15-10132-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BILLY CYPRESS; ETHEL HUGGINS; JOHNSON BILLIE; JAMES CLAY; AUDREY CLAY; NINA BILLIE; AGNES BRADY; BETTY CLAY; EDNA TIGERTAIL; EVELYN CYPRESS; GREG KELLY; HEATHER CYPRESS; LUTHER TIGER; MARY KELLY; JASPER NELSON; PRISCILLA BUSTER,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior,

Defendants-Appellees

ON APPEAL FROM THE ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEES

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Billy Cypress, et al. v. United States of America, et al.

(11th Cir. – No. 15-10132-CC)

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

C-1 of 3

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the appellees hereby certify that, to the best of their knowledge, information, and belief, the following persons and entities have an interest in the outcome of this appeal:

Billie, Johnson, Plaintiff-Appellant

Billie, Nina, Plaintiff-Appellant

Brady, Agnes, Plaintiff-Appellant

Buster, Priscilla, Plaintiff-Appellant

Ciraolo, Caroline D., Acting Assistant Attorney General, Tax Division, Department of Justice

Clay, Audrey, Plaintiff-Appellant

Clay, Betty, Plaintiff-Appellant

Clay, James, Plaintiff-Appellant

Billy Cypress, et al. v. United States of America, et al.

(11th Cir. – No. 15-10132-CC)

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

C-2 of 3

Cypress, Billy, Plaintiff-Appellant

Cypress, Evelyn, Plaintiff-Appellant

Cypress, Heather, Plaintiff-Appellant

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Goldsmith, Steven M., Attorney for Plaintiffs-Appellants

Huggins, Ethel, Plaintiff-Appellant

Jewell, Sally, Secretary of the Interior, Defendant-Appellee

Kelly, Greg, Plaintiff-Appellant

Kelly, Mary, Plaintiff-Appellant

Lew, Jacob J., Secretary of the Treasury, Defendant-Appellee

Billy Cypress, et al. v. United States of America, et al.

(11th Cir. – No. 15-10132-CC)

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

C-3 of 3

McLaughlin, Teresa E., Attorney, Appellate Section, Tax Division, Department of Justice

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Tiger, Luther, Plaintiff-Appellant

Tigertail, Edna, Plaintiff-Appellant

United States of America, Defendant-Appellee

Urda, Patrick J., Attorney, Appellate Section, Tax Division, Department of Justice

Welsh, Robert L., Trial Attorney, Tax Division, Department of Justice

Williams, Kathleen M., Judge, United States District Court for the Southern District of Florida

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c) and Fed. R. App. P. 34(a), counsel for the appellees respectfully inform this Court that they believe that oral argument may be useful to aid this Court's disposition of this appeal.

TABLE OF CONTENTS

Page

Page

TABLE OF CITATIONS

Cases:

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Cases (continued): **Page(s)**

Statutes:

* Cases or authorities chiefly relied upon are marked with asterisks.

Statutes (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

Statutes (continued): **Page(s)**

Rules:

Federal Rules of Appellate Procedure:

Federal Rules of Civil Procedure:

Miscellaneous:

* Cases or authorities chiefly relied upon are marked with asterisks.

Miscellaneous (continued): **Page(s)**

* Cases or authorities chiefly relied upon are marked with asterisks.

STATEMENT OF JURISDICTION

1. Jurisdiction in the District Court

Billy Cypress, a member of the Miccosukee Tribe of Indians of Florida, and fifteen other members of the Tribe (together, plaintiffs) brought this suit against the United States, the United States Departments of the Treasury and of the Interior, and the Secretaries of the Treasury and of the Interior in their official capacities (together, the Government). Plaintiffs sought a declaratory judgment that the imposition of federal income taxes on payments received from a Miccosukee account, comprised primarily of revenues from the Tribe's gaming operations, violated various statutory and treaty provisions governing the relationship between the United States and the Miccosukee. (Doc. 1, ¶¶ 86, 98-148.)[1] Plaintiffs invoked the District Court's federal question jurisdiction under 28 U.S.C. § 1331. (Doc. 1, ¶ 17.) As the District Court held, however, and as is explained in the Argument, *infra*, the United States has not waived its sovereign immunity to permit plaintiffs' suit, and, furthermore, the Anti-

[1] "Doc." references are to the documents contained in the record by the Clerk of the District Court. "Br." references are to appellants' opening brief.

Injunction Act, I.R.C. § 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), deprived the District Court of jurisdiction over plaintiffs' claims for declaratory and injunctive relief.

2. Jurisdiction in the Court of Appeals

On December 12, 2014, the District Court entered an order granting the Government's motion to dismiss for lack of subject matter jurisdiction. (Doc. 28.) The court did not enter a separate judgment document pursuant to Federal Rule of Civil Procedure 58(a), but plaintiffs still filed a notice of appeal on January 9, 2015. (Doc. 29.) Under Federal Rules of Appellate Procedure 4(a)(2) and 4(a)(7)(A), the judgment was deemed entered (and the notice of appeal is treated as filed) as of May 11, 2015, 150 days after the filing of the December 12, 2014 dismissal order. This Court's jurisdiction rests upon 28 U.S.C. § 1291.

3. Timeliness of the appeal

Plaintiffs' appeal is timely under 28 U.S.C. § 2107(b) and Federal Rules of Appellate Procedure 4(a)(1)(B) and 4(a)(2). As just noted, because plaintiffs filed their notice of appeal before the entry of the

judgment, it was treated as filed on the deemed date of entry of the judgment.

IN THE UNITED STATES COURT OF APPEALS
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No. 15-10132-CC

BILLY CYPRESS; ETHEL HUGGINS; JOHNSON BILLIE; JAMES CLAY; AUDREY CLAY; NINA BILLIE; AGNES BRADY; BETTY CLAY; EDNA TIGERTAIL; EVELYN CYPRESS; GREG KELLY; HEATHER CYPRESS; LUTHER TIGER; MARY KELLY; JASPER NELSON; PRISCILLA BUSTER,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior,

Defendants-Appellees

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUES

1. Whether the District Court correctly held that the Miccosukee Reserved Area Act, Pub. L. No. 105-313, 112 Stat. 2964

(1998), *codified at* 16 U.S.C. § 410, did not constitute a waiver of the Government's sovereign immunity for suits for declaratory and injunctive relief by tribal members.

