motion to Dismiss, two weeks after the deadline.97 Hembree began to use legal authority and precedence from Cherokee court decisions. "In summary, the law of this court generally follows the federal standing doctrine, this court will not allow the hypertechnical federal complexities pertaining to standing [to] prevail over a just and expeditious resolution of a case . . ."98 In his fight for the standing argument, Hembree also used precedence balancing Cherokee law with state and federal law. "This court will balance the guidance provided by Federal and State decisions in the interests of fundamental justice tempered by prudence and guidance both by the entirety of our Cherokee Constitution."99 Hembree also preys on the mistakes of Respondent by stating that they admitted in responsive pleadings that in Title 43 there are references to husband and wife, and that the traditional legal definition of those terms are gender specific, even though the Respondents corrected their position previously on this admission.100 As for standing, Hembree disclaims filing the action for purposes of harassment, but instead believes the clarification of the Cherokee Code does justice for all parties and the entire Cherokee Nation by defining the language.101 Lastly, Hembree attacks the subject matter jurisdiction premise of the Respondents in that, a constitutional question works through the court system first instead of taking a direct route to the United States Supreme Court. Additionally, "[i]f any party [were] aggrieved by the decision of the District Court then obviously they would have their appellate rights as in any other case."102 With this second

96. Motion for Summary Judgment, McKinley & Reynolds (No. CV-04-36).
97. Response to Motion to Dismiss, McKinley & Reynolds (No. CV-04-36).
100. Motion for Summary Judgment, McKinley & Reynolds (No. CV-04-36).
101. Id.
102. Id.
round of Motions and Petitions, Judge Cripps filed a Court Minute on August 30, 2004, setting another hearing for September 17, 2004.\footnote{Court Minute, McKinley & Reynolds (No. CV-04-36).}

\textbf{J. Response to Motion for Summary Judgment}

Hembree filed a Response to Motion for Summary Judgment on August 27, 2004.\footnote{Response to Motion for Summary Judgment, McKinley & Reynolds (No. CV-04-36).} Although Hembree was overdue in filing his response, he attacked the argument of the Respondent, claiming they "had ample time to review said response. Therefore, Respondent’s Motion for Summary Judgment on this issue is moot."\footnote{Id.} Then, Hembree restated his previous position on standing.\footnote{Id.} Finally, Hembree shows his irritation with the Respondents seemingly saying he "is just plain wrong."\footnote{Id.} He does so by restating that he "has cited Cherokee Nation authority supporting his argument".\footnote{Id.}

\textbf{K. Response to Petitioner’s Response to Motion to Dismiss}

The Respondent’s filed yet another Response to Petitioner’s Response to Motion to Dismiss on September 2, 2004.\footnote{Response to Petitioner’s Response to Motion to Dismiss at 1, McKinley & Reynolds (No. CV-04-36).} In this second Response, stand firm on their claims that Petitioner does not have grounds for a hearing on the merits.\footnote{Id.} Respondents claim the petition is not sound, no standing exists, the black letter of the law is clearly in their favor, and the district court has no subject matter jurisdiction.\footnote{Id.}

The first attack was on the Petition itself. "The Judicial Appeals Tribunal has previously held that ‘In Re’ actions are not in compliance with the law and will be dismissed . . . "\footnote{Grayson v. Tribal Election Comm., JAT-87-E2 (Cherokee Judicial Appeals Trib. 1987).} In \textit{Grayson}, the court dismissed the case for failure to name a defendant in accordance with the Cherokee Code.\footnote{Response to Petitioner’s Response to Motion to Dismiss at 1, In re: Marriage License of Dawn L. McKinley and Kathy E. Reynolds (Cherokee Dist. Ct. 2004) (No. CV-04-36).} So, even though the Respondents believed the original Petition lacked merit, they were concerned about the preservation of the marriage. In essence, Respondents feared that by not responding would be an equivalent to a default judgment in
favor of Hembree. "However, Respondents [still maintain that their] filings do not cure Petitioner’s procedural failure."\textsuperscript{114}

The Respondents then focus on the issue of standing. The Judicial Appeals Tribunal in numerous cases requiring a ruling on standing has cast a wide net in its efforts to include the claims and hear the cases. "One theme continues to ring [forth] in every case: the party filing the case must show harm."\textsuperscript{115} The argument was that Hembree failed to show harm, which is a fundamental requirement of any case. "At no time did the court rule that [a petitioner has] standing just because he was a Cherokee citizen.\textsuperscript{116} "Hembree . . . has not shown the court any connection he has to the issue at hand or how the holding of standing in Phillips v. Eagle would cloak him with standing."\textsuperscript{117}

The Respondents go even further in dismantling the standing argument. "Petitioner is still attempting to compare apples and oranges, although the oranges are nearer in color, they are still oranges."\textsuperscript{118} "For standing, harm must be done or pending which can be calculated."\textsuperscript{119}

Petitioner would have this Court open a Pandora’s Box of harmful standing claims that could destroy the status of civil contracts, not just marriage, in the Cherokee Nation.\textsuperscript{120} Petitioner is not the alter ego of the Cherokee Nation, he is not cloaked in any constitutional authority to represent the Cherokee Nation, nor is he anything more than an employee of the Cherokee Nation.\textsuperscript{121}

