UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

CLEONE WHALEN, Plaintiff, v. OGLALA SIOUX TRIBE EXECUTVE OFFICERS, et al., Defendants.	Case No. 5:20-cv-5070-JLV **REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

COME NOW defendants Oglala Sioux Tribe Executive Officers and Oglala Sioux Tribal Council Members, by and through counsel, and for their Reply Brief in Support of their Motion to Dismiss state as follows:

INTRODUCTION

This federal lawsuit concerns the 2020 primary and general elections of the Oglala Sioux Tribe ("Tribe"). Plaintiff is an enrolled member of the Tribe who alleges that the tribal elections did not comply with the local laws of the Tribe, including the Oglala Sioux Tribe Election Code. *See* O.S.T. Ord. No. 20-23 (Feb. 25, 2020) (Def. Exh. B) [doc. 8-2], *amended by* O.S.T. Ord. No. 20-52 (Aug. 11, 2020) (Def. Exh. C) [doc. 8-3].[1]

Before filing suit in this Court, Plaintiff challenged the tribal elections in the appropriate tribal forums. Her challenges were heard and denied by the Oglala Sioux Tribe Election Commission, *see In re the Contest of Henny Cleone Whalen*, Case No. 2020-01 (O.S.T. Election Comm'n Sep. 21, 2020) (Def. Exh. D) [doc. 8-4], and the Supreme Court of the Oglala Sioux

[1] Unless otherwise specified, references to Defendants' exhibits are to the exhibits filed with Defendants' Brief in Support of Motion to Dismiss [doc. 8]. All exhibits are authenticated in the Declaration of Steven Gunn (Jan. 20, 2021).

Nation, *see In the Matter of the Election Contest of Henny Cleone Whalen*, Case No. ELEC-2000-0001 (O.S.T. S. Ct. Sep. 24, 2020) (Def. Exh. E) [doc. 8-5]; *In the Matter of the Election Contest of Henny Cleone Whalen*, Case No. ELEC-2000-0001 (O.S.T. S. Ct. Oct. 5, 2020) (Def. Exh. F) [doc. 8-6]; *In the Matter of Election Appeals of Cleone Whalen, Mary Redhawk, and Darren Janis*, Case Nos. ELEC-2000-09, ELEC-2000-10 & ELEC-2000-11 (O.S.T. S. Ct. Nov. 9, 2020) (Def. Exh. G) [doc. 8-7]. The Supreme Court found that Plaintiff's challenges concern "matters that do not even remotely impact a full and fair democratic election" and are supported by "zero evidence." Def. Exh. G [doc. 8-7] 1-2.

Plaintiff now asks this Court "to declare the 2020 Oglala Sioux Tribal Primary and General Election Null and Void." Compl. [doc. 1] 1-2. The results of the tribal elections have been certified under tribal law, and the duly-elected tribal officials have been sworn into office. *See* O.S.T. Res. No. 20-206 (Dec. 4, 2020) (attached as **Exhibit I**). *See* Declaration of Steven Gunn (Jan. 20, 2021) 2 (¶ 10).

Defendants move the Court to dismiss this action for lack of subject matter jurisdiction because it raises claims arising under tribal law, not federal law as required by 28 U.S.C. § 1331, because those claims have already been heard and decided by the Supreme Court of the Oglala Sioux Nation, and because assertion of such claims in this Court is barred by the doctrine of tribal sovereign immunity. Defendants also move the Court to dismiss this action for failure to state a claim upon which relief can be granted, insufficient process, and insufficient service of process.

In her Response Brief, Plaintiff challenges the inherent right of the Oglala Sioux Tribe to make its own laws and be governed by them. Pl. Resp. Br. [doc. 12] 2. She also raises new claims under tribal law that are outside her Complaint and, thus, not properly before the Court. *See*, *e.g.*, *id*. at 3 (district boundaries, apportionment), 5 (background checks), etc. Plaintiff fails to

demonstrate how her claims arise under federal law, as opposed to tribal law, or how the assertion of her claims in this Court is not barred by the doctrine of tribal sovereign immunity. In short, she fails to demonstrate how this Court has jurisdiction over this action or Defendants. Further, even if this Court had jurisdiction, which it does not, Plaintiff's Complaint fails to state a legally-cognizable claim upon which the Court could grant the extraordinary relief Plaintiff seeks. Accordingly, this case should be dismissed.

