No. 22-30436

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MONTIE SPIVEY,

Plaintiff-Appellant,

v.

CHITIMACHA TRIBE OF LOUISIANA; CYPRESS BAYOU CASINO & HOTEL; APRIL WYATT; JACOB DARDEN; TOBY DARDEN; JACQUELINE JUNCA,

Defendants-Appellees.

On Appeal from
United States District Court for the Western District of Louisiana
Case No. 6:22-cv-491

BRIEF OF APPELLEES CHITIMACHA TRIBE OF LOUISIANA, CYPRESS BAYOU CASINO & HOTEL, APRIL WYATT, JACOB DARDEN, TOBY DARDEN, AND JACQUELINE JUNCA

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees do not request oral argument.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, over this appeal from a final judgment in the U.S. District Court for the Western District of Louisiana.

STATEMENT OF THE ISSUES

1. Where the district court dismissed identical claims twice on grounds that apply, as a matter of federal law, with equal force to federal, state, and tribal court; and, the Plaintiff concedes the claims cannot be re-filed in the dismissing court; and, the Plaintiff does not propose any cure to the pleading defects in the face of repeated challenges, did the district court abuse its discretion by designating the second dismissal as "with prejudice"?
2. Where the district court exercised mandatory federal question jurisdiction over claims in a removed action and determined that tribal sovereign immunity bars the claims, and it is black letter law that a district court has no discretion to remand claims that are under its jurisdiction, did the district court err by denying a motion to remand the claims to state court?

STATEMENT OF THE CASE

I. Introduction

With this appeal, Plaintiff-Appellant Montie Spivey seeks to continue futile litigation after his claims have been dismissed twice. Spivey neither contests the substantive basis for dismissal nor does he suggest any cure for the defects in his complaint that would allow the claims to proceed in any jurisdiction. In these circumstances, the district court did not abuse its discretion by dismissing the second action with prejudice.

Spivey filed identical complaints in federal and state court—*Spivey I* and *Spivey II*, respectively. This appeal relates to *Spivey II*, which was removed to federal court. Both complaints contained allegations and claims arising from events that occurred when Spivey was employed at Cypress Bayou Casino Hotel ("CBCH"), an enterprise of the Chitimacha Tribe of Louisiana ("Tribe"), a federally recognized Indian tribe. Spivey was involved in authorizing a payment from CBCH to the then-Chairman of the Tribe, a former CBCH employee. The payment drew scrutiny from gaming regulators, whose investigations lead to criminal proceedings in Louisiana state court that involved Spivey—though Spivey was never charged with any crime. Nevertheless, Spivey blames the Tribe and its governing body, the Tribal Council, for the events. He attempted to obtain compensation through the lawsuits.

Defendants-Appellees moved to dismiss both lawsuits on the basis of tribal sovereign immunity. The Chitimacha Tribe of Louisiana is a federally recognized

Indian tribe. *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 86 Fed. Reg. 7554, 7555 (Jan. 29, 2021). "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." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Tribal sovereign immunity applies not only to the Tribe itself, but also to an arm or instrumentality of the Tribe, including its gaming enterprise, CBCH. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798-800 (2014) (citing *Kiowa*, 523 U.S. at 760). And a claim against Tribal officials in their official capacity is "'another way of pleading an action against an entity of which an officer is an agent'"—the Tribe—and is thus "barred by sovereign immunity," just like the claims against the Tribe. *Lewis v. Clarke*, 137 S. Ct. 1285, 1290-91 (2017) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)).

The district court agreed with Defendants-Appellees. *Spivey I* was dismissed without prejudice on the basis of tribal sovereign immunity. Spivey did not appeal and *Spivey I* is a final judgment. In *Spivey II*, the district court applied the reasoning of *Spivey I* and, finding that Spivey could not state any viable claim arising from the events at issue, dismissed the action with prejudice. Spivey does not contest the underlying rationale for the dismissals. Instead, he insists that he should be allowed to relitigate the same issues and claims. He does not acknowledge any limitation on this claimed right to relitigate the issues, and will presumably do so until he obtains

the ruling he wants. Under these circumstances, it was within the district court's discretion to dismiss *Spivey II* with prejudice, and the district court committed no reversible error in doing so.