2. Whether the Anti-Injunction Act, I.R.C. § 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201, which prohibit the courts from issuing injunctions and declarations against the assessment and collection of federal taxes, barred plaintiffs' claims for declaratory and injunctive relief.

3. Whether the District Court abused its discretion in denying plaintiffs' motion to amend their complaint.

STATEMENT OF THE CASE

(i) Course of proceedings and disposition in the court below

Plaintiffs brought the instant action to obtain a declaration that certain funds received from the Miccosukee Tribe were not taxable and, at least implicitly, to obtain an injunction or writ of mandamus against assessment and collection. (Doc. 1 at 6-7, 39-40, 41-42, 46, 47, 50, 52.) The Government moved to dismiss for lack of subject matter jurisdiction on the grounds that the Government had not waived its sovereign immunity and that, in any event, the Anti-Injunction Act and the tax

exception to the Declaratory Judgment Act deprived the District Court of jurisdiction. (Doc. 11.) The court granted the Government's motion to dismiss (Doc. 28), and plaintiffs appealed (Doc. 30).

(ii) Statement of the facts

a. Internal Revenue Code framework

This case is the latest in a string of litigation stemming from an Internal Revenue Service investigation into the tax treatment of revenues from the gaming activities of the Miccosukee Tribe of Indians of Florida and its members' compliance with federal tax laws.[2] As a

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[2] *See, e.g., Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535 (11th Cir. 2013); *Miccosukee Tribe of Indians of Fla. v. United States*, 698 F.3d 1326 (11th Cir. 2012); *Miccosukee Tribe of Indians of Fla. v. Jewell*, 996 F. Supp.2d 1268 (S.D. Fla. 2013); *Miccosukee Tribe of Indians of Fla. v. United States*, No. 12-cv-22638-UU, 2013 WL 7728831 (S.D. Fla. Feb. 11, 2013); *Miccosukee Tribe of Indians of Fla. v. United States*, 877 F. Supp. 2d 1331 (S.D. Fla. 2012); *Billy Cypress v. Commissioner*, No. 15157-10 (Tax Ct. filed Jul. 6, 2010); *Johnson Billie v. Commissioner*, No. 13105-11 (Tax Ct. filed June 2, 2011); *Nina Billie v. Commissioner*, No. 22976-13 (Tax Ct. filed Oct. 8, 2013); *Agnes Brady v. Commissioner*, No. 02805-12 (Tax Ct. filed Jan. 30, 2012); *Betty Clay v. Commissioner*, No. 11729-11 (Tax Ct. filed May 18, 2011); *Edna Tigertail v. Commissioner*, No. 26518-13 (Tax Ct. filed Nov. 12, 2013); *Evelyn Cypress v. Commissioner*, No. 25476-13 (Tax Ct. filed Oct. 25, 2013); *Greg Kelly v. Commissioner*, No. 11750-11 (Tax Ct. filed May 18, 2011); *Heather Cypress v. Commissioner*, No. 20287-13 (Tax Ct. filed Sept. 3, 2013); *Luther Tiger v. Commissioner*, No. 26748-13 (Tax Ct. filed Nov. 14, 2013); *Mary Kelly v. Commissioner*, No. 20038-12 (Tax

(continued…)

general matter, the Internal Revenue Code imposes reporting and withholding requirements relating to tribal distributions from gaming activity:

> Every person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity conducted or licensed by such tribe shall deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax.

I.R.C. § 3402(r)(1). As United States citizens, tribal members must report and pay federal income tax on "all income from whatever source derived," I.R.C. § 61, unless an exemption is created by treaty or statute.

b. Background to current litigation

Plaintiffs are sixteen members of the Miccosukee Tribe of Indians of Florida, a federally recognized Indian tribe. (Doc. 1, ¶ 1.) The Miccosukee Tribe has operated gaming activities in Dade County, Florida, since 1990 (*id.*, ¶¶ 58-59), and currently imposes a "7.75% assessment on gaming and other resort revenues" (*id.*, ¶ 87). The

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(…continued)
Ct. filed Aug. 9, 2012); *James Clay v. Commissioner*, No. 07870-13 (Tax Ct. filed April 8, 2013).

proceeds of this assessment are deposited into a "tribal trust account of distributable tribal revenues" (*id.*, ¶ 86), which the Tribal Government disburses "to sustain[ ] tribal members in their existing communities" (*id.*, ¶ 88). According to plaintiffs' complaint, this trust account also includes proceeds from "its fuel tax on the Tribe's fueling station" and "its income from tribal leases, licenses, and enterprises on other tribal trust lands." (*Id.*, ¶ 86.) In 2005, the Internal Revenue Service began investigating the Miccosukee Tribe and its members to determine whether they were properly complying with the federal tax laws governing the treatment of tribal revenues and disbursements from tribal gaming activity. (*Id.*, ¶ 78.)

c. The proceedings in the District Court

In 2014, plaintiffs filed the complaint in this case against the United States (and the Secretaries of the Treasury and the Interior, acting in their official capacities), seeking declaratory relief to avoid payment of federal income tax on distributions they received from the Tribe. (Doc. 1.) The complaint invoked the District Court's federal question jurisdiction under 28 U.S.C. § 1331 and asserted that the Miccosukee Reserved Area Act (MRAA), Pub. L. No. 104-313, 112

Stat. 2964, *codified at* 16 U.S.C. § 410, contained a waiver of sovereign immunity. (*Id.*, ¶¶ 17-18.) The complaint further asserted that "[s]ubject-matter jurisdiction is permitted under 28 U.S.C. § 2201 and sovereign immunity has been waived by Section 702 of the Administrative Procedure[ ] Act . . . ." (*Id.*, ¶ 93.)

