No. 18-2174

United States Court of Appeals
for the Sixth Circuit

JOY SPURR

Plaintiff-Appellant

v.

MELISSA LOPEZ POPE, Chief Judge of Tribal Court of Nottawaseppi Huron Band of the Potawatomi; SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF POTAWATOMI; NOTTAWASEPPI HURON BAND OF POTAWATOMI

Defendants-Appellees

On Appeal from the United States District Court
for the Western District of Michigan
The Honorable Janet T. Neff

BRIEF OF DEFENDANTS-APPELLEES

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I. REQUEST FOR ORAL ARGUMENT

The Nottawaseppi Huron Band of the Potawatomi ("NHBP" or the "Band"), the NHBP Supreme Court, and the Honorable Melissa L. Pope, respectfully request that the Court hold oral argument. The issue presented is of critical importance to Indian tribes as it implicates the scope of their authority to protect their members and others under the Violence Against Women Act, and it involves a provision of that Act that has not been interpreted by a federal court since its amendment by Congress in 2013.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 over Ms. Spurr's claim that the NHBP Tribal Court exceeded its jurisdiction as a matter of federal law. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) ("§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction"). The district court did not have jurisdiction over any claims against the Band or the NHBP Supreme Court as all claims against those entities are barred by sovereign immunity, and that remains so on appeal.

The district court issued a final decision disposing of the issue appealed from (and all other claims of Ms. Spurr) on September 27, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES

Whether the Band and the NHBP Supreme Court enjoy sovereign immunity to Ms. Spurr's suit.

Whether the NHBP Tribal Court exceeded the limits of its jurisdiction when it issued a civil personal protection order against Ms. Spurr, a non-Indian, under 18 U.S.C. § 2265(e), which provides, in pertinent part, that "a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving *any person*, including the authority to enforce any orders through civil contempt proceedings[.]" 18 U.S.C. § 2265(e) (emphasis added).[1]

IV. STATEMENT OF THE CASE

The Band is a federally recognized sovereign Indian tribe that enjoys a government-to-government relationship with the United States. *See* 83 Fed. Reg. 34,863, 34,865 (July 23, 2018). The NHBP Reservation is located in Fulton, Michigan. The Honorable Melissa L. Pope is the Chief Judge of the NHBP trial

[1] Ms. Spurr's "Statement of the Case" canvasses a range of factual and legal allegations, including purported due process violations and constitutional infirmities in NHBP law. *See* Br. 2-13. While Defendants-Appellees do not concede the merit of any of these allegations, they do not address all of them here because Ms. Spurr states that "[t]he *sole issue* in this case is whether the NHBP Tribal Courts had subject matter jurisdiction to issue and enforce a personal protection order against Mrs. Spurr." *Id.* at 13 (emphasis added); *see also id*. at 27 (substantially the same). Ms. Spurr's entire Argument section is likewise restricted to that single question of law. *Id*. at 13-27. Accordingly, Defendants-Appellees limit their arguments in reliance on those statements and so as not to burden this Court with extraneous material.

court (the "Tribal Court"). The NHBP Supreme Court is the highest appellate court in the Band's court system. These entities are hereafter referred to collectively as the "Tribal Government Defendants."

American Indian and Alaska Native citizens experience some of the highest rates of violent crime and stalking of any group in the United States. More than 80% of Native American men and women experience violent crime in their lifetimes, and 48.8% of Native women and 18.6% of Native men experience stalking.[2] The perpetrators of these acts are overwhelmingly non-Indian – 90% in the case of male victims and 97% in the case of female victims.[3] In response to this "epidemic," S. Rep. No. 112-153, at 8 (2012), Congress enacted Title IX of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013). Based on a "community-coordinated response model" that "recogniz[ed] that tribal nations may be best able to address violence in their own communities," S. Rep. No. 112-153, at 8, Title IX "recognized and affirmed" the authority of participating tribes to impose criminal sanctions against certain non-Indian perpetrators of domestic or dating violence, harassment, or other threatening acts, 25 U.S.C. § 1304(a)(1)-(2), (5), (b)(1). In addition, and directly applicable to

[2] *See, e.g.*, Andre B. Rosay, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings From the National Intimate Partner and Sexual Violence Survey* 44-45 & Tables 6.1, 6.2, Nat'l Inst. of Justice (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

[3] *Id*. 46, Figure 6.1.

the issue raised in this case, Congress recognized that civil protection orders are *also* an "important tool" for tribes to address these issues; thus, Title IX explicitly "clarif[ied] Congress's intent to recognize that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian." S. Rep. No. 112-153, at 11. *See* 18 U.S.C. § 2265(e).