II. Procedural Background

A. The Claims in *Spivey I* and *Spivey II* are Identical

The allegations in *Spivey I* and *II* are identical. The complaints were filed in July 2021 and October 2021, respectively. All of the claims arise from an action of the Chitimacha Tribal Council—its referral to the State District Attorney, pursuant to the Tribal-State Gaming Compact, of an investigation of a bonus payment.

Spivey named six defendants: the Chitimacha Tribe of Louisiana ("Tribe"), a federally recognized tribe (ROA.95, ¶ 1(a); ROA.15, ¶ I(a)), the "Cypress Bayou Casino," which is a gaming enterprise owned and operated by the Tribe (ROA.95, ¶ 1(b); ROA.15, ¶ I(b)), properly known as the Cypress Bayou Casino Hotel ("CBCH"); and current and former members of the Tribe's governing body, the Chitimacha Tribal Council (together, the "Tribal Defendants"), for actions of the Council taken while they were members of the Council (ROA.95-96, ¶ 1(c)-(e); ROA.15, ¶ I(c)-(f)). Spivey alleges that in 2015 he was the Chief Financial Officer of CBCH. ROA.96, ¶ 3; ROA.15, ¶ III. Spivey alleges that O'Neil Darden was a CBCH employee before he was elected Tribal Chairman. ROA.96, ¶ 4; ROA.16, ¶ IV. As an employee of CBCH, Darden would have been eligible for a bonus, but

Chitimacha Tribal Laws prohibit a council member from working in the casino or receiving financial gain from the casino. ROA.97, ¶¶ 7, 10; ROA.16, ¶ VII. Spivey alleges that the Tribal Council considered the matter and decided that Darden would be eligible for a bonus pro-rated to the term of his employment at CBCH. ROA.98, ¶ 12; ROA.17, ¶ IX. Spivey alleges that he "was responsible for overseeing the processing of the bonuses to the employees" and that "Darden's bonus was distributed via direct deposit on January 5, 2016." ROA.98, ¶ 14; ROA.17, ¶ X.

Spivey alleges that "a complaint was made to the tribal gaming commission of an alleged 'misappropriation of bonus monies'" and "the Louisiana State Police was called to investigate." ROA.99, ¶ 17; ROA.18, ¶ XIII. Following the investigation, Spivey alleges that he and others "were criminally charged for felony theft and unauthorized use of a moveable." ROA.99, ¶ 17; ROA.18, ¶ XIII. Spivey alleges that the U.S. Attorney declined to prosecute Spivey, "and the matter was sent back to The Chitimacha Tribal Council." ROA.99, ¶ 18; ROA.18, ¶ XIV. At that point, Spivey alleges that the Council was "vested with the decision to refer the matter to the local State District Attorney or 'do whatever is best in the interest of justice.'" ROA.99, ¶ 18; ROA.18, ¶ XIV. According to Spivey, "the council decided to pursue the baseless charges with the District Attorney for the 16th JDC Parish of St. Mary." ROA.99-100, ¶ 18; ROA.18, ¶ XIV. Spivey admits that no criminal charges resulted from the Tribal Council's referral of the matter to the District

Attorney, and that he received a letter from District Attorney confirming that no charges would be sought. ROA.100, ¶ 20; ROA.18, ¶ XVI.

Spivey "seeks damage for injuries set forth under 42 U.S.C §§ 1893 [sic] and 1985 against the council members in their individual capacities for intentionally causing and/or negligently allowing frivolous criminal charges to be brought against Plaintiff" as well as punitive damages and attorney's fees under 42 U.S.C. § 1988. ROA.101, ¶¶ 26-27; ROA.19, ¶¶ XX, XXII. Spivey asserts claims "under Louisiana Civil Code Article 2315" for the same alleged injuries. ROA.101, ¶ 28; ROA.19 ¶ XXI.

B. The District Court Dismissed *Spivey I* without Prejudice Based on Tribal Sovereign Immunity

The Tribal Defendants moved to dismiss *Spivey I* based on sovereign immunity, official immunity, and other grounds. ROA.108 (summary of grounds for Defendants' motion to dismiss). On February 2, 2022, the Magistrate Judge issued a Report & Recommendation for dismissal because sovereign immunity bars Spivey's claims that: (1) Defendants violated "42 U.S.C. 1983 and 1985 in causing him to be criminally charged in connection with" authorizing a bonus payment; (2) Defendants are liable for punitive damages under 42 U.S.C. 1988; and, (3) Defendants committed "negligent and intentional tort" by "bringing a frivolous criminal complaint against him." ROA.107-08. Spivey did not file any objection to

the Report & Recommendation. On February 23, 2022, Judge Summerhays adopted the Report & Recommendation in full. ROA.125-26. *Spivey I* is a final judgment.

