IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BURREL JONES, *Plaintiff*, v. ALABAMA-COUSHATTA TRIBE OF TEXAS AND NASKILA GAMING, *Defendants.*	§ § § § § § § § § § §	No. 9:20-CV-63

THE TRIBE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

As established in their Motion to Dismiss [DE 18], Defendants possesses "the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citation omitted). Plaintiff's Response [DE 20] does not address the Tribe's immunity arguments. It merely reiterates the theory pled in the First Amended Complaint ("FAC"). Plaintiff has not shown jurisdiction exists over his tort claim, and this case should be dismissed based on the Tribe's sovereign immunity.

ARGUMENT

The Tribe has not waived its immunity from tort claims, and neither the First Amendment nor an inapposite case from Alabama changes that fact. Although Plaintiff contends that sovereign immunity does not bar some actions for declaratory relief, he does not explain why his claim is viable. It is not. *See* Mot. at 5–15. Plaintiff's declaratory action seeks only to vindicate his alleged right to bring the very tort claim barred by sovereign immunity. FAC ¶ 37. That circular logic cannot save Plaintiff's claims from dismissal. *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680–81 (5th Cir. 1999) ("[T]he Tribe has sovereign immunity from an award of damages only.").

The Response fundamentally misapprehends tribal sovereign immunity. As the Supreme Court and this Court have recognized, the doctrine may leave tort victims without remedies against Indian tribes. *Kiowa Tribe of Okla. v. Manuf. Techs., Inc.*, 523 U.S. 751, 758–59 (1998); *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Tex.*, 72 F. Supp. 2d 717, 718–20 (E.D. Tex. 1999) (rejecting argument that tort claims survive tribal sovereign immunity). That is true here.

I. The First Amendment Does Not Circumvent Tribal Sovereign Immunity.

The Tribe explained in its Motion (at 7–12) that the First Amendment cannot salvage Plaintiff's claims. The Response offers no rebuttal to that argument, implicitly conceding—as the Supreme Court has repeatedly stated—that Indian tribes generally are "'unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.'" *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). The Court may dismiss Plaintiff's claims on this basis alone.

The Response instead mainly contends (at ¶¶ 5–8) that Plaintiff's Petition Clause claim presents a federal question. But the existence of a federal question does not create jurisdiction over an Indian tribe for a damages suit. That this Court has jurisdiction to consider Plaintiff's First Amendment claim in no way immunizes that claim—or the claims dependent upon it—it from a motion to dismiss.

As the Tribe previously explained, "sovereign immunity is not foreclosed by either the Declaration of Independence or the constitutional right to petition for redress of grievances." *See, e.g.*, *Hoffmeister v. United Student Aid Funds, Inc.*, 2020 WL 3422864, at *3 (June 23, 2020 10th Cir.) (citing *Christensen v. Ward*, 916 F.2d 1462, 1471–73 (10th Cir. 1990). Plaintiff does not attempt to refute this argument, which is supported by 250 years of immunity jurisprudence. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) ("'An integral component' of the States' sovereignty was 'their immunity from private suits.' This fundamental aspect of the States'

'inviolable sovereignty' was well established and widely accepted at the founding." (citations omitted)). Absent an express and unambiguous waiver of immunity for Plaintiff's tort claims—which Plaintiff has not identified—his claims must be dismissed. *See, e.g.*, *Gould v. United States*, 2007 WL 2325177, at *6 (W.D. Va. Aug. 9, 2007) ("Plaintiff's citation of his First Amendment right to petition the government for redress of grievances does not achieve a waiver of sovereign immunity in light of the cases . . . demanding an unambiguous waiver[] to be strictly construed.").

II. The "Interest Of Justice" Does Not Overcome Tribal Sovereign Immunity.

As a plea for supplemental jurisdiction over his tort claims, Plaintiff asserts that "courts that have been faced with facts similar to those in the case at bar have held that a defendant tribe's use of the sovereign immunity defense does not apply where justice requires that immunity not be upheld." Resp. ¶ 10 (emphases added). Yet Plaintiff points to only a single state-court case that does not have similar relevant facts, *Wilkes v. PCI Gaming Authority*, 287 So. 3d 330 (Ala. 2017). The Response nowhere addresses the numerous—and unanimous—federal circuit court decisions that have upheld tribal sovereign immunity in analogous contexts, Mot. at 13–14, except to say that they are nonbinding, Resp. ¶ 14, despite the Fifth Circuit's alignment with them.

