CASE NO. 20-10173-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EGLISE BAPTISTE BETHANIE DE FT. LAUDERDALE, INC., et al.,

Appellants,

v.

THE SEMINOLE TRIBE OF FLORIDA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
District Court Case No. 0:19-cv-62591-BB

ANSWER BRIEF OF APPELLEE SEMINOLE TRIBE OF FLORIDA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Local Rule 26.1(a)(2), Appellee Seminole Tribe of Florida notifies the Court that the following individuals and corporations have an interest in the outcome of this appeal:

Alcide, Vilcias, Proposed Appellee

Auguste, Aida, Appellee

Auguste, Uslande, Proposed Appellee

Augustave, Rachel, Proposed Appellant

Aurelus, Berthony, Appellant

Aurelus, Yvrose, Proposed Appellant

Bloom, Beth, United States District Judge

Belizaire, Mariana, Appellant

Brutus, Ychelinde, Appellant

Celestin, Rosena, Appellant

Charles, Elvire, Proposed Appellant

Charles, Jarmut, Appellant

Charles, Joham, Proposed Appellee

Charles, Quesner, Appellant

Charlot, Elisena, Appellant

Cyriac, Elislanne, Proposed Appellee

Cyriac, Lifranc, Proposed Appellee

Dalal, Abdul-Sumi, Esq., Counsel for Appellee Aida Auguste

Demosthene Marie, Appellant

Demosthene Max, Appellant

Destin, Claire Valerie, Appellant

D'Haiti, Seraphin, Appellant

Docteur, Roselie, Appellant

Dubois, Max, Appellant

Duverna, Emmanuel, Appellant

Eglise Baptiste Bethanie de Ft. Lauderdale, Inc.,. Appellant

Estelan, Majorie, Appellant

Estelan, Wisnick, Appellant

Francois, Aline Suzan, Appellant

Gedilus, Madelene Pierre, Appellant

Gedilus, Nereus, Appellant

Gesler Ilsenat, Appellant

GrayRobinson, P.A., Counsel for Appellee Seminole Tribe of Florida

Hatcher-Bolin, Kristie, Counsel for Appellee Seminole Tribe of Florida

Hyacinthe, John Wesley, Proposed Appellee

Isemar, Michael, Appellant

Isma, William, Proposed Appellee

Isma, Anida Auguste, Proposed Appellee

Ismael, Jean, Appellant

Ismael, Julianna, Appellant

Jean-Baptiste, Cika Bezana, Appellant

Jean-Baptiste, Gertha, Appellant

Jeudy, Irma, Appellant

Johnson | Dalal, Counsel for Appellee Aida Auguste

Johnson, Mark C., Esq., Counsel for Appellee Aida Auguste

Joly, Florence, Appellant

Jonvil, Rodrigue, Proposed Appellant

Joseph, Ertha, Appellant

Joseph, Horat, Appellant

Joseph, Josette, Appellant

Joseph, Loubins, Proposed Appellant

Lafrance, Julia, Appellant

Louis, Frank, Proposed Appellee

Louis, Rosemene, Proposed Appellee

Marc, Odane, Proposed Appellee

Menar, Fisella, Appellant

Menar, George, Appellant

Meronvil, Misela, Appellant

Metschlaw, P.A., Counsel for Appellants

Metsch, Lawrence R., Esq., Counsel for Appellants

Michel, Esaie, Appellant

Michel, Gertha, Appellant

Milhomme, Annalise, Proposed Appellee

Milhomme, Mafer, Proposed Appellee

Milhomme, Rosita, Appellant

Moise, Luthane, Appellant

Moise, Nicolas, Appellant

Moreney, Prevainqueur, Proposed Appellee

Munnings, Louise, Appellant

Noel, Emile, Appellant

Noel, Florence, Appellant

Noel, Zius, Appellant

Parfait, Dumarsais, Appellant

Parfait, Hertha, Appellant

Petit-Beau, Barcelot, Appellant

Petit-Beau, Boniface, Appellant

Petit-Beau, Lydieunie, Appellant

Petit-Beau, Verdeline, Appellant

Philippe, Georges, Proposed Appellant

Pierre, Claudette, Appellant

Pierre, Fenise, Proposed Appellant

Pierre, Hermanie, Appellant

Pierre, Keldy Denita, Appellant

Pierre, Lavita, Appellant

Pierre, Lines, Appellant

Pierre, Maude, Proposed Appellee

Pierrelus, Jean Louis, Appellant

Pierre-Louis, Aneila, Appellant

Pineless, Emily L., Esq., Counsel for Appellee Seminole Tribe of Florida

Prosper, Fenelon, Appellant

Racine, Fana, Appellant

Racine, Henriot, Proposed Appellant

Racine, Mirlande, Appellant

Roberson, Jackson, Appellant

Roberson, Solange, Appellant

Schellhase, Mark D., Esq., Counsel for Appellee Seminole Tribe of Florida

Saintil, Aliane, Appellant

Saintil, Luckerne, Appellant

Saintil, Hermantilde, Appellant

Saintil, Marie, Appellant

Saint-Remy, Acceline, Appellant

Saint-Remy, Andy, Appellant

Saint-Remy, Leonne, Appellant

Seminole Tribe of Florida, Appellee

Solvilien, Jean, Appellant

Stinfil, Misela, Proposed Appellant

St.-Louis, Muregne, Appellant

Sylvain, Joseph, Appellant