C. The District Court Dismissed *Spivey II* with Prejudice, Applying the Preclusive Effect of *Spivey I*, and Finding that Plaintiff's "Best Case" was Not Adequate to Plead any Claim

Spivey filed the complaint in this action, *Spivey II*, in Louisiana State court on October 25, 2021—while *Spivey I* was pending and after the Tribal Defendants moved to dismiss. Spivey did not serve any Defendant until February 1, 2022. The Tribal Defendants removed to federal court on February 17, 2022 and answered on February 24, 2022. ROA.11, 79.

The Tribal Defendants filed a motion for judgment on the pleadings. ROA.149. Spivey filed a motion to remand the action to State court. ROA.88. After the parties fully briefed both motions, the Magistrate Judge issued a Report & Recommendation ("R&R") concluding that, "[a]s previously analyzed in detail in the prior federal court suit, tribal immunity precludes Plaintiff's federal law claims under §1983 and §1985." ROA.209. The R&R "clarifie[d] that tribal immunity precluded Plaintiff's state law claims as well." ROA.210. The court "held that Plaintiff's claims against the individual tribe council members were, in effect, official capacity claims barred by tribal immunity, despite Plaintiff's broad allegations of intentional and negligent acts." *Id.* The court found "that Plaintiff's state court suit removed to this Court is essentially identical to the previous

complaint filed in federal court." *Id*. The court held that "[a]ll claims are barred by tribal immunity" and "[f]or the detailed reasons set forth in the Court's prior ruling in" *Spivey I*, "these claims should be dismissed with prejudice." ROA.210. The district court relied on the "best case" rule that dismissal with prejudice is appropriate when a plaintiff has repeatedly asserted the adequacy of the complaint, and refused to amend it in the face of challenges. *Id*. (citing *Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021)).

Spivey objected to the R&R. ROA.213. The district court adopted the R&R on June 24, 2022, holding "that the Magistrate Judge's report and recommendation is correct" and adopting "the findings and conclusions therein as its own." ROA.228.

SUMMARY OF THE ARGUMENT

The district court fully adjudicated the application of sovereign immunity to Spivey's claims. It assessed Spivey's arguments regarding waiver, and the possibility that Spivey could state claims against the individual Tribal Council members in their personal capacities, which would not be barred by sovereign immunity. This adjudication left no room for any claim based on the referral. Nevertheless, Spivey challenges the district court's designation of the dismissal as "with prejudice" because it would prevent him from filing the same claims in another court. Brief of Appellant Montie Spivey at 16-17, Spivey v. Chitimacha Tribe of Louisiana, et al., No. 22-30436 (5th Cir. filed Sept. 22, 2022) ("Spivey Br.").

But Spivey's assumption that removal of the "with prejudice" designation would also remove all preclusive effects of the *Spivey I* and *II* judgments is mistaken. The underlying judgments have preclusive effects so substantial that any designation other than "with prejudice" would be misleading. The district court did not abuse its discretion by applying that designation.

Spivey also contends that the district court's dismissal with prejudice of *Spivey II* was improper because it was entered *sua sponte*, but offers no substantive argument to support his contention. Spivey Br. at 10-11. Spivey does not, and cannot, contend that the district court failed to consider any factual allegation or legal theory that he put forward. The "best case" rule provides that *sua sponte* dismissal with prejudice is appropriate in a case like this, where the plaintiff repeatedly declares the adequacy of the complaint and does not offer an amended complaint even in the face of a motion to dismiss. Here, the district court considered a complaint identical to one it dismissed just a few months earlier. Spivey did not, and still does not, offer any suggestion, even in the vaguest terms, of how he might amend his complaint to avoid tribal sovereign immunity.

Spivey chooses to evade these issues and instead discusses dismissal in the abstract, relying on the general statement that dismissal on the basis of sovereign immunity should be without prejudice. Spivey overstates the scope and purpose of that general rule. The underlying rationale is that a plaintiff might be able to cure the

defects in their complaint and to establish a claim against defendants related to the incident at issue. But, as cases from this Court confirm, when immunity forecloses all possible claims arising from a particular incident, dismissal with prejudice is appropriate. Additionally, issue preclusion applies to jurisdictional determinations, and a plaintiff cannot engage in repeated, futile litigation of the same issues.