The Government filed a motion to dismiss, arguing that the District Court lacked subject matter jurisdiction because (i) the plaintiffs had failed to demonstrate a waiver of sovereign immunity, and (ii) the declaratory relief sought by plaintiffs was barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), and the Anti-Injunction Act, I.R.C. § 7421(a). (Doc. 11.) As to the purported waiver of sovereign immunity, the Government first noted the well-established rule that general jurisdictional statutes, such as 28 U.S.C. § 1331, do not waive sovereign immunity. (*Id.* at 6.) The Government further contended that the MRAA did not create such a waiver. (*Id.* at 7-8.) In particular, the Government argued that MRAA provides a waiver of sovereign immunity only as to the Tribe's rights to certain areas of land and does not create a specific waiver of sovereign immunity regarding taxes. (*Id.*) Moreover, the Government explained

that the statute's waiver of sovereign immunity only applies to causes of action brought by the Tribe, not individual members. (*Id.*)

The Government also argued that plaintiffs' claims for declaratory relief were barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), and the Anti-Injunction Act, I.R.C. § 7421(a) (referred to collectively as the Acts), and that, contrary to plaintiffs' assertions in their complaint, their situation did not fall within a judicially created exception to the Acts' proscriptions. (Doc. 11 at 8-16.) The Government first explained that the Acts prohibit precisely the type of declaratory relief regarding federal taxes sought by plaintiffs. It further noted that the bar imposed by the Acts overrules the general waiver of sovereign immunity contained in the Administrative Procedure Act (APA), as that waiver does not apply where other statutes limit relief.[3] (*Id.* at 10-11.)

[3] As part of its analysis, the Government noted that, although the relief sought by plaintiffs was declaratory, the Anti-Injunction Act applied as well, noting that an injunction against the assessment or collection of a tax and a judicial declaration that a tax is inapplicable have the same effect on the Government's ability to assess and collect taxes. (Doc. 11 at 10.)

The Government next contended that plaintiffs' situation did not satisfy the narrow exception recognized in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7-8, 82 S. Ct. 1125, 1129-30 (1962), because plaintiffs failed to establish both (i) that the Government could "under no circumstances" prevail on the merits of the tax liability and (ii) that the taxpayer was threatened with irreparable injury for which it lacked an adequate legal remedy. (Doc. 11 at 11-16.) The Government pointed out that its position that plaintiffs' income from tribal distributions here is taxable had a strong basis and that the complaint failed to establish any express exemption from taxation for such distributions from the Tribe. (*Id.* at 12-16.) In particular, the Government explained that the complaint's references to 25 U.S.C. § 459e, which exempts distributions of receipts from "Submarginal Land" described in 25 U.S.C. § 459a, did not provide an exemption for the distributions in issue because that statute does not relate to any land belonging to the Miccosukee Tribe. (*Id.* at 15.) Nor could the plaintiffs establish irreparable injury, the Government contended, as there were multiple alternative "avenues for taxpayers to challenge asserted tax deficiencies and protest collection activities." (*Id.* at 12.)

In response, plaintiffs argued that general subject matter jurisdiction existed under 28 U.S.C. §§ 1331 and 2201(a) and that the Government had waived its sovereign immunity relating to this action based upon the MRAA and the APA. (Doc. 19 at 4-6.) According to plaintiffs, the court was obliged to credit their interpretation of the MRAA as waiving sovereign immunity to generally allow causes of actions by Tribe members because this assertion was set forth as an allegation in their complaint. (*Id*. at 6.)

Plaintiffs further contended that the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act did not operate to deprive the court of the general jurisdiction granted by the APA because they satisfied the *Williams Packing* exception to the Acts' proscription. (*Id*. at 7-12.) Plaintiffs asserted that 25 U.S.C. § 459e provided an express exemption from taxes at issue and that, consequently, there were no circumstances under which the Government could prevail. (*Id*. at 10-12.) According to plaintiffs, they would not be able to pursue one of the alternative avenues identified by the Government. They asserted in this regard that they could not maintain a refund action without the participation of the Tribe as an indispensable party (*id*. at 8) and that

the "Tribe would not agree to join voluntarily" (*id.* at 9). Plaintiffs also asserted that they would suffer irreparable injury "regarding their very way of life as members of the Miccosukee Tribe" if they were forced to pay the tax. (*Id.* at 10.)

The District Court subsequently heard oral argument on the motion to dismiss, at which time plaintiffs requested leave to add additional factual allegations addressing the "irreparable injury" component of the *Williams Packing* test. (Doc. 28 at 9.)

d. The District Court's decision

The District Court granted the Government's motion to dismiss for lack of subject matter jurisdiction. (Doc. 28.) As an initial matter, the District Court ruled that plaintiffs had not "establishe[d] an explicit waiver of sovereign immunity applicable to this action." (*Id.* at 3.) Specifically, the court held that the Declaratory Judgment Act did not waive sovereign immunity in the instant case because its scope was limited to expressly exclude tax matters. (*Id.* at 3-4.) The court also rejected plaintiffs' reliance on the MRAA, "which principally addressed the relationship between the Miccosukee's Tribe's land and Everglades National Park." (*Id.* at 4.) The court concluded that this Act, which

authorized claims by the Tribe, did not contain an unequivocal expression of a waiver of sovereign immunity for individual members. (*Id.*) And the court further held that, even if the Act could be construed to permit such suits by individual members, plaintiffs had not shown that their claims "arise from any violation of the [Act], which makes no reference to, provision for or mention of taxes of any kind." (*Id.* at 5.)

The District Court also agreed with the Government that the APA did not constitute a waiver of sovereign immunity for plaintiffs' declaratory suit, given the limitations set forth in the Declaratory Judgment Act and the Anti-Injunction Act. (Doc. 28 at 5-6.) The court further held that plaintiffs had failed to satisfy the requirements of the *Williams Packing* exception to the Acts. (*Id.* at 6-8.) In rejecting plaintiffs' assertion that 25 U.S.C. § 459e conclusively established that the tribal distributions would be exempt from taxation, the court stated that plaintiffs "failed to show that Miccosukee lands are governed by any of the provisions of Section 459, nor have they offered any support for the argument that § 459e creates a federal tax exemption for any income derived from any business enterprises situated on all Tribal lands." (*Id.* at 7.) The court also rejected plaintiffs' claim of irreparable

injury, ruling that plaintiffs had not explained why the Tribe would be an indispensable party to a refund action brought by one of its members. (*Id*. at 8.)