On February 2, 2017, NHBP tribal member Nathaniel Spurr petitioned the Tribal Court for an ex parte personal protection order ("PPO") against Ms. Spurr.[4] Mr. Spurr ("petitioner") alleged that Ms. Spurr was engaged in a campaign of harassment against him, including: unwanted visitation to his residence on the NHBP Reservation; several hundred letters, emails, phone calls, voicemails, and statements within the tribal community accusing him of a wide range of criminal activity and other misconduct; intervention in his personal relationships; and representation of herself as him (online and via U.S. mail) to insurance, financial, and governmental entities and the making of false statements to some of those entities in order to obtain his confidential information and to impair his standing with those entities. PPO Petition, RE 22-3, Page ID # 268-281.

On February 3, 2017, the Tribal Court issued a temporary (14-day) ex parte PPO against Ms. Spurr. Tribal Ct. Op. & Order (July 21, 2017), RE 22-1, Page ID

[4] Nathaniel Spurr and Ms. Spurr share the same last name, as Ms. Spurr is married to Nathaniel Spurr's father, Stephen Spurr, who is Ms. Spurr's attorney in this matter.

203. On February 16, 2017, the Tribal Court conducted a hearing, at which it received witness testimony and other evidence and heard the arguments of the parties, to determine whether the temporary PPO should be made permanent (one year). *Id*. at Page ID # 204.

On February 17, 2017, the Tribal Court issued an order finding that the evidence warranted the issuance of a permanent PPO. *Id.* This finding was upheld by the NHBP Supreme Court. Tribal S. Ct. Op. (Jan. 25, 2018), RE 22-2, Page ID # 261 (summarizing the Tribal Court's factual findings and finding them "amply supported by evidence in the record"). As a result, the Tribal Court issued a permanent civil PPO against Ms. Spurr prohibiting her from a range of unwanted contact with the petitioner (including restrictions on Ms. Spurr's physical proximity to the petitioner and his residence, and prohibitions on contacting him by mail, telephone, or electronic means). PPO, RE 1-3, Page ID # 31. That is the PPO at issue in this case.

The Tribal Court issued the PPO expressly under the authority of both NHBP law and 18 U.S.C. § 2265(e), which provides:

> **Tribal court jurisdiction.** For purposes of this section, *a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person*, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

18 U.S.C. § 2265(e) (emphasis added).[5]

In October 2017, the petitioner alleged to the Tribal Court that Ms. Spurr had violated the PPO with continuing harassing conduct. On December 13, 2017, and January 31, 2018, the Tribal Court held hearings at which the parties presented evidence, arguments, and witness testimony regarding whether Ms. Spurr should be found in civil contempt for violating the PPO. Order After Hearing (Feb. 13, 2018), RE 22-4, Page ID #283 ¶ 3. The Tribal Court found that Ms. Spurr had violated the PPO and held her in civil contempt. *Id*. at Page ID # 284 ¶ 13, 286 ¶ 27. The Tribal Court required Ms. Spurr to pay compensatory civil sanctions in the form of the petitioner's attorney's fees and $250 in costs associated with the adjudication of the matter. *Id*. at Page ID # 284-285 ¶¶ 13-20, 286-287 ¶¶ 27-34. Ms. Spurr was given the option of community service in lieu of paying the $250 costs. *Id*.[6]

[5] The statute's reference to "section 1151" is to 18 U.S.C. § 1151, which defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government[.]" *Id*. at § 1151(a). Ms. Spurr does not challenge the status of the NHBP Reservation as "Indian country" under section 1151.

[6] Ms. Spurr did not challenge in the district court the Tribal Court's finding of civil contempt or its issuance of civil sanctions. *See* Dist. Ct. Op. & Order (Sept. 27, 2018), RE 33, Page ID # 389-390. She likewise has not challenged those matters here, limiting her arguments to the question of the Tribal Court's jurisdiction to issue the PPO.

Ms. Spurr filed an action in the district court on December 11, 2017. There, she challenged the Tribal Court's jurisdiction to issue the PPO based on her status as a non-Indian. She asserted that if the PPO is criminal in nature, tribal courts have no criminal jurisdiction over non-Indians; and if the PPO is civil in nature, tribal courts generally lack civil jurisdiction over non-Indians except under narrow exceptions not met in her case. Complaint Br., RE 1-1, Page ID # 17; RE 1-2, Page ID # 18-21. On April 9, 2018, the Tribal Government Defendants jointly moved to dismiss this claim under Federal Rule of Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, based on the plain text of section 2265(e). Joint Mtn. to Dismiss, RE 30, Page ID # 362. They further moved to dismiss all claims against the Band and the NHBP Supreme Court on grounds of sovereign immunity. *Id*. at Page ID # 355-58.

On September 27, 2018, the district court granted the Rule 12(b)(6) motion, concluding that "the plain text of [18 U.S.C. § 2265] subsection (e) clearly establishes the Tribal Court's 'full civil jurisdiction' under federal law to issue the order in this case" and therefore "Plaintiff's jurisdictional challenge is not plausible and is properly dismissed under FED. R. CIV. P. 12(b)(6)." Dist. Ct. Op. & Order, RE 33, Page ID # 399. The district court did not reach the question of the sovereign immunity of the Band or the NHBP Supreme Court, having dismissed all of Ms. Spurr's claims on other grounds. *Id.* at Page ID # 393 n.1.