Not only does Spivey contend that he should be allowed to relitigate his case, he argues that the district court should have assisted that futile effort by remanding the action to state court. But the district court had federal question jurisdiction over the case and therefore could not remand it to state court. Remand would require the federal court to find that it did not have jurisdiction over the federal question claims—but the state court did. Spivey does not identify any authority supporting such an outcome. Even if the district court could remand, the substantive outcome would be the same. The state court would be required to apply the preclusive effect under federal law. And if the State court were to address tribal sovereign immunity, it is bound by federal law on that issue as well.

ARGUMENT

I. Standard of Review

This court reviews a "district court's decision to grant a motion to dismiss with or without prejudice only for abuse of discretion." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 368 Fed. Appx. 574, 579 (5th Cir. 2010) (citing *Club Retro, LLC v. Hilton*, 568 F.3d 181, 215 n. 34 (5th Cir.2009)). Spivey asserts, incorrectly, that

the proper standard of review is *de novo*. That standard would apply to review of a district court's dismissal under Rule 12(b)(1). *Spec's Family Partners, Ltd. v. Nettles*, 972 F.3d 671, 674-75 (5th Cir. 2020). But this is not an appeal of the Rule 12(b)(1) dismissal. Spivey only appeals the "with prejudice" designation, and that is subject to review only for abuse of discretion. *Bullard*, 368 Fed. Appx. at 579.

The district court's denial of a motion to remand is reviewed *de novo*. *Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 182 (5th Cir. 2018).

This court may affirm the district court's "with prejudice" designation and its denial of the motion to remand "on any ground that finds support in the record." *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 735 (5th Cir. 2020) (citing *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957)).

II. The Judgment in this Case is Correctly Characterized as "With Prejudice" Because Spivey Pled His Best Case, the Threshold Issue of Sovereign Immunity was Fully Adjudicated, and Spivey Cannot Plead Around It

Spivey's claims have been dismissed twice. He identifies no alleged error in the basis for dismissal in either case, and no factual allegations or legal theory that would lead to a different outcome if he brought the claims in state or tribal court. Yet, Spivey wants to this Court to affirmatively grant him the right to additional attempts to litigate the same threshold issue of tribal sovereign immunity. The "with prejudice" designation is appropriate here; it is applied broadly to judgments with preclusive effect even though the precise preclusive effect may depend on the nature

of the claim and applicable law. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506-07 (2001). The substance of the district court's judgment in this case precludes all claims arising from the conduct at issue here: the Tribal Council's referral of the bonus investigation to the State District Attorney. Spivey only hopes that further litigation of that issue would produce an inconsistent ruling by a state court—but that is the very outcome that the preclusion doctrines are meant to foreclose. Indeed, the preclusive effect of the district court's judgment reinforces the district court's application of the "best case rule"—which authorizes the district to dismiss this case *sua sponte* because Spivey cannot plead facts sufficient to overcome tribal immunity. *Carver v. Atwood*, 18 F.4th 494, 498 n.1 (5th Cir. 2021) (quoting *Brown v. Taylor*, 829 F.3d 365, 370 (5th Cir. 2016)).

A. The District Court Fully Adjudicated a Threshold Issue in Spivey's Claims

There is no legitimate basis for Spivey's suggestion that some viable claim for relief remains after the judgments in *Spivey I* and *II*. The district court's assessment and application of tribal sovereign immunity left no question that it barred all claims, against all Defendants, based on the alleged wrongful conduct—the "referral by the Tribal Council of the [bonus payment] incident to the district attorney for the 16th Judicial District Court for the Parish of St. Mary"—and any resulting injury. ROA.120.

1. Spivey Failed to Establish a Waiver or Abrogation of Sovereign Immunity

Spivey made three arguments that the Tribe waived sovereign immunity for claims arising from the referral: (1) that the Compact is an implied waiver of immunity; (2) that the concurrent criminal jurisdiction of the Tribe and State waives the Tribe's immunity for civil claims; and, (3) that the Compact waives immunity for claims covered by insurance. ROA.113-15. The district court rejected the arguments.