ARGUMENT

I. PLAINTIFF'S CASE SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE IT DOES NOT RAISE A FEDERAL QUESTION.

Plaintiff fails to demonstrate how her challenges to the 2020 tribal elections arise under federal law. She makes several arguments, none of which is availing. This case does not raise a federal question and, accordingly, it should be dismissed.

First, Plaintiff argues that that the Oglala Sioux Tribe ("Tribe") no longer retains its "original, inherent right of self-government." Pl. Resp. Br. 2. This is simply not true. The Supreme Court has held that, "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). The Supreme Court has said, time and again, that the powers of Indian tribes are "'powers of local self-government,'" *Santa Clara Pueblo*, 436 U.S. at 56 (quoting *Talton v. Mayes*, 163 U.S. 376, 384 (1896)), and "'*inherent powers of a limited sovereignty which has never been extinguished*.'" *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). *Accord*, *United States v. Lara*, 541 U.S. 193, 197 (2004). In this case, when the Tribe conducted its primary and general elections in 2020, it did so under its

inherent powers of tribal self-government, not under authority of any federal statute. Plaintiff fails to identify a federal law that Defendants violated in the 2020 tribal elections.

Second, Plaintiff argues that the Tribe is "limited to maintaining consistency with federal law." Pl. Resp. Br. 2. Even assuming solely for the sake of argument that this were the case, Plaintiff fails to identify a federal law that restricts the Tribe's power to conduct its own tribal elections, let alone a federal law that the Defendants in this case violated in respect to the 2020 tribal elections. The courts have held that, "[t]ribal election disputes, like tribal elections, are key facts of internal tribal governance and are governed by tribal constitutions, statutes, or regulations," *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010), and further that, "resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court." *Runs After v. United States,* 766 F.2d 347, 352 (8th Cir. 1985).

Third, Plaintiff argues that, in hearing and deciding her election challenges, the Supreme Court of the Oglala Sioux Nation "failed to protect Plaintiff's procedural due process expressed in the Fifth Amendment of the United States Constitution." *Id*. at 4-5. However, the Supreme Court of the Oglala Sioux Nation is not a defendant in this case and, even if it were, the United States Supreme Court has held, time and again, that, "the Fifth Amendment [does] not 'operat[e] upon' 'the powers of local self-government enjoyed' by the tribes." *Santa Clara Pueblo*, 436 U.S. at 56 (quoting *Talton v. Mayes*, 163 U.S. at 384). Thus, Plaintiff would have no cause of action against the Supreme Court of the Oglala Sioux Nation under the Fifth Amendment.[2]

[2] Plaintiff's Fifth Amendment claim is raised for the first time in Plaintiff's Response Brief. It is not set forth in the Complaint [doc. 1] and, therefore, it is not properly before the Court.

The Tribe has the inherent power to "make [its] own substantive law in internal matters," including tribal elections, and it has the inherent power "to enforce that law in [its] own forums." *Santa Clara Pueblo,* 436 U.S. at 55-56. Plaintiff's challenges to the 2020 tribal elections arise under tribal law, not federal law, and those challenges have been heard and decided by the appropriate tribal forums. Plaintiff's Complaint fails to allege a basis for federal question jurisdiction under 28 U.S.C. § 1331 and, as a result, the Complaint should be dismissed.[3]

II. THIS ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE IT IS BARRED BY THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

Plaintiff fails to demonstrate how the assertion of her claims in this Court is not barred by the doctrine of tribal sovereign immunity. She argues that the tribal law preserving the Tribe's sovereign immunity, O.S.T. Ord. No. 15-16 (Sep. 28, 2015) (Def. Exh. H), is unconstitutional because it "voids" the right of tribal members to petition for redress of grievance." Pl. Resp. Br. 5-6. Not so. The petition clause generally affords a right to petition the legislative and executive branches of government for redress of grievances, but it does not guarantee a response by those branches of government to a petition for redress and it does not waive sovereign immunity from suit or guarantee a right to judicial redress against the government. *See generally Minnesota State*