Tanis, Bienne, Appellant

Tanis, Lucia, Appellant

Telusnord, Itony, Appellant

Telusnord, Marie Angelet, Appellant

Thervil, Dieniva, Appellant

Thervil, Ludie, Appellant

Toussaint, Guirlande, Proposed Appellant

Valburn, Elio Paul, Proposed Appellee

Valburn, Marlene, Proposed Appellee

Valle, Alicia O., United States Magistrate Judge

Zetrenne, Paulette, Proposed Appellant

Zetrenne, Rodrigue, Proposed Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellee Seminole Tribe of Florida does not believe oral argument is necessary for this Court to resolve the issues raised in this Appeal. However, to the extent this Court believes it will be beneficial to its review, the Seminole Tribe of Florida welcomes the opportunity to appear before this Court.

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STATEMENT OF JURISDICTION

Appellants contend the District Court had jurisdiction over their claims under 28 U.S.C. §1331. This appeal is from a January 3, 2020 Omnibus Order that, among other things, dismissed all of Appellants' claims against Seminole Tribe of Florida with prejudice for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity. This Court has jurisdiction under 28 U.S.C. §1291 to review the District Court's January 3, 2020 Omnibus Order, which dismissed all of Appellants' claims against the Seminole Tribe of Florida for lack of subject matter jurisdiction. The Clerk entered Final Judgment on January 9, 2020. (Doc. No. 54). Appellants timely filed a Notice of Appeal on January 14, 2020. (Doc. No. 55).

STATEMENT OF THE ISSUE

Whether the District Court had subject matter jurisdiction over a lawsuit brought under 18 U.S.C. § 248 and state law claims of "interference with business relationships" and "trespass" against the Seminole Tribe of Florida, a federally recognized Indian tribe, based upon the doctrine of tribal sovereign immunity.

STATEMENT OF THE CASE

Appellants Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. and Andy Saint-Remy originally filed their Verified Complaint ("Complaint") against the Seminole Tribe of Florida and Defendant Aida Auguste ("Auguste") on October 17, 2019. (Doc. No. 1). The Complaint was premised on an alleged incident involving six (6) individuals who wore Seminole Police Department uniforms and entered Appellants' Church Property on September 29, 2019. (Doc. No. 1 - Pg 5, ¶ 12).

Appellants subsequently filed their First Amended Complaint (the "Amended Complaint")[1] on December 1, 2019, which named approximately seventy-six (76) additional plaintiffs for the same alleged incident, but each Appellant brought, individually, causes of action against the Seminole Tribe of Florida under 18 U.S.C. § 248(c)(1) (Counts 1 & 4–80). (Doc. No. 21). Only Appellant Eglise Baptiste asserted claims for Interference With Business Relationships (Count 2) and Trespass (Count 3) against the Seminole Tribe of Florida. (Doc. No. 21 at 8-9).

Notably, Appellants conceded in their Amended Complaint that the Seminole Tribe of Florida "is a Native American tribe which has been recognized

[1] Although the Seminole Tribe of Florida moved to dismiss the original Complaint (Doc. Nos. 8, 11, & 17), the Court entered an Order denying the Seminole Tribe of Florida's Motion to Dismiss for Lack of Subject Matter Jurisdiction as Moot on December 2, 2019 because Appellants had filed the Amended Complaint with the District Court's permission. (Doc. Nos. 15, 22).

by the United States Department of the Interior pursuant to 25 U.S.C. § 5123" and is a "dependent domestic sovereign," as characterized by the Supreme Court of the United States. (Doc. No. 21 - Pg 4, ¶ 3.). Appellants also alleged in their Amended Complaint that the Seminole Police Department is an agency of the Seminole Tribe of Florida and "operates under the supervision of the Tribal Council." *Id.*

The Seminole Tribe of Florida moved to dismiss the entirety of Appellants' claims for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity. (Doc No. 28). Appellants filed a Response in Opposition to the Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 31), and the Seminole Tribe of Florida filed a Reply in support of its Motion to Dismiss (Doc. No. 35).