As a final matter, the District Court denied as futile plaintiffs' motion to amend their complaint to include additional information about potential harm. (Doc. 28 at 9.) The court explained that, given its conclusions that plaintiffs failed to show that the Government could not prevail under any circumstances, or that a refund action did not provide an adequate remedy at law, an amendment expanding upon the harm the taxes might cause "would not cure the fundamental defects in the Complaint." (*Id*.)

(iii) Statement of the standard or scope of review

"In reviewing a district court's dismissal of a complaint under Rule 12(b)(1) for lack of subject matter jurisdiction, [this Court] review[s] the district court's legal conclusions *de novo* . . . ." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013). In the context of a facial attack on a complaint, as here, this Court looks to "'see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for

the purposes of the motion.'" *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (alteration in original)). Where a district court has denied amendment of a complaint on the grounds of futility, this Court exercises *de novo* review as to the legal question whether such an amendment would be futile. *See SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1336 (11th Cir. 2010).

SUMMARY OF ARGUMENT

Plaintiffs, sixteen members of the Miccosukee Tribe of Indians of Florida, brought this action for declaratory and injunctive relief to bar the assessment and collection of federal income taxes on distributions from gaming proceeds that were paid out of a tribal account. The District Court correctly dismissed this case for lack of subject matter jurisdiction, both because the Government did not waive its sovereign immunity and because plaintiffs' claims are barred by the Anti-Injunction Act, § 7421 of the Code, and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

1. The District Court correctly rejected plaintiffs' invocation of Miccosukee Reserved Area Act (MRAA), Pub. L. No. 105-313, 112 Stat. 2964, *codified at* 16 U.S.C. § 410, as a basis for subject matter jurisdiction. Although § 8(i)(2) of the MRAA permits suit "to enjoin the United States from violating any provisions of this Act," plaintiffs fail to make (and thereby waive) any argument that the instant suit for declaratory relief relating to taxes constitutes an action to enjoin the violation of any provisions of the MRAA. Accordingly, as an initial matter, plaintiffs cannot establish that this case fits within the specified waiver of sovereign immunity. Moreover, even if plaintiffs had not waived this threshold requirement, this suit, which concerns the taxability of gaming proceeds, clearly does not relate to any provision of the MRAA. The MRAA does not address taxes at all, but sets forth rights and obligations of the Miccosukee Tribe and the United States relating to the Miccosukee Reserved Area and Everglades National Park. In addition, the MRAA further establishes that its waiver of sovereign immunity only extends to actions brought by the Tribe, rather than encompass suits brought by members, which is the case here. Although plaintiffs invoke Indian canons of construction in hopes of

obtaining a more expansive reading of this waiver of sovereign immunity, the plain language of the MRAA does not permit such an interpretation. As a result, the District Court correctly held that the MRAA did not provide a jurisdictional basis for plaintiffs' suit.

2. Plaintiffs also fail to demonstrate that the Administrative Procedure Act would permit a court to exercise jurisdiction over their bid for declaratory relief to restrain the assessment and collection of federal taxes. The Anti-Injunction Act broadly provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The tax exception to the Declaratory Judgment Act similarly bars the issuance of declaratory relief with respect to federal taxes. The Supreme Court has interpreted these Acts broadly as confining tax litigation to the precise channel enacted by Congress – here, a suit for refund of the tax or a deficiency action in the Tax Court. In enacting the APA, Congress by no means overruled these Acts' proscription. It made an express exception to the waiver of sovereign immunity where other "statutes

preclude judicial review," 5 U.S.C. § 701(a)(1), and left intact "other limitations on judicial review," 5 U.S.C. § 702.

The District Court correctly rejected plaintiffs' contention that their situation falls within the narrow judicial exception to the Acts' proscription recognized in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7-8, 82 S. Ct. 1125, 1129-30 (1962). Under the *Williams Packing* exception, injunctive or declaratory relief may issue only where (i) it is clear that the Government can under no circumstances prevail on the merits *and* (ii) the plaintiff lacks any adequate remedy at law and otherwise will suffer irreparable injury. Plaintiffs fail to satisfy either prong.

Plaintiffs assert that 25 U.S.C. § 459e, which excludes from income distribution of receipts from specified tribal land, establishes that the Government cannot prevail. But this provision relates only to distributions relating to the property of certain tribes set forth in 25 U.S.C. § 459a, which plainly does not encompass any Miccosukee tribal land.

Moreover, plaintiffs fail to establish that they lack an adequate remedy either in a District Court refund action or a Tax Court

deficiency proceeding. Although plaintiffs assert that a refund action would require the joinder of the Miccosukee Tribe, which could invoke its sovereign immunity to avoid suit, they utterly fail to establish that the Tribe would be a necessary party or that a refund suit could not proceed without the Tribe's participation. And they do not even suggest that the Tribe must be a party to a Tax Court deficiency action, another adequate alternative remedy.

3. The District Court correctly denied plaintiffs' motion for leave to amend their complaint on grounds of futility. Although leave to amend is freely given under the Federal Rules of Civil Procedure, the court understood that the additional allegations proposed by plaintiffs would not cure the numerous defects in their complaint or lift the bar of the Anti-Injunction Act (and the tax exception to the Declaratory Judgment Act) against the relief sought.

The order of the District Court is correct and should be affirmed.

ARGUMENT

I.

The District Court correctly held that the Miccosukee Reserved Area Act did not constitute a waiver of sovereign immunity for this suit

A. Sovereign immunity principles

It is well settled that the United States, as a sovereign, is immune from suit without its prior consent. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S. Ct. 1011, 1014-15 (1992); *United States v. Dalm*, 494 U.S. 596, 608, 110 S. Ct. 1361, 1368 (1990); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 769 (1941). If the United States consents to being sued, the suit may be maintained only if brought in strict compliance with the terms of the statute waiving immunity. *Soriano v. United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 273 (1957); *Sherwood*, 312 U.S. at 590, 61 S. Ct. at 771. Where a suit has not been consented to by the United States, a court does not have jurisdiction over it, and the action must be dismissed. *United States v. U.S. Fid. Guar. Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 656 (1940); *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006); *McMaster v. United States*, 177 F.3d 936, 939 (11th Cir. 1999) ("The terms upon which the Government consents to be sued must be

strictly observed and exceptions thereto are not to be implied.") (internal quotation omitted).