Wilkes concerned a wholly distinguishable factual context. It involved a DWI motor-vehicle accident between an Indian and non-tribal members outside of tribal lands. 287 So. 3d at 331. The *Wilkes* court therefore focused on *Kiowa Tribe*'s language about "those who 'have no choice in the matter'" when it comes to sovereign immunity, such as non-Indians harmed outside of tribal lands. *Id.* at 334 (quoting *Kiowa Tribe*, 523 U.S. at 758–60). This case does not involve the scenario addressed by *Wilkes*. It involves an individual who willingly conducted business with the Tribe, knowingly came onto the Tribe's lands, and allegedly was injured on the Tribe's premises.

As important, *Wilkes* was wrongly decided. *See* Mot. at 13–14. Rather than looking for an unambiguous waiver of sovereign immunity, the *Wilkes* court—relying on the dissent in *Kiowa Tribe*, 523 U.S. at 766 (Stevens, J., dissenting), and the dissent in *Bay Mills*, 572 U.S. at 814–31 (Thomas, J., dissenting)—asked whether the Supreme Court had ever upheld immunity under the exact fact pattern before it. *See Wilkes*, 287 So. 3d at 334–35. *Wilkes* cannot be squared with federal sovereign-immunity precedent. The Supreme Court recognized in *Kiowa Tribe* that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." 523 U.S. 751, 758–59. But *Kiowa Tribe* still emphasized that it is up to Congress—not the courts—to restrict tribal sovereign immunity, *id.*, which it has not done for tort claims. It is thus irrelevant if a "key comparison" between this case and *Wilkes* involves "the interests of justice." Resp. ¶ 14. That view is found in the dissent in *Kiowa Tribe*—not its holding. *See Kiowa Tribe*, 523 U.S. at 766 (Stevens, J., dissenting).

As the Tribe's Motion shows (at 13), courts routinely uphold tribal sovereign immunity against tort claims. Plaintiff challenges none of those cases except to call them "non-binding." Resp. ¶ 14. But the logic of those cases applies here and is supported by precedent from the Fifth Circuit and courts in this District. *See Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571–72 (5th Cir. 2001) (citing *TTEA*, 181 F.3d at 680); *Tribal Smokeshop*, 72 F. Supp. 2d at 718–19; *Elliott v. Capital Int'l Bank & Trust, Ltd.*, 870 F. Supp. 733, 734–35 (E.D. Tex. 1994). Indeed, the only federal court to have addressed *Wilkes* has rejected it in favor of federal circuit-court precedent holding that Indian tribes are immune from tort suits. *Oertwich v. Trad. Village of Togiak*, 413 F. Supp. 3d 963, 968 (D. Alaska 2019) (citing *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563 (9th Cir. 2016)).

CONCLUSION

Longstanding and unanimous federal precedent makes clear that tribal sovereign immunity controls the outcome of this case. Congress has not abrogated the Tribe's sovereign immunity and the Tribe has not waived it. Plaintiff's claims should be dismissed. *See, e.g.*, *Elliot*, 870 F. Supp. at 735 ("'[I]t is too late in the day, and certainly beyond the competence of this court, to take issue with a doctrine so well-established [as tribal sovereign immunity]. . . . . *Santa Clara Pueblo* and its lineage compel us to conclude that nothing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation.'" (quoting *Am. Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985)).

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By: */s/ Justin R. Chapa*

Danny S. Ashby
Texas Bar No. 01370960
danny.ashby@morganlewis.com
Justin Roel Chapa
Texas Bar No. 24074019
justin.chapa@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201-7347
T: 214.466.4000
F: 214.466.4001

Frederick R. Petti
Texas Bar No. 24071915
fpetti@pettibriones.com
PETTI & BRIONES, PLLC
8160 East Butherus Drive, Suite 1
Scottsdale, Arizona 85260

Counsel for Defendants
The Alabama-Coushatta Tribe of Texas and
Naskila Gaming

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Reply in Support of Motion to Dismiss* was served upon counsel below through the Court's CM/ECF system on August 20, 2020:

Rashon Murrill
rmurrill@fko-law.com
1011 Augusta Dr., Suite 111
Houston, Texas 77057
Attorney for Plaintiff

/s/ Justin R. Chapa
Justin Roel Chapa