This appeal followed.

V. SUMMARY OF ARGUMENT

Ms. Spurr's claim against the Band and the NHBP Supreme Court is barred by sovereign immunity and should have been dismissed on that ground. Under federal law, an Indian tribe enjoys sovereign immunity to suit except where (1) Congress has abrogated the tribe's immunity, or (2) the tribe has waived it. Ms. Spurr alleged neither of those exceptions below and for good reason, as neither has occurred.

The district court correctly dismissed the claim against the Tribal Court for failure to state a claim under Rule 12(b)(6). The Tribal Court issued a civil PPO against Ms. Spurr in a civil proceeding under circumstances precisely contemplated by Congress when it amended section 2265(e) in 2013 to affirm tribal courts' "full civil jurisdiction" to issue PPOs against "any person." Both the unambiguous text of that provision and its legislative history evidence Congress's intent to recognize the very jurisdiction that the Tribal Court asserted here. Ms. Spurr's attempts to characterize the PPO as criminal in nature, and therefore within the ambit of a different VAWA provision (25 U.S.C. § 1304), thoroughly misconstrue the latter provision, ignore numerous clear indicia of the PPO's civil nature, and cite not a single case supporting the characterization of the PPO as criminal. Ms. Spurr's reliance on *Montana v. United States*, 450 U.S. 544 (1981),

to argue that the Tribal Court overstepped established limits on its civil jurisdiction overlooks the fact that *Montana* addresses tribal civil jurisdiction as a matter of federal common law. Here, by contrast, the Tribal Court exerted jurisdiction under the express terms of a federal statute. "And that fact makes all the difference." *United States v. Lara*, 541 U.S. 193, 207 (2004).

VI. ARGUMENT

A. Standard of Review

This Court reviews de novo the dismissal of a complaint under Rule 12(b)(6). *See Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 608-09 (6th Cir. 2009). To survive a motion to dismiss, the complaint must allege "facts that, if accepted as true, are sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim to relief that is plausible on its face.'" *Id.* at 609 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While all well-pleaded factual allegations in the complaint are accepted as true, *id.*, the Court need not accept "any legal conclusions or unwarranted factual inferences," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. All of Ms. Spurr's Claims Against the Band and the NHBP Supreme Court Are Barred by Sovereign Immunity

The Band is a sovereign Indian tribal government acknowledged by federal law "to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United

States[.]" 81 Fed. Reg. 5,019, 5,020 (Jan. 29, 2016). "Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quotation marks omitted). A tribe's sovereign immunity extends to all of its "governmental" activities. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (tribal sovereign immunity extends to "arms of the tribe").[7]

Where tribal sovereign immunity adheres, it deprives federal courts of subject matter jurisdiction over claims against a tribe and/or tribal entities and subjects a suit against such entities to dismissal. *See Kiowa Tribe*, 523 U.S. at 754. Tribal sovereign immunity is subject to only two exceptions. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id*. *See also Memphis Biofuels*, 585 F.3d at 921 (absent congressional abrogation or tribal waiver, "the tribe's immunity remains intact").

The burden for establishing congressional abrogation of tribal immunity lies with the party asserting it, and the burden is onerous. "[T]o abrogate such

[7] As explained below, the Band and the Tribal Court did not assert sovereign immunity for the Tribal Court in the district court and do not do so on appeal.

immunity, Congress must unequivocally express that purpose." *Bay Mills*, 572 U.S. at 790 (quotation marks and alterations omitted). *See also Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1078 (6th Cir. 2013) ("Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear." (quotation marks omitted)).

The burden for establishing a tribal waiver of sovereign immunity likewise lies with the party asserting claims against the Tribe, and that burden is likewise onerous. *See C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) ("[T]o relinquish its immunity, a tribe's waiver must be clear." (quotation marks omitted)).

Ms. Spurr's complaint alleged neither that Congress has unequivocally abrogated the sovereign immunity of the Band and its Supreme Court, nor that the Band has waived that immunity. Nor would Ms. Spurr be able to support any such allegation, as no such abrogation or waiver exists. Accordingly, Ms. Spurr's claim is barred against the Band and the NHBP Supreme Court. The United States Supreme Court is emphatic on this point: "[W]e have time and again treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver). . . . The upshot is this: Unless Congress has authorized [such a] suit, our precedents demand that it be dismissed." *Bay Mills*, 572 U.S. at 789, 791 (quotation marks and alterations omitted). *See*

also Memphis Biofuels, 585 F.3d at 923 (affirming district court's dismissal for lack of jurisdiction under Rule 12(b)(1) in suit against "arm of the tribe" absent congressional abrogation and tribal waiver).

