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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ELENA BARRON, Plaintiff, v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, Defendant.	)	Case No. 3:18-cv-00118-SLG

REPLY IN SUPPORT OF MOTION TO DISMISS
FED. R. CIV. PRO. 12(b)(1) [DKT. 9]

Plaintiff's *Opposition* at Dkt. 12 is based on fundamental error. Defendant Alaska Native Tribal Health Consortium (ANTHC) is a tribal health consortium. It is a governmental entity formed by and for the benefit of Alaska's 229 federally-recognized tribes pursuant to Public Law No. 105-83, § 325, to operate Indian Self-Determination and Education Assistance Act (ISDEA) programs. It is not a for-profit Alaska Native Claims Settlement Act (ANCSA) corporation.

This distinction is critical. Congress treats tribes and tribal organizations differently than ANCSA corporations due to their inherent sovereign status.[1] This explains why the Tenth Circuit in *Wardle v. Ute Indian Tribe*[2] and the Eleventh Circuit in *Taylor v. Ala. Intertribal Council Title IV*[3] held that tribes are not subject to suit under 42 U.S.C. § 1981, while the Fourth Circuit in *Aleman v. Chugach Support Services, Inc.*[4] held that for-profit ANCSA corporations are subject to the statute. *Taylor* and *Wardle* guide this court's decision here.

Even if § 1981 did apply to tribes and tribal organizations, the Court would not have subject matter jurisdiction due to ANTHC's tribal sovereign immunity from suit. ANTHC's opening memo and supporting evidence spell this out in detail.[5] Plaintiff implicitly concedes this argument by responding only with citations to authorities dealing with ANCSA corporations; *Becker v. Kikiktagruk Inupiat Corporation*,[6] *Aleman v. Chugach Support Services, Inc.*, and *Seldovia Native*

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[1] This point was addressed in ANTHC's *Memorandum in Support of Motion to Dismiss*, Dkt. 10 at 6, FN 15. Plaintiff is incorrect that ANTHC overlooked authorities like *Becker v. Kikiktagruk Inupiat Corp.*, No. 3:09-CV-00015-TMB, 2010 WL 11619259 (D. Alaska Aug. 12, 2010). *Becker* and related cases are distinguishable and do not apply because they address whether § 1981 applies to ANCSA corporations, not Indian tribes and tribal consortia.

[2] 623 F.2d 670 (10th Cir. 1980).

[3] 261 F.3d 1032 (11th Cir. 2001).

[4] 485 F.3d 206 (4th Cir. 2007).

[5] *See* Dkts. 10 and 11.

[6] *Id.* at *1 ("KIC is a Native Village Corporation organized under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-28 (ANCSA).").

Ass'n v. Lujan,[7] are distinguishable on that basis from cases involving tribes, as the cases recognize themselves.[8] Plaintiff ignores this distinction.

There are three points here. First, ANTHC is not subject to § 1981 as it is a tribal health care consortium. Second, even if it were covered by § 1981, plaintiff would not have a remedy because of ANTHC's tribal sovereign immunity. Third, plaintiff has judicially admitted she does not seek tort remedies for her alleged employment issues. And, for the record, ANTHC strongly denies plaintiff's claims of discrimination.

ARGUMENT

A. Alaska Native Tribes and Tribal Consortia Are Not Covered by § 1981.

Tribal governments pre-date the founding of the United States and are "distinct, independent political communities, retaining their original natural rights," including "the common-law immunity from suit traditionally enjoyed by sovereign powers."[9] It is firmly settled federal and Alaska law that tribes retain their governmental sovereignty, including sovereign immunity from suit, except where expressly and clearly abrogated by Congress.[10]

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[7] 904 F.2d 1335 (9th Cir. 1990).

[8] In *Aleman*, for example, the Fourth Circuit indicated its view in *dicta* that both ANCSA corporations and tribes fall within the scope of § 1981's terms. Fatally for plaintiff's argument here, however, the court also stated: "To be sure, we have recognized Indian tribal immunity as a bar to Section 1981 liability. But the defendants claim no such immunity here and we find no basis to conclude that the ownership of the defendant [ANCSA] corporations by Alaska Natives and their devisees, or any other attribute, entitles the defendants to immunity . . . . Alaska Native Corporations and their subsidiaries are not comparable sovereign entities[.]" 485 F.3d at 213 (citing *Yashenko v. Harrah's N.C. Casino Co.,* 446 F.3d 541, 551–53 (4th Cir.2006)).