On December 9, 2019, Appellants moved for Leave to File a Second Amended Complaint (Doc. No. 25), which the Seminole Tribe of Florida again opposed, arguing it was immune from suit pursuant to the doctrine of tribal sovereign immunity. (Doc. No. 29). The District Court subsequently denied Appellants' Motion for Leave to File a Second Amended Complaint in its January 3, 2020 Omnibus Order.[2] (Doc. No. 50).

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[2] Although the District Court denied Appellants' Motion for Leave to file a Second Amended Complaint, the proposed Second Amended Complaint purported to assert eighty-six (86) separate counts directly brought by each Appellant against the Seminole Tribe of Florida. Each of these eighty-six (86) separate counts asserted a claim for violation of 18 U.S.C. § 248, but the proposed Second

The District Court dismissed all of Appellants' claims with prejudice, finding it lacked subject matter jurisdiction over the Seminole Tribe of Florida based upon the doctrine of tribal sovereign immunity. (Doc. No. 50 - Pg 13 & 22). The District Court entered Final Judgment on January 9, 2020. (Doc. No. 54). Appellants timely filed a Notice of Appeal on January 14, 2020. (Doc. No. 55).

STATEMENT OF THE FACTS

Appellants alleged in the Amended Complaint that on September 29, 2019, while Eglise Baptiste held its weekly church service "in the religious structure located on the 'Church Property,'" six (6) individuals[3] wearing Seminole Police Department ("SPD") uniforms "traveled from SemTribe's reservation in two vehicles, one of them an SPD marked squad car" and "(a) entered the Church Property, (b) disabled the Church Property's surveillance cameras, (c) expelled from the Church Property all the worshipers who opposed Auguste, (d) changed the locks to the doors of the religious structure located on the Church Property, (e) seized the business records of Eglise Baptiste and (f) locked the gates to the Church Property." (Doc. No. 21 - Pg 6, ¶ 10). Appellants further alleged that in

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Amended Complaint did not assert any other cause of action against the Seminole Tribe of Florida. (Doc. No. 25-1, Doc. No. 50 – Pg 3).

[3] The Seminole Tribe of Florida noted in its Motion to Dismiss that Appellants failed to identify the alleged "individuals who wore Seminole Police Department uniforms" or plead that such individuals were working within the course and scope of their employment. (Doc. No. 28 - Pg 2, n.1)

violation of 18 U.S.C. § 248, the Seminole Tribe of Florida's officers "expelled the individual Appellants (who were participating in Sabbath religious services) from the church property; and (2) stood guard over the Auguste Defendants' seizure of the church's real and personal property." (I.B. at 24).

Despite Appellants' acknowledgement that the Seminole Tribe of Florida is a federally recognized Indian tribe and that the Seminole Police Department is an agency of the Seminole Tribe of Florida, the Amended Complaint alleges:

> [t]he judicial doctrine of tribal sovereign immunity does not insulate SemTribe from the claims which Plaintiffs have asserted against SemTribe in this civil action because: (a) the actions of SemTribe's police officers took place more than eleven (11) miles away from SemTribe's Hollywood, Florida, reservation; (b) prior to September 29, 2019, Plaintiffs had not had an opportunity to negotiate with SemTribe for a waiver of SemTribe's tribal sovereign immunity; and (c) other than this civil action, Plaintiffs have no means by which to secure monetary compensation for SemTribe's infringements of Plaintiffs' rights under Federal and Florida law.

(Doc. No. 21 - Pg 7, ¶¶ 3 & 11). The Seminole Tribe of Florida subsequently moved to dismiss Appellants' Amended Complaint for lack of subject matter jurisdiction because Congress did not abrogate the Seminole Tribe of Florida's tribal sovereign immunity, nor did the Seminole Tribe of Florida waive its tribal sovereign immunity. (Doc. Nos. 28 & 35). Among other authorities, the Seminole Tribe of Florida relied upon *Kiowa Tribe of Okla. v. Mfr. Techs., Inc.*, 523 U.S. 751, 754 (1998), *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1228

(11th Cir. 2012), and *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1286, 1289 (11th Cir. 2001).

The District Court entered its Ominbus Order dismissing Appellants' claims with prejudice on January 3, 2020 (Doc. No. 50). In so doing, the District Court held that the Seminole Tribe of Florida was "entitled to tribal sovereign immunity…based on the extensive case law from both the Supreme Court and the Eleventh Circuit establishing that an Indian tribe is entitled to immunity from suit unless there is a clear waiver by the tribe or some unequivocal statutory abrogation of such immunity by Congress." (Doc. No. 50 -Pg 13). The District Court recognized that it was "undisputed Defendant Seminole Tribe did not expressly waive its immunity from suit" and explained that "[a]bsent some definitive language making it unmistakably clear that Congress intended to abrogate tribal sovereign immunity in enacting [18 U.S.C. § 248], the Court concludes that Defendant Seminole Tribe is entitled to immunity from suit in the instant action." (Doc. No. 50 – Pg 11-12).