As noted, Ms. Spurr did not allege either of the accepted exceptions to tribal sovereign immunity. She instead contrived a third exception that finds no support anywhere in federal law. She contended that "[t]he United States Supreme Court has stated that a federal court has federal question jurisdiction to determine whether a Tribal Court has jurisdiction; tribal sovereign immunity does not apply." Brief (Feb. 12, 2018), RE 21, Page ID # 147. The Court has said no such thing. To the contrary, it has made clear that federal question jurisdiction and sovereign immunity are "wholly distinct" concepts. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 & n.4 (1991) ("no one contends that § 1331 suffices to abrogate immunity for all federal questions"). And neither case cited by Ms. Spurr holds otherwise. *See* Brief, RE 21, Page ID # 147 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), and *Nat'l Farmers Union*.). *Plains Commerce Bank* did not even involve a claim against a tribe or tribal entity and accordingly said nothing – implicitly or explicitly – about tribal sovereign immunity. While *National Farmers Union* held that whether a tribal court has, as a matter of federal law, overstepped its jurisdiction is a federal question under 28 U.S.C. § 1331, it went no further because the petitioners had failed to exhaust

tribal remedies. *See* 471 U.S. at 857 ("Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief. *Whether the federal action should be dismissed* . . . is a question that should be addressed in the first instance by the District Court." (emphasis added)).

Because the Band and the NHBP Supreme Court enjoy sovereign immunity from Ms. Spurr's claim, the proceedings against them should be dismissed on that ground. *See Bay Mills*, 572 U.S. at 791.

C. The Plain Text of 18 U.S.C. § 2265(e) Recognizes Tribal Court Civil Jurisdiction to Issue PPOs Against Non-Indians.

The Band has not asserted sovereign immunity on the part of the Tribal Court against these proceedings in order to permit the adjudication of the propriety of the Tribal Court's actions.[8]

The Tribal Court enjoyed jurisdiction to issue the PPO against Ms. Spurr by virtue of the unambiguous text of section 2265(e). As demonstrated below, none of Ms. Spurr's arguments to the contrary undermines this conclusion.

[8] In *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the Tenth Circuit held that the *Ex parte Young* exception to sovereign immunity applies in an official capacity suit against a tribal court judge alleging that he exceeded his jurisdiction under federal law. Because the Band and the Tribal Court have waived the Tribal Court's immunity here, this Court does not need to address whether sovereign immunity would apply absent the waiver.

The Tribal Court issued the PPO against Ms. Spurr expressly "under the authority of the . . . Violence Against Women Reauthorization Act of 2013, 18 U.S.C. § 2265." PPO, RE 1-3, Page ID # 31 ¶ 2. Section 2265(e) is entitled "Tribal court jurisdiction" and provides as follows:

> **Tribal court jurisdiction.** For purposes of this section, *a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person*, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

18 U.S.C. § 2265(e) (emphasis added). By its plain terms, the scope of the civil jurisdiction to issue and enforce PPOs conferred by this provision is "full" and applies to "any person" – a category that certainly includes Ms. Spurr. Thus, the statutory predicate for the Tribal Court's civil jurisdiction to issue the PPO against Ms. Spurr could not be more emphatic. *See Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507, 512 (6th Cir. 2015) ("We must presume that Congress says what it means and means what it says, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992), and therefore must apply a statute as it is written[.]").

To counter the textual clarity of section 2265(e), Ms. Spurr notes that the provision appears under the section heading "Full faith and credit given to protection orders." 18 U.S.C. § 2265. On this basis, Ms. Spurr asserts that section

2265(e) "is about 'full faith and credit given to protection orders,' not jurisdiction." Br. 22. This argument is without merit. As this Court has explained:

> That the heading of [a section] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. . . . While accurately referring to [certain subjects], [the heading] neglects to reveal that [the section] also deals with [other subjects]. But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis.

United States v. Cain, 583 F.3d 408, 416 (6th Cir. 2009) (all but third brackets in original) (quoting *Bd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528 (1947), which refers to "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. . . . [T]hey cannot undo or limit that which the text makes plain," *id.* at 528-29).

Here, the text of the provision – specifically entitled "Tribal court jurisdiction" – makes plain that tribal courts "*shall have full civil jurisdiction* to issue and enforce protection orders[.]" 18 U.S.C. § 2265(e) (emphasis added). Ms. Spurr's assertion that section 2265(e) is not about jurisdiction is simply at war with this text.

Furthermore, "[t]he legislative history confirms what the text . . . make[s] plain[.]" *Perez v. Postal Police Officers Ass'n*, 736 F.3d 736, 741 (6th Cir. 2013). Section 2265(e) is a part of the Violence Against Women Act ("VAWA") and was amended by Congress in 2013. Pub. L. No. 113-4, § 905, 127 Stat. 54, 124 (2013).