Plaintiffs assert that the MRAA acts as a waiver of the United States' sovereign immunity in the instant case, permitting individual members of the Tribe to bring a suit seeking declaratory relief to bar collection and assessment of taxes. The District Court correctly rejected this claim based on the unambiguous language of the MRAA.

B. The District Court correctly held that the Miccosukee Reserved Area Act did not effect a waiver of sovereign immunity

1. "The starting point for all statutory interpretation is the language of the statute itself." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). "If the text of the statute is unambiguous, we need look no further." *Iberiabank v. Beneva 41-I, LLC*, 701 F.3d 916, 924 (11th Cir. 2012). "In determining whether a statute is plain or ambiguous, we consider 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Warshauer v. Solis*, 577 F.3d 1330, 1335 (11th Cir. 2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843 (1997)). "Where the language Congress chose to express its intent is

clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998). *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

As relevant here, the MRAA contains a specific waiver of sovereign immunity, which permits suit against the United States under two conditions: (i) the action is "to enjoin the United States from violating any provision of this Act," and (ii) the suit is brought by the "Tribe." 112 Stat. 2964, § 8(i)(2). As the District Court correctly held, plaintiffs have not established either requirement. Consequently, the MRAA does not waive sovereign immunity here.

2. As an initial matter, plaintiffs fail to make any argument that their suit is a civil action "to enjoin the United States from violating any provision of this Act." Plaintiffs' failure to address this requirement constitutes waiver of this issue, undercutting their claim that the MRAA permits their suit. *See Sepulveda v. U.S. Attorney Gen.*,

401 F.3d 1226, 1228 n.2 (11th Cir. 2005) (per curiam) (noting that if an appellant fails to raise an issue in her initial brief, that issue is considered abandoned); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (asserting that a party waives an issue by failing to make any arguments with respect to that issue).

Even assuming, *arguendo*, that plaintiffs had not waived their opportunity to make this required showing, it is clear that plaintiffs' suit is not in fact one to enjoin the United States from violating any provisions of the MRAA. As the District Court noted (Doc. 28 at 5), the MRAA "makes no reference to, provision for or mention of taxes of any kind." Moreover, although the MRAA addresses gaming, it does so only to provide that "[n]o class II or class III gaming . . . shall be conducted within the [Miccosukee Reserved Area]." 112 Stat. 2964, § 6(c)(1). The MRAA, rather, establishes a legal framework outlining the rights and obligations of the Miccosukee Tribe and the United States pertaining to the Miccosukee Reserved Area and Everglades National Park. *Id.*, §§ 2(5), 3(1). The MRAA explicitly recognizes its limited scope, stating that, "[e]xcept as otherwise specifically provided in this Act, nothing in this Act supersedes any requirement of any other applicable Federal

law." *Id.*, § 8(c)(3). This suit, which addresses the proper tax treatment of gaming revenues distributed to members of the Tribe, plainly is not the type of action to which the United States consented to be sued in the MRAA. *See McMaster*, 177 F.3d at 939 ("[T]he terms upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.") (internal quotations omitted).

3. Plaintiffs' failure to establish that their suit comes within the scope of the MRAA's authorization forecloses their argument that the MRAA provides a valid jurisdictional basis. Plaintiffs nevertheless argue that the District Court erred in its ruling that the MRAA's waiver of sovereign immunity was restricted to actions by the Miccosukee Tribe itself and does not extend to actions brought by members. (Br. 18-23.) Even if plaintiffs were correct on this point, the MRAA still would not provide a waiver of sovereign immunity because their action is not one to enjoin the United States from violating provisions of the MRAA.

In any event, plaintiffs are incorrect. The MRAA authorizes the "Tribe" to bring an action to enjoin the United States from violating its provisions. 112 Stat. 2964, § 8(i)(2). The MRAA defines the term "Tribe" to mean "the Miccosukee Tribe of Indians of Florida, a tribe of

American Indians recognized by the United States and organized under section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476), and recognized by the State of Florida pursuant to chapter 285, Florida Statutes." *Id.*, § 4(10). "Applying the maxim of statutory construction *expressio unius est exclusio alterius*, the Supreme Court has admonished 'when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" *Belluso v. Turner Commc'ns Corp.*, 633 F.2d 393, 397 (5th Cir. 1980) (quoting *Nat'l Railroad Passenger Corp. v. Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458, 94 S. Ct. 690, 693 (1974)).[4] Here, the MRAA provides for a cause of action against the United States only by the Tribe. The scope of this authorization should not be widened to include an individual member of the Tribe. As the District Court held, "the MRAA does not contain an 'unequivocal expression of a waiver of sovereign immunity for individual members of the Miccosukee Tribe." (Doc. 28 at 5.)

[4] This Court has adopted as binding precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

This interpretation is confirmed by the statute read as a whole. Plaintiffs' view (Br. 19) that the term Tribe necessarily includes its members renders multiple parts of the MRAA superfluous. The MRAA contains several references to "the Tribe and its members," but does not do so in authorizing suit. For example, § 5(c)(2) requires that the Miccosukee Reserved Area be treated "as a federally recognized Indian reservation solely for purposes of – . . . (B) the eligibility of the Tribe *and its members* for any Federal health, education, . . . or social welfare programs . . . ." (Emphasis added.) Similarly, § 8(b)(2) provides that "[n]othing in this Act shall authorize the Tribe *or members* or agents of the Tribe to interfere with any Federal employee . . . ." (Emphasis added.) And § 8(e)(3) provides that, "[i]n the event the Secretary exercises the authority granted the Secretary under paragraph (2), the United States shall be liable to the Tribe *or the members of the Tribe* . . . ." (Emphasis added.) These references to the Tribe's members would be superfluous if a reference to the Tribe were interpreted to include its members as well. To avoid treating the express references to the Tribe's members as surplusage, the term Tribe should not be interpreted to encompass its members. *Hibbs v. Winn*, 542 U.S. 88,

101, 124 S. Ct. 2276, 2286, (2004) (recognizing that courts are to avoid constructions that would render statutory language superfluous or inoperative).