SUMMARY OF THE ARGUMENT

The District Court properly recognized that it lacked subject matter jurisdiction to address the claims against the Seminole Tribe of Florida. The Seminole Tribe of Florida is a federally recognized Indian tribe and, therefore, entitled to tribal sovereign immunity for any and all claims brought against it,

regardless of the type of relief sought, the conduct alleged, or the location where the alleged incident occurred. The doctrine of tribal sovereign immunity can be waived only by Congress or the Seminole Tribe of Florida. Importantly, 18 U.S.C. § 248 is devoid of any statement expressly abrogating the Seminole Tribe of Florida's immunity, and the Seminole Tribe of Florida never waived its tribal sovereign immunity for any of the actions alleged by Appellants.

Appellants offer no supporting authority for the proposition that 18 U.S.C. § 248 abrogates the Seminole Tribe of Florida's tribal sovereign immunity, or that this Court should consider other factors when evaluating whether the doctrine of tribal sovereign immunity applies.[4] The fact that Appellants alleged employees of the Seminole Tribe of Florida engaged in off-reservation "criminal misconduct" does not change the tribal sovereign immunity analysis.

Moreover, the District Court's conclusion that the Seminole Tribe of Florida is immune from suit is consistent with and supported by binding precedent. Both the Supreme Court of the United States and this Court have reaffirmed numerous times that an Indian tribe may be subject to suit only if Congress expressly and unequivocally authorizes the suit, or the Indian tribe expressly and unequivocally waives its immunity for the suit. The law of the land thus remains: absent

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[4] Despite their contentions otherwise, Appellants have alternative legal remedies that they may seek, and have sought, to recover for their alleged injuries rather than suing the Seminole Tribe of Florida.

congressional abrogation of tribal sovereign immunity in a federal statute or an Indian tribe's waiver of immunity, tribal sovereign immunity applies. As such, the Seminole Tribe of Florida is immune from suit and the District Court properly dismissed the Amended Complaint with prejudice for lack of subject matter jurisdiction. Accordingly, this Court should affirm the District Court's final order dismissing Appellants' claims with prejudice.

ARGUMENT

I. Standard of Review

A district court's order dismissing a complaint based on sovereign immunity from suit is subject to de novo review. *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1227 (11th Cir. 2012); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1203 (11th Cir. 2012); *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1128 (11th Cir. 1999).

II. The District Court Properly Dismissed All of Appellants' Claims Against the Seminole Tribe of Florida for Lack of Subject Matter Jurisdiction Based on Tribal Sovereign Immunity.

A. Seminole Tribe of Florida is a federally recognized Indian tribe.

Section 16 of the *Indian Reorganization Act of 1934*, as amended, 25 U.S.C. § 5123, establishes the right of an Indian tribe to organize for the common welfare of its members by adopting a constitution and bylaws in accordance with the provisions

of the Act. By adopting its Constitution, the Seminole Tribe of Florida became a fully recognized Indian tribe under the laws of the United States. *See* Doc. No. 28-1, *Am. Const. & Bylaws of the Seminole Tribe of Fla.*; *Inglish Interests, LLC v. Seminole Tribe of Fla., Inc.*, 2:10-CV-367, 2011 WL 208289, at *1 (M.D. Fla. Jan. 21, 2011) (discussing that the Seminole Tribe of Florida "has long been recognized as an Indian tribe"). Pursuant to 25 U.S.C. § 513, the Seminole Tribe of Florida is included on the Department of Interior's "list of recognized tribes." *See Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 84 FR 1200-01, 1203 (Feb. 1, 2019). Appellants do not dispute the irrefutable fact that the Seminole Tribe of Florida is a federally recognized Indian tribe. (Doc. No. 21).

B. As a federally recognized Indian tribe, the Seminole Tribe of Florida is entitled to tribal sovereign immunity.

Indian tribes are "'domestic dependent nations'" that exercise "inherent sovereign authority", and "as dependents, the tribes are subject to plenary control by Congress." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potowatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Even so, an Indian tribe is a separate sovereign that pre-existed the United States Constitution and, therefore, Indian tribes "retain their original natural rights" that were vested in them as sovereign governmental entities existing long before the genesis of the United States. *Santa Clara Pueblo*

v. Martinez, 436 U.S. 49, 56 (1978); *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1207 (11th Cir. 2009); *Fla. Paraplegic Assoc.,* 166 F.3d at 1130. Thus, the principle of tribal sovereign immunity from suit is a well-established doctrine. *U.S. v. U.S. Fidelity Guar. Co.,* 309 U.S. 506, 512 (1940); *Bay Mills Indian Cmty.*, 572 U.S. at 788; *Kiowa Tribe of Okla.*, 532 U.S. at 760; *Furry*, 685 F.3d 1237; *Sanderlin*, 243 F.3d at 1293; *Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312, 1325 (11th Cir. 2016).