[3] The two cases cited by Plaintiff provide no basis for federal jurisdiction over her tribal election dispute. *See* Pl. Resp. Br. 6 (citing *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982); *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979)). Only one of the cases—*Shortbull*—dealt with a tribal election dispute and in that case, unlike the case at bar, plaintiff alleged a violation of his rights under 42 U.S.C. § 1985 based on invidious race- or class-based discrimination. The plaintiff in *Shortbull* was not certified as a candidate for tribal president because he was not an enrolled member of the Tribe. In the end, the court held that the Tribe's "right to define who is eligible to run in tribal elections" is similar to the right to define its own membership, which "'has long been recognized as central to its existence as an independent community,'" and the "policy of promoting Indian self-government … suggests that requiring presidential candidates to be enrolled members of the Tribe is a legitimate political determination that does not create an invidiously discriminatory classification" under 42 U.S.C. § 1985. *Shortbull*, 677 F.2d at 650 (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32).

Board for Community Colleges v. Knight, 465 U.S. 271, 285-286 (1984); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979); *We the People Found., Inc. v. United States*, 485 F.3d 140, 144 (D.C. Cir. 2007). The Tribe's law preserves tribal sovereign immunity without infringing on the right to petition for redress of grievances.

The law of tribal sovereign immunity is well-settled. The Supreme Court has "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)." *Michigan v. Bay Mills Indian Cmty*., 134 S.Ct. 2024, 2030-2031 (2014) (quoting *Kiowa Tribe v. Mfg. Technologies, Inc*., 523 U.S. 751, 756 (1998)).

In this case, Plaintiff has not identified a congressional authorization of suit or a tribal waiver of immunity. To the contrary, the Tribe has preserved its immunity and, for the reasons set forth in Defendants' opening Brief [doc. 8], the Tribe's immunity bars suit against the Tribal Council, Executive Committee, and individual members of the Tribal Council and Executive Committee. *See* Def. Br. [doc. 8] 10-13 & 14, n. 5.

III. THIS ACTION SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND FOR INSUFFICIENT PROCESS AND INSUFFICIENT SERVICE OF PROCESS.

Plaintiff fails in her Complaint and in her Response Brief to cite any source of law—federal or tribal—that would authorize this Court to grant the extraordinary and unprecedented relief she seeks in respect to the internal elections of the Tribe. Plaintiff fails to state or recite the elements of any legally-cognizable claim that would provide "grounds" for her "entitlement to relief." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation omitted). No such authority or grounds exist. Accordingly, this case should be dismissed under Rule 12(b)(6).

Further, although this case has been pending since November 20, 2020, it appears that no summonses have been issued and no defendant has been served with a summons or a copy of the Complaint. Accordingly, this case should be dismissed under Rule 12(b)(4) & (5). The fact that the Complaint is available on PACER, *see* Pl. Resp. Br. 6, does not excuse the requirements of proper process and service.

CONCLUSION

For the foregoing reasons, defendants Oglala Sioux Tribe Executive Officers and Oglala Sioux Tribal Council Members submit that this action should be dismissed.

Respectfully submitted this 20th day of January 2021.

/s/ Steven J. Gunn
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CERTIFICATE OF SERVICE

The undersigned certifies that, on January 21, 2020, a true and accurate copy of the foregoing was served on the parties listed below by operation of the Court's Case Management/Electronic Case Filing (CM/ECF) system:

Terry Pechota
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Attorney for Defendant Oglala Sioux Tribe Election Commission

The undersigned further certifies that, on January 20, 2021, a true and accurate copy of the foregoing was served on the parties listed below by depositing the same in United States mail, postage prepaid, addressed as follows:

Cleone Whalen
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Pine Ridge, SD 57770
Plaintiff

Mary Felicia, Election Commissioner
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Pine Ridge, SD 57770
Defendant

Sandra Old Horse, Election Commissioner
P.O. Box 3015
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Defendant

/s/ Steven J. Gunn
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