- Spivey argued that the Compact provision stating that "[t]he Tribe and the State shall retain all sovereignty and immunity to suit while discussing, negotiating, or confecting this Compact" implied that "that sovereign immunity is waived in some way once the [C]ompact is in effect." ROA.177, 115. The district court disagreed, holding that the quoted provision means "simply, that the well-settled rule of the sovereignty of the Tribe extends to the process of discussing, negotiating, and confecting the Tribal Compact, and is in full force and effect even during that process, before the Compact is, in fact, adopted and in official operation." ROA.115.
- Spivey argued that the provisions of the Compact that allow for concurrent criminal jurisdiction waive sovereign immunity. The district court held that "[t]he existence of concurrent criminal jurisdiction does

not waive sovereign immunity in a civil case." ROA.115 (citing *Bonnette v. Tunica-Biloxi Indians,* 873 So.2d 1, 6-7 (La. App. 3 Cir. 2003)).

- Finally, Spivey argued that the Compact provisions which require the tribe to acquire insurance for any liabilities waive sovereign immunity. The district court held that the Compact provisions applicable to the Tribe "do not prohibit or limit the assertion of immunity." *Id.*

The district court concluded its analysis of Spivey's waiver arguments by invoking the "well-settled law that any waiver of tribal sovereign immunity cannot be implied or inferred but must be 'unequivocally expressed.'" ROA.116 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014)). And because "nothing in the Tribal Compact expressly authorizes Spivey (or any employee) to bring actions under federal and state law against the named defendants in federal court," permitting Spivey to proceed with his claims would require the court to "make the very inferences or implications that federal case law prohibits." ROA.116.

2. Spivey Failed to Establish Personal Liability Claims Against the Individual Defendants

Spivey also argued that official immunity did not apply to the individual Defendants because the claims against the individuals were personal claims and any damages would not operate against the tribe. ROA.117. The Court analyzed Spivey's argument under the Supreme Court's holding in *Lewis v. Clarke*, 137 S. Ct. 1285,

1290–91 (2017), which clarifies the scope of official immunity. ROA.117-22. A claim against Tribal officials in their official capacity is "'another way of pleading an action against an entity of which an officer is an agent'—in this case, the Tribe—and is thus 'barred by sovereign immunity,' just like the claims against the Tribe." ROA.121 (quoting *Lewis*, 137 S. Ct. at 1290-91). Thus, if the "'the relief sought is only nominally against the official and in fact is against the official's office,' then it is an official-capacity claim barred by sovereign immunity." ROA.121-22 (quoting *Lewis*, 137 S. Ct. at 1291). Applying this framework, the district court found that:

> [P]laintiff claims that the Tribal Council members improperly referred a frivolous criminal charge to the State District Attorney after the U.S. Attorney declined to prosecute him. . . . The Tribal Council members sued herein were vested with the investigatory power -- as a Tribe -- to refer the matter to the state district attorney for prosecution, and this power is set forth clearly in the Compact. Under the express language of the Compact, the '**Tribe** may prosecute the matter within its Criminal Justice system or refer the matter for State prosecution.' *See* Compact at Section 4(a) (emphasis added). Here, the Tribal Council members decided -- on behalf of the Tribe -- to refer the matter to the St. Mary Parish district attorney. . . . [R]egardless of how the plaintiff characterizes his claims in his Complaint, the undersigned finds that the Tribal Council members acted on behalf of the Tribe in referring the matter to the State District Attorney. As such, the real party in interest is the Tribe, and all claims against the Tribal Council members in this capacity are barred.

ROA.120-22.

The district court's findings do not leave any room for any claim against the Tribe, CBCH, or the Council members based on the Tribal Council's referral of the

bonus investigation to the State District Attorney. Spivey exhausted his arguments based on waiver, abrogation, and personal liability. There are no other options for any claim based on the referral.

And there is no possibility, much less a presumption, that a state court could reach a different conclusion. Only Congress can abrogate or modify a tribe's immunity. *Bay Mills*, 572 U.S. at 789. Tribal sovereign immunity applies in state court to the same extent it applies in federal court. *Id.*; *see also Bonnette v. Tunica-Biloxi Indians*, 873 So.2d 1, 2-6 (La. App. 3 Cir. 2003). It "is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (citing *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 891 (1986)); *Washington v. Confederated Tribes of Colville Reservation*, 447 U. S. 134, 154 (1980)). Accordingly, a state court must apply federal law to tribal sovereign immunity matters, and cannot create a different law of tribal sovereign immunity that might lead to an outcome different than federal law.