Prior to the 2013 VAWA amendments, section 2265(e) simply stated that tribal courts enjoy "full civil jurisdiction to enforce protection orders[.]" Pub. L. No. 106-386, § 1101, 114 Stat. 1464, 1494 (2000). In 2008, a federal district court had held that this language does not recognize tribal jurisdiction over non-tribal members, reasoning:

> There must exist "express authorization" by federal statute of tribal jurisdiction over the conduct of non-members. . . .
>
> . . . [Section 2265(e) contains] no express congressional authorization to enter protective orders . . . against non-tribal members pursuant to the VAWA. Accordingly, there is no tribal jurisdiction pursuant to legislative grant.

Martinez v. Martinez, Case No. C08-5503 FDB, 2008 U.S. Dist. LEXIS 104300, at *9 (W.D. Wash. Dec. 16, 2008). In direct response to *Martinez*, Congress clarified in the VAWA 2013 amendments that tribal courts enjoy "full civil jurisdiction *to issue* and enforce protection orders *involving any person*[.]" 18 U.S.C. § 2265(e) (emphasized language added by the amendment). The Senate Report accompanying the bill introducing the 2013 amendments explained that section 2265, as amended,

> confirms the intent of Congress . . . by clarifying that *every Tribe has full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians*. . . .
>
> This would effectively reverse a 2008 decision from a Federal district court in Washington, which held that an Indian Tribe lacked authority to enter a protection order . . . against a non-Indian[.]

S. Rep. No. 112-265, at 11 & n.66 (2012) (citing *Martinez*) (emphasis added).

Indeed, the very statement of legislative history reproduced in Ms. Spurr's brief likewise states that Congress amended section 2265(e) in 2013

> to clarify Congress's intent to recognize that tribal courts have full civil jurisdiction to issue and enforce protection orders *involving any person, Indian or non-Indian*. At least one Federal district court has misinterpreted 18 U.S.C. 2265(e) and held that tribes lack civil jurisdiction to issue and enforce protection orders against certain non-Indians who reside within the reservation . . . [Section 2265(e) as amended] corrects this error.

Br. 22 (quoting S. Rep. No. 112-153, at 11) (emphasis added). Why Ms. Spurr believes this legislative history favors her position is unclear.

In sum, by its plain terms, section 2265(e) is unquestionably jurisdictional and encompasses Ms. Spurr as a proper subject of the Tribal Court's civil PPO. The legislative history emphatically reinforces that conclusion.

D. The PPO Was Civil, Not Criminal, in Nature.

Ms. Spurr next argues that "[i]f" the PPO issued by the Tribal Court was criminal in nature, then it was beyond the Tribal Court's jurisdiction as a matter of federal law. Br. 15. But Ms. Spurr makes no valid argument that this was so.

To begin with, the PPO was requested not by a prosecutor in a criminal proceeding, but by a private litigant in a civil one. Ms. Spurr has not been charged with, much less convicted of, any crime or subjected to any non-civil penalties, and she has not claimed otherwise, in this Court or the district court.

Further, the Tribal Court stated on the face of the PPO that it was issued "under the authority of . . . *18 U.S.C. § 2265*." PPO, RE 1-3, Page ID # 31 (emphasis added). Section 2265(e), as noted above, recognizes only tribal "civil" jurisdiction to issue PPOs, not criminal jurisdiction. As the district court explained, "[o]n its face, the [PPO] was filed under 18 U.S.C. § 2265, and the plain text of subsection (e) clearly establishes the Tribal Court's 'full civil jurisdiction' under federal law to issue the order in this case[.]" Dist. Ct. Op. & Order, RE 33, Page ID # 399.[9]

Ms. Spurr nevertheless suggests that the PPO may have been criminal because it "places severe restrictions on [Ms. Spurr's] freedom of movement and communication[.]" Br. 19. Such restrictions – which are the very essence of protection orders, civil or criminal – simply do not render a protection order criminal in nature. For example, Michigan law authorizes a civil PPO under MCL § 600.2950a. The NHBP PPO at issue here was modeled directly after that PPO and replicates its list of restricted conduct nearly verbatim. *Compare* PPO, RE 1-3, Page ID # 31 ¶ 5, *with* State of Michigan Personal Protection Order (Nondomestic)

[9] The Tribal Court's characterization of its own PPO as civil is entitled to deference, particularly where, as here, its civil nature under NHBP law was affirmed by the NHBP Supreme Court, Tribal S. Ct. Op., RE 22-2, Page ID # 258-259. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("[T]ribal courts are best qualified to interpret and apply tribal law.").