[9] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978).

[10] *Michigan v. Bay Mills Indian Cmty*, 134 S. Ct. 2024, 2027 (2014); *see also, e.g., John v. Baker*, 982 P.2d 738, 751 (Alaska 1999); *Douglas Indian Association v. Central Council of Tlingit and Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1176 (Alaska 2017) ("Tribal immunity is a matter

As detailed at Dkt. 10, [11] ANTHC was formed by Alaska's 229 federally-recognized tribes and twelve regional tribal health consortia to provide statewide health services to Alaska Natives and American Indians.[12] The Alaska Tribal Health Compact, a government-to-government agreement between Alaska's tribes and the Secretary of Health and Human Services authorized by P.L. 93-638, ISDEA, 25 U.S.C. § 5301 *et seq.*, and by the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601, *et seq*., Section 121 of Pub. L. 94-437, memorializes the Alaska tribes' agreement to do so with the Government. To promote tribal self-determination and the exercise of tribal sovereignty, ISDEA and IHCIA allow tribal governments and tribal consortiums, in Alaska and elsewhere, to assume and operate federal health care programs for Alaska Natives, American Indians and other eligible individuals.[13]

In contrast, ANCSA corporations are not governmental entities, with ancient history as sovereign tribal nations, but rather are for-profit corporations and purely creatures of a relatively recent federal statute.[14] ANCSA "resolved Native claims to Alaska land by instituting a novel form of Native land ownership,"[15] and resulted in the creation of State-chartered, regional and

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of federal law and is not subject to diminution by the States. We have long held that federally recognized tribes in Alaska are sovereign entities entitled to tribal sovereign immunity[.]") (internal quotation marks omitted) (citing *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977)).

[11] *Id.* at 3-5 and Exs. A-F.

[12] *See* P.L. 105-83, § 325.

[13] 25 U.S.C. § 5302; 25 U.S.C. §§ 5385-5388; *see also generally* Dkt. 11 (*Affidavit of Roald Helgesen*) at ¶¶ 4-6 and Ex. B (Alaska Tribal Health Compact).

[14] 85 Stat. 688 (1971), as amended, 43 U.S.C. § 1601 *et seq*.; Dkt. 10 at 6, FN15.

[15] *John,* 982 P.2d at 748; *Aleman*, 485 F.3d at 209.

village for-profit corporations whose shareholders are Alaska Native people.[16] Certainly, there are many Alaska Natives who are ANCSA corporate shareholders and who are members of federally-recognized tribes. But, Alaska's federally-recognized tribes and the ANCSA corporations are different types of entities entirely.[17]

Underscoring this difference, ANCSA corporations are not exempted from Title VII coverage by Title VII itself, but instead are exempt under a separate provision in ANCSA, 43 U.S.C. 1626(g).[18] In contrast, tribes and tribal consortia like ANTHC are specifically excluded from Title VII's definition of "employer" at 42 U.S.C. § 2000e(b)(1),[19] which is one key to their exemption from § 1981. The courts have consistently held that the Title VII tribal exemption also precludes claims against tribes and tribal organizations under § 1981.[20] As the Eleventh Circuit explained in *Taylor*:

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[16] *State of Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't*, 101 F.3d 1286, 1295 (9th Cir. 1996), *rev'd on other grounds sub nom. Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998) ("Natives own and manage the corporations. Under the original statute, membership in the corporations was restricted to Natives for 20 years, 43 U.S.C. § 1606(h)(1), and the 1987 Amendments allow each corporation to extend this restriction indefinitely. Alaska Native Claims Settlement Act Amendments of 1987, Pub.L. No. 100–241 (1987) (codified at 43 U.S.C. § 1629c).").

[17] *See John*, 982 P.2d at 753 ("Congress did not intend for ANCSA to…handicap tribes by divesting them of their sovereign powers…nowhere does the law express any intent to force Alaska Natives to abandon their sovereignty.").