Moreover, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) (citation and alteration omitted). *See also Loughrin v. United States*, — U.S. —, 134 S. Ct. 2384, 2390 (2014). The Supreme Court recently reemphasized this point. *See Dep't of Homeland Security v. MacLean*, — U.S. —, 135 S. Ct. 913, 919 (2015). In *MacLean*, the Court addressed whether a statutory provision that referred to matters "specifically prohibited by law" should be read as "specifically prohibited by law, rule, or regulation." *Id.* "Congress's choice to say 'specifically prohibited by law' rather than 'specifically prohibited by law, rule, or regulation' suggests that Congress meant to exclude rules and regulations." *Id.* In applying the "interpretive canon that Congress acts intentionally when it omits language," the Court noted that Congress used both phrases in close proximity and had used

the broader phrase ("law, rule, or regulation") at multiple points in the statute, thus "mak[ing] Congress's choice to use the narrower word 'law' seem quite deliberate." *Id.* Congress' choice to use the narrower term "Tribe" rather than the phrase "Tribe or its members" when providing for a cause of action against the United States should therefore be considered deliberate.

In response, plaintiffs contend that the court ignored settled rules of interpretation that ambiguities in legislation relating to Indians should be construed in their favor. (Br. 19-20.) They also contend that their use of the term "Tribe" as including tribal members was a factual allegation that the court was required to accept. (Br. 20.) Neither point is correct. The rule of construction that ambiguous statutes must be construed in the Indians' favor does not apply where, as here, the statute is unambiguous. *See Miccosukee Tribe of Indians of Fla. v. United States Army Corps of Engineers*, 619 F.3d 1289, 1303 n.22 (11th Cir. 2010). *See also* Cohen's Handbook of Federal Indian Law, § 2.02[1], at 115 (Nell Jessup Newton, ed. 2012) ("When a statute is clear on its face, however, the canons of construction will not come into play."). And a court does not have to "accept as true a legal conclusion couched as a

factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007) (citation omitted).

Plaintiffs further argue (Br. 19) that "[u]nder settled law, . . . the [MRAA] must be construed as conferring individual rights on the Plaintiffs even though the legislation nominally benefited the Tribe as a collective entity." Plaintiffs are wrong. There is no established rule in Indian law suggesting that rights accorded to a Tribe also confer equivalent rights on its members. *See, e.g., Blackfeather v. United States*, 190 U.S. 368, 375, 23 S. Ct. 772, 775 (1903) (Act granting "the Shawnee tribe or band of Indians" the right to present claims against the United States in the Court of Claims did not sanction the "claims of the individual members thereof"). The Supreme Court's decision in *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 93 S. Ct. 1257 (1973), upon which plaintiffs rely, does not suggest otherwise. It merely states that legislation referring to Indians collectively could be used to support a cause of action by individual Indians where "the legislation confers individual rights." *See* 411 U.S. at 181; 93 S. Ct. at 1267. Plaintiffs have not established that the MRAA gives them, as

individuals, a right to sue independent of the Tribe. Indeed, the statutory text provides otherwise.

Finally, plaintiffs argue that the MRAA was *in pari materia* with the 1997 Miccosukee Settlement Act, 25 U.S.C. § 1750(a), and that the court should have construed the two statutes together when determining the scope of the waiver of sovereign immunity under the MRAA. (Br. 20-23.) We disagree with both their premise and their conclusion.

"Statutes are *in pari materia* – pertain to the same subject matter – when they . . . have the same purpose or object," and "courts generally turn to an *in pari materia* analysis to resolve a statutory ambiguity and to ascertain legislative intent." 2B Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 51:3 (7th ed. 2008). As an initial matter, there is no statutory ambiguity in the MRAA that calls for an *in pari materia* analysis. Moreover, these statutes are not *in pari materia*. The 1997 Miccosukee Settlement Act relates to a settlement of a lawsuit between the Florida Department of Transportation and the Miccosukee Tribe, *see* 25 U.S.C. § 1750, while the MRAA relates to the establishment of a legal framework for the rights and obligations of the

Miccosukee and the United States with respect to the Miccosukee Reserved Area and the Everglades National Park, *see* 112 Stat. 2964. The two acts have completely distinct purposes, and plaintiffs offer no reason to interpret them together – or to engraft provisions specific to the 1997 Act onto the MRAA.

II.

The District Court correctly held that the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act deprived it of subject matter jurisdiction over plaintiffs' claims for declaratory and injunctive relief against the assessment and collection of federal income taxes

A. Because the APA accommodates, rather than overrides, the Acts, it furnishes no independent waiver of sovereign immunity in these circumstances

Plaintiffs assert that the District Court may entertain their claims under the Administrative Procedure Act (APA). This contention is meritless. To be sure, the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. But the APA limits its waiver of sovereign immunity. It first provides, in 5 U.S.C. § 701(a)(1), that "[t]his chapter," *i.e.*, Chapter 7 of Title 5, U.S.C., §§ 701-706, the part

providing for judicial review of agency action, applies "except to the extent that – (1) statutes preclude judicial review." In 5 U.S.C. § 702, it then provides, in pertinent part, as follows (*id.*):

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

As a result, a more specific statute that restricts jurisdiction takes precedence over the right to judicial review under the APA.

The Anti-Injunction Act and the tax exception to the Declaratory Judgment Act constitute the type of jurisdictional restrictions that are accommodated by the APA's own express restriction on its waiver of sovereign immunity. Those statutes affirmatively preclude the court from exercising jurisdiction over plaintiffs' claims. Since the APA does not apply where "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), and does not "affect[ ] other limitations on judicial review," 5 U.S.C. § 702, plaintiffs cannot use it to circumvent the express ban Congress placed on the issuance of declaratory and injunctive relief with respect to federal taxes. This result is confirmed by the legislative history of the amendment of § 702, which expressly refers to the Acts as an

example of just the type of jurisdictional restriction Congress had in mind in crafting the foregoing exceptions to the availability of judicial review. It states that the "[s]tatutory or rule provisions denying authority for injunctive relief (*e.g.* the Anti-Injunction Act, 26 U.S.C. section 7421, and 28 U.S.C. section 2201, prohibiting injunctive and declaratory relief against collection of federal taxes) . . . remain unchanged [by § 702]." H.R. Rep. No. 94-1656, at 12 (1976).