Since an Indian tribe is a domestic dependent nation which retains its original natural rights, precedent from the United States Supreme Court and this Court firmly establish that an Indian tribe is subject to a lawsuit only when either Congress has authorized the suit or the Indian tribe has waived its immunity. *Kiowa Tribe of Okla.*, 532 U.S. at 754; *Freemanville Water Sys., Inc.*, 563 F.3d at 1208 (recognizing that "Tribal sovereign immunity, where it applies, bars actions against tribes regardless of the type of relief sought"). Where Congress intends to abrogate tribal sovereign immunity, it must do so "expressly, with clear and unequivocal language." *Freemanville Water Sys., Inc.*, 563 F.3d at 1208; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (finding that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *Fla. Paraplegic, Ass'n, Inc.*, 166 F.3d at 1128 (holding that "Congress abrogates tribal immunity only where the definitive

language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act"); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) (recognizing "two well-established principles of statutory construction: that Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and that ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor").

Here, Appellants contend, without any supporting authority, that tribal sovereign immunity does not apply because they alleged "off-the-reservation *criminal* misconduct [by] SemTribe's police officers." (I.B. at 24)(emphasis in original). However, the federal statute that is the basis for Appellants' claims, 18 U.S.C. § 248, is a criminal statute that also provides *civil* remedies against whoever "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." § 248(a)(2) & 248(c)(1).

A review of this federal statute shows it is devoid of any statement from Congress expressly and unequivocally abrogating an Indian tribe's sovereign immunity from suit brought under §248(c)(1). *See* (Doc. No. 50 - Pg 10). Section 248 provides:

(a) Prohibited activities.--Whoever—

...

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

...

(c) Civil remedies.--

(1) Right of action.--

(A) In general.--Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that...such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief.--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

18 U.S.C. § 248.

Had Congress intended to abrogate tribal sovereign immunity for criminal misconduct, it certainly could have done so in 18 U.S.C. § 248. It did not. Thus, Congress did not authorize any lawsuit against an Indian tribe under this statute.[5]

Because 18 U.S.C. § 248 is devoid of language expressly abrogating tribal sovereign immunity, the only other means by which the Seminole Tribe of Florida could be subject to suit would be if the Seminole Tribe of Florida waived its tribal sovereign immunity. Any such waiver must be unequivocally expressed; waiver cannot be implied by the tribe's conduct. *Seminole Tribe of Florida*, 181 F.3d at 1243; *Furry*, 685 F.3d at 1236. "[B]oth abrogation and waiver require the use of express and unmistakably clear language by either Congress or the tribe...." *Furry*, 685 F.3d at 1236; *Sanderlin*, 243 F.3d at 1285.

The Seminole Tribe of Florida expressly set forth in its Amended Tribal Constitution that the Seminole Tribe of Florida is prohibited from delegating any of its constitutional authority in the absence of a tribal ordinance or resolution duly enacted by the Tribal Council sitting in legal session. *See* (Doc. No. 28-1 - Pg 6). In fact, Article V, Section 9(a) of the Amended Tribal Constitution forbids delegation of any of the authorities contained in the Amended Constitution to tribal officials or others *except* by Tribal ordinance or resolution. Thus, no contract or waiver of tribal rights is valid, effective, and binding upon the Seminole Tribe of

[5] While Appellants do not argue the statute is ambiguous, even if they did, any such ambiguity must be resolved in the Seminole Tribe or Florida's favor.

Florida as a sovereign government unless the Tribal Council approves the contract or waiver in an ordinance or resolution while sitting in legal session. (Doc. No. 28-2 - Pg 4).

The Seminole Tribe of Florida, however, made it clear that there has been no such waiver of its immunity for Appellants' action. (Doc. No. 28-3). Specifically, "[a]t no time, and under no circumstances, has the Seminole Tribe of Florida consented to suit on any claim asserted by [Appellants], nor has any waiver of tribal sovereign immunity respecting such claims by [Appellants] ever been approved by the Tribal Council of the Seminole Tribe of Florida in legal session, as constitutionally required." (Doc. No. 28-3 - Pg 2, ¶ 4).[6]

As the District Court also properly recognized, Appellants failed "to cite to any law to support their assertions that tribal sovereign immunity would not apply to the challenged conduct here," as required when a defendant makes a factual attack to the court's jurisdiction over a complaint. (Doc. No. 50 - Pg 8); *see Desporte-Bryan v. Bank of Am.*, 147 F. Supp. 2d 1356, 1359-60 (S.D. Fla. 2001) (finding that where a defendant factually attacks the complaint regarding the trial court's jurisdiction, the court may weigh matters outside the pleadings, such as

[6] The District Court was permitted to consider the Affidavit the Seminole Tribe of Florida filed in support of its Motion to Dismiss as it factually disputed subject matter jurisdiction. *See Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999) ("Factual attacks challenge 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered'").

affidavits; however, the plaintiff bears the burden to prove subject matter jurisdiction). The Seminole Tribe of Florida lodged a "factual attack" on Appellants' Amended Complaint in its Motion to Dismiss. (Doc. No. 28). When making a "factual attack," there is "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Desporte-Bryan*, 147 F. Supp. 2d at 1360; *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (explaining that "factual attacks" challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered"). Accordingly, Appellants had the burden to prove that subject matter jurisdiction existed.