[18] *See, e.g., Abikar v. Bristol Bay Native Corp.*, 300 F.Supp.3d 1092, 1098 (S.D. Cal. 2018) ("Title VII does not apply to [ANCSA] ANCs and their wholly owned subsidiaries" and this statutory provision cannot be amended via contract).

[19] Plaintiff does not apparently dispute that ANTHC is exempt from Title VII's coverage, only that this exemption precludes the application of § 1981 to ANTHC.

[20] *Taylor*, 261 F.3d at 1035; *Wardle*, 623 F.2d at 673 (recognizing that Title VII's specific provisions prohibiting discrimination in employment and excluding Indian tribes from its coverage controlled over the general provisions of § 1981 precluding discrimination claims against the

> [I]n its discussions of Title VII, Congress has explicitly indicated that it does not intend for Indian tribes to be subject to disparate treatment employment discrimination suits for Indian tribe-based employment. . . . . In our view, it would be wholly illogical to allow plaintiffs to circumvent the Title VII bar against race discrimination claims . . . simply by allowing a plaintiff to style his claim as a § 1981 suit.[21]

Plaintiff ignores all this, and incorrectly relies on cases whose holdings and analysis are specific to ANCSA corporations, apparently arguing that all entities which are exempt from coverage by Title VII are nonetheless subject to § 1981. *Becker, Aleman*, and *Seldovia Native Ass'n* are inapposite here. Those cases do not raise or address application of § 1981 to a tribe, nor do they analyze application of the statute in context of tribal sovereignty and "the unique legal status of Indian tribes under federal law and the plenary power of Congress to legislate on behalf of federally recognized Indian Tribes."[22]

It is established federal doctrine that when a statute does not specifically exempt tribes from coverage, a court must examine whether the statute's application would contradict Congress's intent regarding Indian tribes *or* interfere with tribal self-governance. If it does, the statute will only reach the tribe if its language *expressly* applies to tribes.[23] This doctrine controlled

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tribe); *Stroud v. Seminole Tribe of Florida*, 606 F.Supp. 678, 680-81 (S.D. Fla. 1985) ("Congress has not, however, expressly or impliedly extended section 1981 to the employment practices of the Indian tribes."); *see also Yashenko v. Harrah's NC Casino Company, LLC*, 352 F.Supp.2d 653 (W.D.N.C. 2005) (collecting cases and pointing out that the same analysis applies to disparate treatment claims under § 1981 as under Title VII).

[21] *Id.* at 1035.

[22] *Wardle*, 623 F.2d at 673.

[23] *See, e.g., E.E.O.C. v. Karuk Tribe Housing Authority,* 260 F.3d 1071, 1078-82 (9th Cir. 2001) (determining tribal housing authority not subject to Age Discrimination in Employment Act and pointing out the "general acceptance of the notion that the term 'tribal self-government' or similar term, encompasses a tribe's ability to make at least certain employment decisions without interference from other sovereigns"); *Taylor,* 261 F.3d at 1034-35; *Menominee Tribal Enterprises*

the outcome in *Taylor*, where the court determined that applying § 1981 would undermine Congressional intent *and* noted that "[plaintiff]'s employment discrimination claim against the tribe by is also precluded by Indian tribes' strong interest in self-government."[24]

Last, plaintiff cites to *Johnson v. Railway Express Agency, Inc.*, which does not involve ANCSA corporations or Indian tribes at all.[25] The *Johnson* court made only a qualified conclusion: "We *generally* conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct and independent."[26] This is an unremarkable conclusion, and the case is immaterial to the tribal law question presented in the motion at bar.

B. The Court Should Follow *Taylor* and *Wardle*. Tribes and Tribal Organizations Exempt from Title VII are Not Subject to Claims Under § 1981.