¶ 5.[10] And the courts have consistently held proceedings involving section 600.2950a PPOs to be "civil in nature, rather than criminal," *Cavanaugh v. Smith*, No. 282147, 2009 Mich. App. LEXIS 883, at *6 n.3 (Mich. Ct. App. Apr. 23, 2009). *See, e.g.*, *Anderson v. Johnson*, No. 311290, No. 311363, 2014 Mich. App. LEXIS 1284, at *19 (Mich. Ct. App. July 8, 2014) ("[A] PPO proceeding is civil in nature.").

Ms. Spurr also appears to argue that the Tribal Court transformed the PPO from civil to criminal in nature when it "changed the characterization" of it from a "stalking" PPO to a "harassment" PPO in later proceedings. *See, e.g.*, Br. 6. However, both stalking and harassment PPOs are civil under NHBP law, and the Tribal Court used the terms interchangeably. *See, e.g.*, Tribal Ct. Op. & Order, RE 22-1, Page ID # 211 (referring to "'harassment,' also known as 'stalking'"). The PPO on its face pertains to "Stalking," PPO, RE 1-3, Page ID # 31 ¶ 5, and the NHBP Code explicitly authorizes a "Civil protection order," NHBP Code § 7.4-49,

[10] Both the NHBP and Michigan civil PPOs prohibit conduct such as following, approaching, or appearing at the residence or workplace of petitioner; mail, telephonic, or other electronic communications with petitioner; threatening petitioner; and entering property occupied by petitioner. The Michigan PPO is available at https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/cc380.pdf. *See also, e.g.*, *Robertson v. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting from dismissal of certiorari as improvidently granted) (describing a "*civil* protective order against [respondent], prohibiting him from approaching within 100 feet of [petitioner] and from . . . contacting her" (emphasis added)).

to be issued on behalf of a "victim of . . . stalking," *id*. § 7.4-50.[11] NHBP law on the civil nature of harassment protection orders is likewise clear:

> **Harassment; purpose**. . . . This article is intended to provide victims with a speedy and inexpensive method of obtaining *civil harassment protection orders* preventing all further unwanted contact between the victim and the perpetrator.

NHBP Code § 7.4-71 (emphasis added).[12]

Ms. Spurr nevertheless argues that the PPO was criminal in nature because violators of civil harassment PPOs can be subject to criminal contempt penalties, including potential incarceration. Br. 19. Again, and to be very clear, *Ms. Spurr has been subject to no criminal penalties of any kind and has made no allegation to the contrary to the district court or this Court*. The Tribal Court issued civil contempt sanctions in the form of the petitioner's attorney's fees and $250 in costs to compensate the Tribe for the actual costs of adjudicating Ms. Spurr's violation of the PPO. Order After Hearing, RE 22-4, Page ID # 284-285 ¶¶ 13-20, 286-287

[11] Available at https://ecode360.com/31806142.

[12] Available at https://ecode360.com/31806963. Ms. Spurr notes that the NHBP harassment protection order provision appears under a criminal section heading. Br. 19-20. This simply reflects that, while such orders are expressly "civil" under NHBP law, that law authorizes both civil and criminal enforcement mechanisms for such an order. NHBP Code § 7.4-78. In any event, statutory headings "are not meant to take the place of the detailed provisions of the text," *Cain*, 583 F.3d at 416 (citation omitted), and the text here refers expressly to "civil harassment protection orders," NHBP Code § 7.4-71. Indeed, section 2265(e) itself, which unquestionably authorizes "civil" protection orders, appears in Title 18 – the federal *criminal* code.

¶¶ 27-34. *See, e.g., McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000) ("[A]n award of attorney's fees is appropriate for civil contempt in situations where court orders have been violated."); *In re Jaques*, 761 F.2d 302, 305-06 (6th Cir. 1985) (sanctions designed "merely to compensate the government and the opposing counsel" for the costs of the contempt "show that the contempt proceedings were plainly civil"). The Tribal Court further gave Ms. Spurr the option of community service in lieu of the $250 in costs. *See* Order After Hearing, RE 22-4, Page ID # 285 ¶ 18 ("[T]he Court presents these two options for Respondent Joy Spurr to choose whether she will compensate the Tribe through payment or community service hours."). Ms. Spurr did not challenge these sanctions as being other than civil in the district court and has not done so on appeal. *See In re Hood*, 319 F.3d 755, 760 (6th Cir. 2003) (arguments not raised below are waived on appeal), *aff'd*, 541 U.S. 440 (2004); *Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 624 (6th Cir. 2013) ("[A]rguments not raised in a party's opening brief . . . are waived.").