Appellants, however, failed to provide the District Court, or include in its Initial Brief, any evidence or case law establishing that the District Court had subject matter jurisdiction over the claims in the Amended Complaint. They can't. The Seminole Tribe of Florida did not waive its tribal sovereign immunity. Rather, the Seminole Tribe of Florida undisputedly established that the doctrine of tribal sovereign immunity applies and precludes Appellants' purported claims based upon binding Supreme Court and Eleventh Circuit precedent, the Seminole Tribe of Florida's Constitution (Doc. No. 28-1), the Seminole Tribe of Florida's Tribal Sovereign Immunity Ordinance (Doc. No. 28-2), and the Seminole Tribe of

Florida's Affidavit in Support of the Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 28-3).

Because Congress did not expressly and unequivocally abrogate the Seminole Tribe of Florida's tribal sovereign immunity, and the Seminole Tribe of Florida did not expressly and unequivocally waive its tribal sovereign immunity, it is immune from suit. Accordingly, Appellants have not, and cannot, establish subject matter jurisdiction. The District Court therefore did not err in dismissing Appellants' claims against it.

C. The Doctrine of Tribal Sovereign Immunity Applies Even to Alleged Off-Reservation Conduct.

Appellants argue tribal sovereign immunity does not apply because the alleged September 29, 2019 incident occurred off-reservation and involved alleged "*criminal* misconduct" which violated "a *criminal* statute." (I.B. at 24)(emphasis in original). Appellants also brought state law claims for "Interference with Business Relationships" and "Trespass," although they attempted to drop these two (2) causes of action in the Proposed Second Amended Complaint. (Doc. No. 21 - Pg 8-9; Doc. No. 25-1). Nevertheless, when evaluating whether the doctrine of tribal sovereign immunity applies, the analysis is the same: Did Congress expressly and unequivocally authorize the suit against an Indian tribe, or did the Indian tribe expressly and unequivocally waive its tribal sovereign immunity? *See Furry*, 685 F.3d at 1228.

This analysis applies regardless of the requested relief sought, where the alleged incident occurred, or the type of conduct alleged. *Kiowa Tribe of Okla.*, 523 U.S. at 754. That is to say, the Supreme Court has drawn no "distinction based on where the tribal activities occurred" and has further stated "[n]or have we yet drawn a distinction between governmental and commercial activities of a tribe" when determining whether tribal sovereign immunity applies. *Kiowa Tribe of Oklahoma*, 523 U.S. at 754-55; *Bay Mills Indian Cmty.*, 572 U.S. at 785 (holding that tribal sovereign immunity existed "even when a suit arises from off-reservation commercial activity"); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287 (11th Cir. 2015) (recognizing that when evaluating whether tribal sovereign immunity exists, the Supreme Court does not draw a distinction between the types of activities of a tribe). This Court has further affirmed that the tribal sovereign immunity analysis remains the same despite the alleged relief sought. *See Freemanville Water Sys., Inc.*, 563 F.3d at 1208 (explaining that "[t]ribal sovereign immunity, where it applies, bars actions against tribes *regardless of the type of relief sought*") (emphasis added).

Even if this Court evaluates the relief sought or the type of conduct alleged, binding precedent establishes that the Seminole Tribe of Florida is entitled to tribal sovereign immunity for alleged violations involving federal criminal laws, or for state law claims. In *Florida v. Seminole Tribe of Florida*, the State of Florida

argued the Seminole Tribe of Florida violated various criminal laws because it operated slot machines on its reservation at a time when there was no gaming compact in place. 181 F.3d 1237, 1239-43, 1245 (11th Cir. 1999). This Court found the express language of the federal statute contained no abrogation of tribal sovereign immunity and that the Seminole Tribe of Florida had not waived its tribal sovereign immunity. *Id.* 1241-45.