Taylor and *Wardle* are the most apposite cases here. Each considered whether the exclusion of Indian tribes from the definition of "employer" in Title VII precluded application of § 1981 to Indian tribes and tribal organizations. While they did so in the context of Indian preference programs, these cases do not limit their holding to discrimination claims based on

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v. Solis, 601 F.3d 669, 671 (7th Cir. 2010). Similarly, in *Becker*, Judge Burgess recognized the tribal exemption and declined to extend it to ANCSA corporations due to their non-tribal status. 2010 WL 11619259, at *10 (noting that "[a]lthough the *Wardle* court did not discuss the application of § 1981 to Native corporations, its reasoning would seem to extend § 1981 immunity to any entity which is exempt from suit under Title VII," but ultimately agreeing with plaintiff's argument distinguishing ANCSA corporations from Indian tribes which were exempt from § 1981 because of the principles of Indian sovereignty and self-governance.).

[24] *Taylor*, 261 F.3d at 1035.

[25] 421 U.S. 454, 459-60 (1975).

[26] *Id.* at 461 (emphasis added).

Indian preference programs, nor does the Congressional history cited in those cases support such a limitation. Title VII's prohibition against discrimination is general.[27] And in *Taylor*, the Indian preference program was key to the determination that application of § 1981 would interfere with tribal self-governance, *in addition* to finding that allowing plaintiffs to sidestep the general tribal exemption from Title VII would contradict Congressional intent. [28]

The Ninth Circuit in *Pink v. Modoc Indian Health Project, Inc.* cited *Wardle* with approval for the proposition that the tribal exemption from Title VII serves the same purpose as tribal sovereign immunity itself: "to promote the ability of Indian tribes to control their own enterprises."[29] This reasoning applies with equal force to the tribal exemption from § 1981. In addition to contradicting Congressional intent, application of § 1981 to tribes and tribal consortia such as ANTHC would directly and significantly interfere with tribal self-governance. As shown by the evidence submitted in support on ANTHC's opening memo—evidence entirely unrebutted or, for that matter, even discussed by plaintiff—ANTHC is signatory to the Alaska Tribal Health Compact and provides health and other services under the Tribal Self-Governance Program, which is established by Title V of ISDEA and administered by the Indian Health Service, Office of Tribal Self-Governance.[30] Providing health services for Alaska Natives and American Indians is a federal responsibility and a core governmental function of Alaska's 229 federally-recognized tribes.[31] As

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[27] 42 U.S.C. § 2000e-2(b).

[28] 261 F.3d at 1035.

[29] 157 F.3d 1185, 1188 (9th Cir. 1998) (citing *Wardle*, 623 F.2d at 672).

[30] *See* Alaska Tribal Health Compact, Exhibit B to Dkt. 11 (*Affidavit of Roald Helgesen*).

[31] *See E.E.O.C. v. Navajo Health Found.-Sage Mem'l Hosp., Inc,* No. CV 06-2125-PCT-DGC, 2007 WL 2683825, at *3 (D. Ariz. Sept. 7, 2007) (dismissing a Title VII claim against a tribal

an exercise of their sovereignty and self-governance, and in order to effectively provide statewide health services, Alaska's tribes and tribal health have joined together in an inter-tribal health consortium, ANTHC, to carry out these functions directly.

ANTHC, an inter-tribal consortium of tribes and tribal health organizations, is exempt from the definition of "employer" under Title VII. Per *Taylor* and *Wardle*, this also removes ANTHC from the ambit of § 1981.

C. Tribal Sovereign Immunity Protects ANTHC From Suit.

An independent basis for dismissal is that ANTHC is immune from suit by its tribal sovereign immunity.[32] Even if § 1981 by its terms covered ANTHC, that does not mean that plaintiff can sue ANTHC for an alleged § 1981 violation. Courts have consistently held that "a Congressional waiver of Indian tribal sovereign immunity cannot be implied but must be unequivocally expressed."[33] Accordingly, that a tribe is subject to a statute does not compel a finding that it can be sued for violating the statute.[34]

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health organization carrying out federal health programs for tribes pursuant to ISDEA and comparing it to other tribal organizations functioning in a governmental role).

[32] Dkt. 10 at 8.

[33] *Florida Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999) (citing *Santa Clara Pueblo*, 436 U.S. at 58) (internal quotation marks omitted).