The JAT, the final word on Cherokee law, has found that standing, unique as it is in the Cherokee corpus of jurisprudence, is rooted in the legal construct that to have an actionable cause, the party must be able to show harm.\textsuperscript{122} "Petitioner has been wholly unable to show that he has a personal stake in the outcome of Respondent’s marriage."\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.} at 2.
\item \textsuperscript{116} Response to Petitioner’s Response to Motion to Dismiss at 1, \textit{McKinley & Reynolds} (No. CV-04-36).
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} Response to Petitioner’s Response to Motion to Dismiss at 1, \textit{McKinley & Reynolds} (No. CV-04-36); \textit{see also} Cornsilk v. Cherokee Nation, JAT-96-15 (Cherokee Judicial Appeals Trib. 1996).
\item \textsuperscript{120} Response to Petitioner’s Response to Motion to Dismiss at 3, \textit{McKinley & Reynolds} (No. CV-04-36).
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.; see also} Mayes v. Thompson, JAT-95-15 (Cherokee Judicial Appeals Trib. 1995).
\item \textsuperscript{123} Response to Petitioner’s Response to Motion to Dismiss at 4, \textit{McKinley & Reynolds}
\end{itemize}
Petitioner brought this suit in District Court, with all of its flaws, thinking he could railroad a cause of action that would finish up his dirty work by destroying the only marriage certificate issued to a same sex couple. Unable to snuff out the life of the marriage of Kathy Reynolds and Dawn McKinley, two human beings, he has resorted to a suit of harassment under the guise of clarification of law.  

This pleading again discussed whether the Respondents concede to the traditional legal definition of husband and wife. Respondents have asserted and claim to be able to show that the terms of spouse in the Cherokee language are translated into English as, “my companion,” “the one I live with,” and “my cooker.” These terms are gender neutral. Respondents stick firm to these definitions and again attack the motives of the Petitioner. “Petitioner’s claims are rooted in cultural and historic ignorance and an ethic bias that seeks to erode an already fragile remnant of a once brilliant culture that embraced freedom of choice for the individual in all aspects of his or her personal life.”

The final argument in that response is that there is still a lack of subject matter jurisdiction. The act creating the district court allows the district court to hear cases that fall into four categories: crimes, civil cases, domestic relation, and miscellaneous. Even though the point could be made that a marriage application could fall within the broad context of domestic relations or miscellaneous, Respondents obviously do not believe as such. Respondents held firm to the fact that “[t]he JAT further held that the jurisdictional restrictions on the District Court would be ‘strictly construed’ so that the constitutional authority of the JAT would not be infringed.”

V. Analysis and Conclusion

The continuing power struggle between Indian tribes and states usually centers on crime and gaming. Controversy over marriages is rare. Indian tribes have usually been able to follow their own traditions when it comes to recognizing marriages. The United States expressly recognized the right of the Cherokee Indians to regulate their own domestic affairs, and to regulate

(No. CV-04-36); see also Baker v. Carr, 369 U.S. 186 (1962).

124. Id.
125. Id. at 5.
126. Id.
127. Id.
128. Id. at 6.
marriages between members of the tribe by the laws of the tribe. Furthermore, it would appear to be a settled principle of law, sustained by the authorities that so long as the tribal relation exists among Indians, applicable state law, including recognition of the validity of their custom marriages, does not restrict their domestic affairs. In Oklahoma prior to this dispute, a consistent policy existed where Indian tribal custom marriage certificates were recognized as valid by the state. In most cases they still are, except for this special case, which collides with the Oklahoma statute not recognizing same-sex unions.

With the state not recognizing the marriage, the question remains whether McKinley and Reynolds will keep hope of having a valid marriage at least within the Cherokee Nation. The outlook appears to be grim. The Cherokee Code at the time of this marriage application was clearly genderless. On its face, it seemed to support, or at least did not disallow, same-sex marriages. But, the fact that the Cherokee Tribal Council changed the Cherokee Code also bolsters this analysis. If the Cherokee Code did not support these marriages according to a literal reading of black letter law, then there would be no need to change the code.

Although the changes to the Cherokee Code are not retroactive, controversy remains. The bleak outlook for this couple appears in the fact that the district court judge has yet to make a decision on what seems to be a simple reading of straightforward black letter law. If Judge Cripps believed in the plain meaning doctrine, the only ruling would seem to be in favor of McKinley and Reynolds. Instead, the Judge has ignored constant motions on both sides to decide the case, and set the case for trial some time in 2005. On August 20, 2004, Judge Cripps filed a scheduling order to dispose of pending motions in December of 2004 and express his intentions to have a trial to be announced. The desire of the district court to have a trial on an issue that seems so clear according to black letter law and the events surrounding the changes of the Cherokee Code could be a premonition that the court will put an end to the controversy with some strong words that go against the validity of this specific marriage application and set the tone for the ban of same-sex unions at least in one type of sovereign, the Indian tribes. Only time and politics will tell what will happen among the state and federal sovereigns.

Without considering politics or personal bias, it is hard to ignore black letter law. Sometimes the law may not reflect the opinion of some or even the major;

131. Scheduling Order, McKinley & Reynolds (No. CV-04-36).
however, it is still the law. In this case the law has now been changed, indicating that same-sex marriages were allowed or at least that the allowance of such marriages was vague. The law cannot be retroactive; therefore, this issue should not be decided with the new law as a guide, no matter how many people may support it. Society, politicians, and even judges cannot change a law to suit a particular case. In order for our legal system to remain legitimate, we must not contradict it on a whim. The issue in this case should be decided in a court of law under the premise of the law, whatever that may be under the Cherokee Code.