In so finding, this Court observed that the "Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed," and that the Supreme Court "has reaffirmed the doctrine of tribal sovereign immunity…in the strongest of terms." *Id.* at 1243. Consequently, this Court held the doctrine of tribal sovereign immunity applied and that the Seminole Tribe of Florida was immune from suit. *Id.*

With regard to state law claims, this Court also has analyzed whether tribal sovereign immunity existed for various state law negligence claims in a wrongful death action. *Furry*, 685 F.3d at 1226-27. This Court recognized that "the mere applicability of state law (and, therefore, the tribe's lack of self-governance in the area) is not sufficient to cast aside a tribe's immunity from suit." *Id.* at 1231. To determine whether tribal sovereign immunity barred the lawsuit against the Indian tribe for the appellant's state law claims, this Court again evaluated whether

Congress abrogated tribal immunity, or whether the Indian tribe waived its immunity. *Id.* at 1230. This Court expressed that it was "barred by precedent from implying or inferring waiver from the [Indian tribe's] conduct..." *Id.* at 1235. Thus, the Court determined the "straightforward conclusion" was that there was no waiver of tribal sovereign immunity based on state law for private tort claims. *Id.* at 1236.

Here, even though Appellants alleged "off-the-reservation *criminal* misconduct [by] SemTribe's police officers" (I.B. at 24)(emphasis in original), the location and the type of conduct are immaterial, as the same analysis applies. The Supreme Court and this Court have continuously reaffirmed that the doctrine of tribal sovereign immunity is applicable to any action absent a clear abrogation by Congress in the express language of a statute, or an express waiver of immunity by the Indian tribe. *See Bay Mills Indian Cmty.*, 572 U.S. at 803 (leaving to Congress to define "the contours of tribal sovereignty" and declining to "reverse ourselves because some may think its conclusion wrong"); *Seminole Tribe of Florida*, 181 F.3d at 1245 (declining "to modify the doctrine of tribal sovereign immunity absent an express command to the contrary from either Congress or a majority of the Supreme Court").

D. Binding Precedent Establishes That Tribal Sovereign Immunity Is Applicable to a Tort Claim.

Appellants further contend the "doctrine of tribal sovereign immunity does not insulate SemTribe from the claims which [Appellants] have asserted against SemTribe in this civil action because . . . (b) prior to September 29, 2019, [Appellants] had not had an opportunity to negotiate with SemTribe for a waiver of SemTribe's tribal sovereign immunity." (Doc. No. 21 at 7, ¶ 11; I.B. at 16). This allegation does not alter the analysis. Contrary to Appellants' assertion, the United States Supreme Court and this Court have affirmed numerous times that only Congress or an Indian tribe may waive tribal sovereign immunity. *Furry*, 685 F.3d at 1228 ("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") (quoting *Kiowa Tribe of Okla.*, 523 U.S. at 754); *Bay Mills Indian Cmty.*, 572 U.S. at 789 ("[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)") (quoting *Kiowa Tribe of Okla.*, 523 U.S. at 756); *Florida Paraplegic, Ass'n, Inc.*, 166 F.3d 1126, 1130 (11th Cir. 1999) (explaining that the Supreme Court "reaffirmed that according to 'settled law,' an Indian tribe is not subject to suit unless the tribe waives its immunity or Congress expressly abrogates it"); *Contour Spa at the Hard Rock, Inc.*, 692 F.3d at 1204 ("[I]t is nonetheless clear

that '[a]s 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'").

In support of their position, Appellants rely on a Supreme Court decision that specifically held that the baseline position is one of tribal immunity. (Doc. No. 31 - Pg 12; I.B. at 21-22); *Bay Mills Indian Cmty.*, 572 U.S. at 790, 804. Rather than address the clear precedent espoused in the *Bay Mills* case, Appellants rely on a footnote that actually supports the Seminole Tribe of Florida's tribal sovereign immunity position. That footnote states:

> Adhering to stare decisis is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. See supra, at 2034 – 2035. We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us.

Id. at 799, n. 8.

In *Bay Mills* the Court explained that in its decision in *Kiowa Tribe* it "reaffirmed a long line of precedent, concluding that 'the doctrine of tribal immunity' – without any exceptions for commercial or off-reservation conduct – 'is settled law and controls this case.'" *Id.* at 798. In fact, the *Bay Mills* Court reviewed the actions Congress took in response to the *Kiowa Tribe* decision, and

found that Congress specifically did not waive sovereign immunity for tort claims. *Id.* at 802 (finding that Congress *drafted* legislation that "broadly abrogated tribal immunity for most torts," *yet did not adopt* that legislation).

In their Initial Brief, Appellants assert they found "one factually analogous, post-*Bay Mills* reported decision addressing the question posed, but reserved in Footnote 8: *Wilkes v. PCI Gaming Authority*...," a Supreme Court of Alabama opinion. (I.B. at 21-22). In *Wilkes v. PCI Gaming Auth.*, 287 So. 3d 330, 331-32 (Ala. 2017), the court evaluated whether tribal sovereign immunity precluded the plaintiffs' tort claims against tribal defendants, which stemmed from an automobile accident involving a tribal employee.