In any event, the fact that violations of civil protection orders may, under certain circumstances, result in criminal sanctions simply does not categorically render a protection order criminal in nature. *See, e.g.*, 18 U.S.C. § 2261(b)(6) (providing potential criminal "punish[ment]" for violation of "civil or criminal" protection orders). Indeed, violations of Michigan's analogous civil PPO can

subject a person to "immediate arrest and the civil and criminal contempt powers of the court," Mich. Comp. Laws § 600.2950a(11)(a)(i). *See id*. § 600.2950a(23); *see also id.* § 764.15b(1) ("A peace officer, without a warrant, may arrest and take into custody an individual" believed to be in violation of section 600.2950a civil PPO); *In re Foster*, No. 319516, 2015 Mich. App. LEXIS 352, at *2-3 (Mich. Ct. App. Feb. 24, 2015) (affirming circuit court's order finding respondent in criminal contempt for violating a section 600.2950a civil PPO). Even had Ms. Spurr been found in contempt for violating the PPO and *incarcerated* – which she has not – that fact alone would not have transformed the PPO from civil to criminal. *See, e.g.*, *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1400 (6th Cir. 1991) ("Incarceration has long been established as an appropriate sanction for civil contempt.").

In sum, the Tribal Court issued a patently civil PPO in a patently civil proceeding and imposed patently civil consequences for its violation. It did so pursuant to clear authorization under tribal law to issue the PPO as a "civil" order, and unambiguous federal legislation recognizing its "full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings[.]" 18 U.S.C. § 2265(e). Ms. Spurr's arguments to the contrary are without merit.

E. The Supreme Court's Decision in *Montana v. United States* Does Not Aid Ms. Spurr.

Ms. Spurr next argues that if the PPO at issue is civil in nature, its issuance exceeded the "severe limits on the civil jurisdiction of a tribal court over non-Tribal members" as "set forth by the United States Supreme Court in . . . *Montana v. United States*, 450 U.S. 544 (1981)." Br. 20. This argument fundamentally misapprehends *Montana*.

Montana held that Indian tribes presumptively do not enjoy civil jurisdiction over non-Indians on non-Indian-owned fee land within their reservations unless at least one of two exceptions are met: either (1) the non-Indian enters a "consensual relationship[] with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or (2) the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66. According to Ms. Spurr, because she is a non-Indian and neither exception is met here, the Tribal Court therefore lacked jurisdiction to issue the PPO. Br. 20-21.

To begin with, Ms. Spurr provides no support for her assumption that the *Montana* presumption applies to tribally owned trust lands within a Reservation,[13]

[13] *See* Tribal S. Ct. Op., RE 22-2, Page ID # 240 (discussing acts of harassment underlying PPO as occurring "on [tribal] trust land within the reservation").

as opposed to non-Indian fee lands of the sort to which the Court applied its presumption in *Montana*. But the question of whether and to what extent *Montana* applies to tribal lands is far from settled. *Compare Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648, 662, 668 (6th Cir. 2015) (land status "such a significant factor that it may be dispositive") (dicta), *with NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 546 (6th Cir. 2015) ("'[t]he ownership status of land . . . is only one factor to consider'" in applying *Montana*) (alterations in original) (quoting *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)). *See Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 812 (9th Cir. 2011) (the *Montana* rule does not divest tribal governments of "regulatory jurisdiction over non-Indians on Indian land"). In *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), the United States argued to the Supreme Court that *Water Wheel* states the law correctly and that, consistent with its genesis, the *Montana* presumption applies only to non-Indian fee lands found within reservation boundaries. *See* Brief for the United States as Amicus Curiae Supporting Respondents, 2015 U.S. S. Ct. Briefs LEXIS 3746, at *28-33. Because the Court divided equally and did not issue an opinion, it did not resolve the issue.

However, this Court need not reach that issue because *Montana* addresses the scope of tribal jurisdiction over non-Indians as a matter of federal common law, which is of course subordinate to acts of Congress, as *Montana* itself

recognizes. *See* 450 U.S. at 564 ("[E]xercise of tribal [civil] power [over non-Indians] beyond [two *Montana* exceptions] . . . cannot survive *without express congressional delegation*." (emphasis added)). As such, *Montana*, like all common law decisions, applies "when Congress has not 'spoken to a *particular* issue.'" *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237 (1985) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981)).

Here, Congress has spoken emphatically to the particular issue in section 2265(e): "*[A] court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings[.]*" 18 U.S.C. § 2265(e) (emphasis added). As the Supreme Court explained in *Lara*, Congress has plenary authority to "enact legislation that both restricts and, in turn, relaxes . . . restrictions on tribal sovereign authority," and where Congress has done so, extant common law judicial decisions "are not determinative because Congress has enacted a new statute [addressing] the bounds of the inherent tribal authority that the United States recognizes. *And that fact makes all the difference*." 541 U.S. at 202, 207 (emphasis added). In sum, *Montana* provides Ms. Spurr no refuge from the plain text of section 2265(e).

F. Ms. Spurr Misconstrues 25 U.S.C. § 1304.

Finally, Ms. Spurr urges that 25 U.S.C. § 1304, and not 18 U.S.C. § 2265(e),

is the relevant statute that governs whether the NHBP Tribal Court lawfully exercised jurisdiction over her in this case. Ms. Spurr's arguments fundamentally misconstrue section 1304.