As a result, the courts of appeals that have addressed the question have concluded that the waiver of sovereign immunity found in 5 U.S.C. § 702 do not override the ban imposed by the Anti-Injunction Act and the Declaratory Judgment Act. *Hughes v. United States*, 953 F.2d 531, 537 (9th Cir. 1992); *Fostvedt v. United States*, 978 F.2d 1201, 1203-04 (10th Cir. 1992); *Smith v. Booth*, 823 F.2d 94, 97 (5th Cir. 1987); *see Foodservice and Lodging Inst., Inc. v. Regan*, 809 F.2d 842, 846 (D.C. Cir. 1987) (dismissing certain challenges to Treasury Regulations on tip reporting under the Act); *We the People Found. v. United States*, 485 F.3d 140, 142-43 (D.C. Cir. 2007) (likewise agreeing with the Government that, although the plaintiffs invoked 5 U.S.C. § 702, the Anti-Injunction Act deprived the court of jurisdiction to

enjoin the collection of taxes). So, too, here, any attempt to invoke 5 U.S.C. § 702 as a source of jurisdiction to oppose the assessment and collection of income taxes on distributions to tribal members from gaming revenues is likewise affirmatively barred.

B. The Anti-Injunction Act and the tax exception to the Declaratory Judgment Act ban the issuance of injunctive and declaratory relief against the assessment or collection federal taxes

The Anti-Injunction Act, § 7421(a) of the Internal Revenue Code, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[5] The Anti-Injunction Act is designed to preserve the Government's ability to assess and collect taxes expeditiously with "a minimum of preenforcement judicial interference" and "to require that the legal right to the disputed sums be determined in a suit for refund."

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[5] Although plaintiffs here primarily seek declaratory relief, "an injunction of a tax and a judicial declaration that a tax is illegal have the same prohibitory effect on the federal government's ability to assess and collect taxes." *Wyoming Trucking Ass'n, Inc. v. Bentsen*, 82 F.3d 930, 933 (10th Cir. 1996). Notably, in their complaint, they also suggest bases for the court to provide injunctive relief. (Doc. 1 at 6-7.) Accordingly, both the Anti-Injunction Act and the Declaratory Judgment Act govern this case.

Bob Jones Univ. v. Simon, 416 U.S. 725, 736, 94 S. Ct. 2038, 2046 (1974). A claim that falls within the Act's proscription must be dismissed for lack of subject matter jurisdiction. *See Alexander v. "Americans United" Inc.*, 416 U.S. 752, 757-58, 94 S. Ct. 2053, 2057 (1974).

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), similarly bars declaratory relief with regard to federal taxes, providing jurisdiction to the district courts to grant injunctive relief "except with respect to Federal taxes." As the Supreme Court noted in *Bob Jones Univ.*, 416 U.S. at 732 n.7, 94 S. Ct. at 2044, the tax exception to the Declaratory Judgment Act demonstrates the "congressional antipathy for premature interference with the assessment or collection of any federal tax." The scope of the Declaratory Judgment Act is at least as broad as that of the Anti-Injunction Act. *Id.* (reserving question); *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.6 (11th Cir. 2003).

The Supreme Court has interpreted the Acts broadly, so as to protect the Treasury from suits seeking to interject the courts prematurely into federal tax disputes. Instead, the Court has confined

tax litigation to the precise channels prescribed by Congress, such as suits for refund. *Bob Jones Univ.*, 416 U.S. at 746, 94 S. Ct. at 2050.

C. The *Williams Packing* exception does not apply

The Anti-Injunction Act and the tax exception to the Declaratory Judgment Act contain certain stated exceptions, but none is invoked here, and none applies. Plaintiffs do invoke a narrow judicial exception to the Acts' strictures. They contend that their situation falls within the exception recognized by the Supreme Court in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7-8, 82 S. Ct. 1125, 1129-30 (1962). The District Court correctly rejected this contention.

Under *Williams Packing*, an injunction may issue only when it is "clear that the Government could in no circumstances ultimately prevail on the merits" of its claim *and* that "equity jurisdiction" otherwise exists. *United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10, 95 S. Ct. 13, 15 (1974). To satisfy the first prong of the *Williams Packing* test, a plaintiff must demonstrate that "under the most liberal view of the law and the facts, the United States cannot establish its claim." 310 U.S. at 7, 82 S. Ct. at 1129; *Hospital Resource Personnel, Inc. v. United States*, 68 F.3d 421, 428 (11th Cir. 1995). The

Government need only have a good-faith basis for its claim or defense. *Elias v. Connett*, 908 F.2d 521, 525 (9th Cir. 1990). To meet the second prong of the *Williams Packing* test, a plaintiff must demonstrate that it will suffer irreparable injury and that it has no adequate remedy at law. *See Christian Coalition of Fla., Inc. v. United States*, 662 F.3d 1182, 1194 (11th Cir. 2011); *Church of Scientology of Calif. v. IRS*, 920 F.2d 1481, 1486 (9th Cir. 1990).

As the District Court held (Doc. 28 at 6-8), plaintiffs cannot satisfy either prong of the *Williams Packing* exception. In their brief (Br. 29-30), plaintiffs assert that the Government can prevail "under no circumstances" based upon 25 U.S.C. § 459e, which states that "[a]ny distribution of such receipts to tribal members shall neither be considered as income or resources of shall members for purposes of any such taxation . . . ." This argument is meritless. Section 459e only exempts from taxation certain lands identified in 25 U.S.C. § 459a, which tracts do not include any Miccosukee land.