The Alabama Supreme Court held that tribal sovereign immunity did not bar the suit against the tribal defendants because "the Supreme Court of the United States has expressly acknowledged that it has not ruled on the issue whether the doctrine of tribal sovereign immunity has a field of operation with regard to tort claims, and this Court is not bound by decisions of lower federal courts." *Id.* at 335 (citing *Preferred Risk Mut. Ins. Co. v. Ryan*, 589 So. 2d 165, 167 n. 2 (Ala. 1991)) (stating that "[d]ecisions of federal courts other than the United States Supreme Court, though persuasive, are not binding authority on this Court"). The Alabama Supreme Court in *Wilkes* elected to stray from the well-established case law

applying the doctrine of tribal sovereign immunity to tort claims, ignoring Eleventh Circuit precedent.

But this Court has applied and upheld tribal sovereign immunity in a tort case. Specifically, in *Furry*, this Court found tribal sovereign immunity applied in a wrongful death action involving tribal defendants. In so finding, this Court explained, "the Supreme Court's straightforward doctrinal statement, repeatedly reiterated in the holdings of this Circuit, [is] that an Indian tribe is subject to suit in state or federal court 'only where Congress has authorized the suit or the tribe has waived its immunity.'" *Id.* at 1236 (citing *Kiowa Tribe of Okla.*, 523 U.S. at 754); *Sanderlin*, 243 F.3d at 1285; *Seminole Tribe of Florida*, 181 F.3d at 1241; *Fla. Paraplegic Assoc.*, 166 F.3d at 1130-31. Thus, binding Eleventh Circuit precedent clarifies that a "suit against an Indian tribe is barred unless the tribe has clearly waived its immunity or Congress has expressly and unequivocally abrogated that immunity," even in a tort suit. *Id.* at 1226.

Further, the *Wilkes* decision is distinguishable. In *Wilkes*, the court was persuaded that tribal sovereign immunity did not apply because it found the plaintiffs had "no way to obtain relief if the doctrine of tribal sovereign immunity is applied to bar their lawsuit." *Wilkes*, 287 So. 3d at 334. Appellants likewise contend they have "no means by which to secure monetary compensation" other than "through this civil action." (I.B. at 16). Appellants, however, do have other

legal recourse available to them, and therefore, this matter is more aligned with *Bay Mills* than *Wilkes*.

In *Bay Mills,* the Supreme Court acknowledged that the plaintiff had "many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges." *Bay Mills Indian Cmty.*, 572 U.S. at 782, 799 n.8. The same is true here. Appellants not only have alternative remedies against the real parties in interest, but they already have taken legal action against those parties, namely the other Appellees in this appeal.[7] But even if Appellants had no other available means of legal recourse, that would not change the tribal sovereign immunity analysis. *See Seminole Tribe of Florida*, 181 F.3d at 1244 ("implying that lack of forum in which to pursue claim has no bearing on the tribal sovereign immunity analysis") (citing *Fla. Paraplegic Assoc.,* 166 F.3d at 1134); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (recognizing that "[s]overeign immunity may leave a party with no forum for its claims").

The Alabama Supreme Court's abrogation of certain aspects of tribal immunity is inconsistent with Eleventh Circuit and Supreme Court precedent. That decision does not change the clear dictate of the Supreme Court that immunity "is a matter of federal law and is not subject to diminution by the states."

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[7] *Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Aida Auguste et al.*, in the Circuit Court of the 17th Judicial Circuit in and for Broward County Florida, Case No. CACE-19-19270. *See* (Doc. No. – Pg 9, n.3).

Bay Mills Indian Cmty., 572 U.S. at 789 (quoting *Kiowa Tribe of Okla.*, 523 U.S. at 752). The doctrine of tribal sovereign immunity remains the law of the land, and applies to Appellants' claims against the Seminole Tribe of Florida. *See Kiowa Tribe of Okla.*, 523 U.S. at 752 (holding that the United State Supreme Court "decline[d] to revisit our case law and choose to defer to Congress"); *Furry*, 685 F.3d at 1237. As such, the District Court did not err in dismissing Appellants' claims against the Seminole Tribe of Florida with prejudice for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's dismissal of Appellants' Amended Complaint based on lack of subject matter jurisdiction because there has been no abrogation by Congress and no waiver of the Seminole Tribe of Florida's tribal sovereign immunity. Additionally, the Seminole Tribe of Florida respectfully requests this Court to award Seminole Tribe of Florida its reasonable attorneys' fees, expenses, and costs incurred in connection with this appeal pursuant to Seminole Tribal Sovereign Immunity Ordinance C-01-95, and award it such other and further relief as may be just and proper.

Respectfully submitted this 19th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellee's Answer Brief complies with the type-volume limitation of Rule 32(a)(7)(B), Fed.R.App.P. This Answer Brief contains 5,997 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-filing electronically using the Court's ECF system this 19th day of April 2020, which will serve a copy on all counsel of record listed on the attached service list.

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