Section 2265(e) pertains to tribal civil jurisdiction to issue personal protection orders. As discussed above, Congress amended section 2265(e) in 2013 to clarify that such jurisdiction includes authority to issue such orders against "any person." As part of the same VAWA amendments, Congress also enacted 25 U.S.C. § 1304, which affirms that tribes have the authority "to exercise special domestic violence criminal jurisdiction over all persons." 25 U.S.C. § 1304(b)(1). Section 1304 criminal jurisdiction extends to acts of "[d]omestic violence and dating violence" committed within a tribe's Indian country and to "[v]iolations of protection orders" occurring in that country. *Id.* § 1304(c)(1)-(2). In contrast to section 2265(e)'s unqualified reference to "any person," under section 1304, a tribe "may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant" resides or works in the Indian country of the tribe or is a spouse or dating partner of a tribal member or other Indian residing in the tribe's Indian country. *Id.* § 1304(b)(4)(B).

Ms. Spurr contends that because she does not fit within these categories, she thus falls outside the Tribal Court's jurisdiction to issue the PPO in this case. But these limitations apply only where a tribe asserts *criminal* jurisdiction over a non-

Indian under the authority of section 1304. As demonstrated above, the Tribal Court did not assert criminal jurisdiction over Ms. Spurr *at all*, much less under section 1304. It asserted civil jurisdiction under section 2265(e), which contains no such limitations. As the district court explained, "Plaintiff's reliance on § 1304 is misplaced. . . . The two statutes govern two different subject areas." Dist. Ct. Op. & Order, RE 33, Page ID # 399.

Ms. Spurr's error stems from section 1304's definition of the term "protection order" as including orders issued by "a civil or criminal court." 25 U.S.C. § 1304(a)(5). According to Ms. Spurr, "that Section 1304(a)(5) applies to both civil and criminal protection orders is crucial[.]" Br. 14. From this, Ms. Spurr appears to assume that section 1304 is the statutory source of (and hence sets forth the limitations on) tribal jurisdiction to issue protection orders, criminal and civil. But section 1304's reference to protection orders issued by a "civil or criminal court" is not a grant of jurisdiction to issue protection orders at all. It simply defines the kinds of protection orders – civil and criminal – the violation of which could subject a defendant to a tribe's special domestic violence criminal jurisdiction under section 1304. It says nothing about the separate recognition of tribal jurisdiction to issue and civilly enforce civil protection orders under section 2265(e).

In sum, section 1304 has no relevance here. The Tribal Court did not assert special domestic violence criminal jurisdiction over Ms. Spurr. It asserted civil jurisdiction over her in a civil proceeding, issued a civil PPO, and enforced it with civil contempt sanctions. These circumstances fall squarely within the unambiguous text of section 2265(e). The district court correctly dismissed Ms. Spurr's claim as not plausible on its face. *See Bell Atl. Corp.*, 550 U.S. at 570 (to survive a Rule 12(b)(6) motion to dismiss, the complaint must "state a claim to relief that is plausible on its face").

VII. CONCLUSION

For the foregoing reasons, the Tribal Government Defendants respectfully request that this Court affirm the judgment of the district court.

January 25, 2019

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)B). The brief contains 6963 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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I certify that on January 25, 2019, I caused this document to be served via the CM/ECF system on all parties or their counsel of record if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 30(g), hereby designate the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No.
Excerpts from the Petition for Personal Protection Order and Supporting Affidavit (Attachment C to Defendants' Joint Response to Request for Preliminary Injunction)	02/02/2017	RE 22-3	268-281
Excerpts from NHBP Tribal Court Opinion and Order (Attachment A to Defendants' Joint Response to Request for Preliminary Injunction)	07/21/2017	RE 22-1	203, 211
Brief in Support of Complaint	12/11/2017	RE 1-1, RE 1-2	17, 18-21
Personal Protection Order	12/11/2017	RE 1-3	31
Excerpts from Opinion of the Supreme Court for the Nottawaseppi Huron Band of the Potawatomi (Attachment B to Defendants' Joint Response to Request for Preliminary Injunction)	01/25/2018	RE 22-2	240, 258-259, 261
Brief in Support of Motion for Preliminary Injunction	02/12/2018	RE 21	147
Excerpts from Order After January 31, 2018 Hearing for Violating a Valid Personal Protection Order (Attachment D to Defendants' Joint Response to Request for Preliminary Injunction)	02/13/2018	RE 22-4	283-287
Memorandum of Law in Support of Defendants' Joint Motion to Dismiss	04/09/2018	RE 30	362
Opinion and Order Granting Motion to Dismiss	09/27/2018	RE 33	399
Judgment	09/27/2018	RE 34	401

Description of Entry	Date	Record Entry No.	Page ID No.
Notice of Appeal	10/10/2018	RE 35	402