In their bid to establish that the Government has no chance of success on the merits, Plaintiffs cite several revenue rulings recognizing the nontaxability of certain types of income derived by an allottee from

allotted lands. (Br. 30, citing Rev. Rul. 60-96, 1960-1 C.B. 18; Rev. Rul. 57-523, 1957-2 C.B. 51; Rev. Rul. 56-342, 1956-2 C.B. 20.) But those revenue rulings, as the District Court explained, "stand only for the proposition that income generated from oil leases, grazing fees and farming is exempt from federal taxes." (Doc. 28 at 7.) Moreover, as the District Court also noted (*id.* at 8), the rulings predate the enactment of 25 U.S.C. § 459e by fifteen years. Accordingly, plaintiffs clearly fail to establish that the Government can "under no circumstances" prevail.

Nor can plaintiffs show that they will suffer an irreparable injury or that they lack an adequate remedy at law. As an initial matter, mere allegations of financial hardship are insufficient to support a finding of irreparable harm. *E.g., Church of Scientology*, 920 F.2d at 1489. Although plaintiffs assert that "taxation could cause serious consequences" to their way of life (Br. 29), they fail to establish that the payment of taxes as required by Congress constitutes irreparable harm.

Likewise, plaintiffs fail to show that they have no adequate remedy at law. As the District Court noted (Doc. 28 at 8), plaintiffs have the alternative remedy of pursuing a Tax Court deficiency suit to challenge the imposition of the tax. I.R.C. §§ 6213(a), 7442. A Tax

Court deficiency action is also an adequate legal remedy. *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990). Notably, 12 of the 16 plaintiffs here have already filed such actions. Alternatively, plaintiffs can pay the tax determined against them, file a timely administrative refund claim, and if six months elapse without action being taken thereon, or within two years after the claim is denied, file a suit for refund in a federal district court or the Court of Federal Claims. I.R.C. §§ 6511, 6532(a)(1), 7422; 28 U.S.C. §§ 1346(a)(1), 1491. "The courts have repeatedly held that the opportunity to sue for a refund is an adequate remedy at law which bars the granting of an injunction." *Church of Scientology*, 920 F.2d at 1489. *See also Bob Jones Univ.*, 416 U.S. at 746, 94 S. Ct. at 2050; *see also Americans United*, 416 U.S. at 762, 94 S. Ct. at 2059; *Am. Friends Serv. Comm.*, 419 U.S. at 11, 95 S. Ct. at 15; *Hobson v. Fischbeck*, 758 F.2d 579, 581 (11th Cir. 1985).

Plaintiffs contend that a refund suit does not provide an adequate remedy for themselves as individuals because the Miccosukee Tribe is an indispensable party, as the "named beneficiary of the rights Congress granted in the 1997 and 1998 Acts" (Br. 27), and that the Tribe, as a necessary party, would invoke sovereign immunity (Br. 28).

Plaintiffs miss the mark. Rule 19(a)(1) of the Federal Rules of Civil Procedure requires joinder if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

As was true in the District Court (Doc. 28 at 8), plaintiffs have not demonstrated in their brief on appeal that the Miccosukee Tribe would be deemed an indispensable party to any refund action by its members. Although the Tribe might have a general interest in such litigation, plaintiffs do not demonstrate that the court would be unable to "accord complete relief" in the absence of the Tribe, or that the refund action would impair the rights of the Tribe or leave plaintiffs open to inconsistent obligations. And plaintiffs fail even to suggest that the Tribe is an indispensable party to a Tax Court deficiency action, which is another adequate alternative remedy.

But even assuming, *arguendo*, that the Miccosukee Tribe was an indispensable party, it is entirely speculative for plaintiffs to assert that they would not be able to maintain their refund actions. Rule 19(b) expressly allows a court to determine whether an action should proceed if joinder is not feasible, and plaintiffs offer no reason to think that such an action would not be allowed to proceed. Indeed, the District Court aptly pointed out, it "has not found any authority for the proposition that a Native American tribe is a necessary party to a tax refund claim brought by one of its members under 28 U.S.C. § 1346(a)(1)." (Doc. 28 at 8.)

III.

The District Court did not err in denying – as futile – plaintiffs' motion to amend their complaint

Plaintiffs also argue that the District Court erred in denying their oral motion to amend their complaint.[6] Although, as a general matter, leave to amend a complaint "should [be] freely give[n]," Fed. R. Civ. P. 15(a), a district court may properly deny leave to amend "when such

[6] Prior to making this motion at the hearing, plaintiffs filed a motion to amend their complaint (Doc. 23), which they subsequently withdrew (Doc. 24).

amendment would be futile," *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004). "When a district court denies the plaintiff leave to amend a complaint due to futility, the court is making the legal conclusion that the complaint, as amended, would necessarily fail." *St. Charles Foods, Inc. v. America's Favorite Chicken Co.*, 198 F.3d 815, 822 (11th Cir. 1999). *Accord Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999) ("This court has found that denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal.") (citation omitted).

Here, the District Court properly denied plaintiffs' motion to amend their complaint. (Doc. 28 at 9.) Even if plaintiffs were granted leave (as requested) "to add additional factual allegations to address the 'irreparable injury' component of the *Williams Packing* test," their complaint still would be subject to dismissal. Plaintiffs sought relief barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. As a result, they needed to satisfy an exception to these Acts, such as one recognized in *Williams Packing*, in order to maintain their suit. In this case, the Court held that plaintiffs had failed to satisfy either prong of the *Williams Packing* test. They did

not establish that the Government had no chance of prevailing, nor did they show that they lacked an adequate remedy at law. As this Court has recognized, "[t]he Supreme Court has made clear . . . that a taxpayer must establish *both* prongs of the [*Williams Packing*] exception to the Anti-Injunction Act before a court may entertain his claim for injunctive relief against the IRS." *Christian Coalition*, 662 F.3d at 1194 (italics in original). Even assuming that plaintiffs' added allegations would cure the complaint's defects as to irreparable injury, their complaint would still be subject to dismissal based on its other fatal flaws. The denial of the motion for leave to amend was therefore proper.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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Attorney for United States

Dated: October 8, 2015

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I hereby certify that on this 8th day of October, 2015, this brief was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and seven (7) paper copies were sent to the Clerk by First Class Mail. Counsel for the Appellants will be served by means of the appellate CM/ECF system.

/s/ Patrick J. Urda
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