[34] *Id.* ("[W]hether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions.") (citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998)); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2nd Cir. 2000) ("[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it."); *Boricchio v. Casino*, No. 1:14-CV-818 AWI SMS, 2015 WL 3648698, at *4 (E.D. Cal. June 10, 2015) (same); *Bales v. Chickasaw Nation Industries,* 606 F.Supp.2d 1299, 1307 (D. New Mexico 2009) (explaining that tribal sovereign immunity and Title VII's exemption of Indian tribes are "distinct concepts" because "the applicability of a statute to a tribe is a separate issue from the issue of tribal sovereign immunity" and its protection of the tribe from suit).

In response, plaintiff again confuses ANCSA corporations with tribes and tribal consortia, arguing that "Alaska Native Corporations, and its [sic] health consortiums, do not have sovereign immunity from suits filed under 42 U.S.C. § 1981," citing *Aleman* and *Seldovia Native Ass'n*.[35] In *Aleman*, however, the defendants did not raise or argue tribal sovereign immunity, and despite some broader language in *dicta*, the court only addressed the immunity of ANCSA corporations, noting expressly that tribal sovereign immunity applied to § 1981 claims.[36] *Seldovia Native Ass'n* did not discuss tribal sovereign immunity at all; it addressed only State sovereign immunity under the Eleventh Amendment, which is different from tribal sovereign immunity.[37] Those cases have no bearing on the question of ANTHC's tribal sovereign immunity.

The cases which do control on the issue of tribal sovereign immunity are discussed in detail ANTHC's opening memo at Dkt 10. These include *Pink*, *Montella v. Chugachmiut, Barnes v. Bristol Bay Area Health Corporation*, *Beversdorf v. Tanana Chiefs Conference* and *Bekkum v. Arctic Slope Native Association*—all cases which found that tribal health consortia share in their constituent tribes' sovereign immunity.[38] Courts review the specific organization, its purpose,

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[35] *Opposition* at 13 and at FN 45.

[36] 485 F.3d at 213. Note that the *Aleman* court somewhat confusingly also refers to "immunity" from coverage by Title VII and § 1981, but this reference to "immunity" should be read to mean "exemption" from coverage, and not tribal sovereign immunity, which is a distinct concept. *Bruguier v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 237 F.Supp.3d 867, 871 (W.D. Wisc. 2017) ("First, the Tribe's sovereign immunity precludes their claims. Second, the Tribe is not an "employer" under Title VII. Each of these two reasons provides an independent basis for dismissal.").

[37] 904 F.2d at 1349-50; *see Douglas Indian Association v. Central Council of Tlingit and Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1177-78 (Alaska 2017) (explaining why tribal and state sovereign immunity must be analyzed differently).

[38] *Memorandum* at 8-11.

and its relationship to its founding, controlling or constituent tribes. This is exactly what ANTHC did in its opening memo, which plaintiff complains "devoted several pages toward identifying the structural backdrop" for ANTHC.[39] Plaintiff does not address these cases or otherwise explain why they should not apply, nor does she disagree with ANTHC's description of its relationship to Alaska Native tribes and regional tribal consortia.

For these reasons, should this Court reach this issue, it should find that ANTHC is protected by tribal sovereign immunity from plaintiff's suit.[40]

D. Plaintiff Judicially Admits She is Not Raising Tort Claims or Seeking Tort Damages.

Plaintiff does not dispute that the Federal Tort Claims Act (FTCA) provides the unique and exclusive remedy for tort claims against ANTHC. Instead, she denies raising tort claims or seeking tort remedies.[41] This is a judicial admission and binding on plaintiff.

CONCLUSION

This Court should grant ANTHC's *Motion to Dismiss*, as §1981 does not apply to ANTHC, and the Court therefore does not have subject matter jurisdiction. This Court also does not have subject matter jurisdiction due to ANTHC's tribal sovereign immunity from suit. Finally, plaintiff has judicially admitted that she is not raising tort claims or seeking tort remedies, and in any case, plaintiff's tort claims against ANTHC are barred by the FTCA.

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[39] *Opposition* at 3.

[40] *Armijo v. Pueblo of Laguna*, 149 N.M. 234, 238 (2010) (quoting *Ameriloan v. Superior Court*, 169 Cal.App.4th 81, 86 (2008)) ("[Tribal] sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation….Rather[,] it presents a pure jurisdictional question.'").

[41] *Opposition* at 3, 13.

DATED this 26th day of July, 2018, at Juneau, Alaska.

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