The same is true in the Chitimacha Tribal Court. While Indian tribes are not necessarily bound by federal law with respect to internal governance, the Chitimacha Tribe has determined that for civil actions in its Tribal Court, federal law has "binding effect." Chitimacha Comprehensive Codes of Justice, Title IV – Civil Procedure, Sec. 601, *available at:*

https://chitimacha.gov/sites/default/files/CCCJ%20Title%20IV%20-%20Civil%20Procedure%20with%20Amendments.pdf.

B. The *Spivey I* and *II* Judgments Preclude Any Claim Based on the Referral

Spivey does not appeal the district court's substantive findings on sovereign immunity, yet demands that this Court allow him to relitigate the same issues. The judgments have substantial preclusive effect based on well-established law.

1. The *Spivey II* Judgment Cannot be Characterized as "Without Prejudice" Because Spivey Admits the Claims Cannot be Re-Filed in the Dismissing Court

Spivey omits a critical point—he assumes, but fails to establish, that the district court's judgment could be designated "without prejudice." In fact, it would not be appropriate to do so. The Supreme Court explained that "[t]he primary meaning of 'dismissal without prejudice,' . . . is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim." *Semtek*, 531 U.S. at 505. The *secondary* meaning of dismissal without prejudice is that it "will also ordinarily (though not always) have the consequence of not barring the claim from other courts, but its *primary meaning relates to the dismissing court itself*." *Id*. (emphasis added); *see also Foster v. City of El Paso*, 308 Fed. Appx. 811, 812 (5th Cir. 2009) (affirming dismissal "with prejudice" and holding that the preclusive effect of a judgment turns on the "appl[ication] [of] federal law of claim preclusion," not the "with prejudice" designation itself). As such, an argument for

dismissal without prejudice must establish as a threshold matter that the plaintiff is not barred from refiling his claim in the dismissing court. Spivey does not even attempt to make such a showing—in fact, he concedes that he cannot bring his claims in the dismissing court. ROA.198.

As Spivey put it, "[i]n a previous action"—*Spivey I*—that "involv[ed] the same parties, claims, and facts, the Court dismissed the same claims presented in this lawsuit [*Spivey II*] . . . due to sovereign immunity." ROA.198. Spivey expressly agreed that the holding "has preclusive effect on federal proceedings going forward." ROA.198. Spivey even conceded that "[n]othing in the case significantly changed" between *Spivey I* and *Spivey II* "and therefore there was no reason for the Magistrate Judge to change her reasoning." ROA.218. Consequently, it is not appropriate to designate the *Spivey II* judgment as "without prejudice."

2. The Federal Law of Issue Preclusion Applies to Jurisdictional Determinations, Including in State Court and Chitimacha Tribal Court

In this case, the district court judgments have significant preclusive effects beyond the dismissing court. Not only would the substantive law of tribal sovereign immunity apply in state court, the federal law for claim and issue preclusion would apply too.

As this Court recently confirmed, "'[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations.'" *Bank of La. v. Fed. Deposit*

Ins. Corp., 33 F.4th 836, 837 (5th Cir. 2022) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 n.9 (1982)); *see also Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980). This Court has even described adjudication of some jurisdictional issues as "on the merits" such that "true res judicata" applies because the judgment "does adjudicate the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims." *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 469 (5th Cir. 2013) (internal quotations omitted) (citing *Boone*, 617 F.2d at 436). In other words, when the jurisdictional issue in a subsequent case is the same as what was adjudicated in earlier, all claims subject to the jurisdictional defect are barred whether asserted in the first action or not. *Id*. "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate," claim and issue preclusion "protect against the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotations omitted) (citing *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

The district court was correct in determining that the judgement in *Spivey I* precluded relitigation of the jurisdictional issues in *Spivey II*—and Spivey does not dispute it. The district court's findings addressed the elements of issue preclusion,

and found that: the tribal sovereign immunity issues in *Spivey I* and *II* are identical; tribal sovereign immunity was adjudicated in *Spivey I*; and, the adjudication of sovereign immunity was necessary to the judgment in *Spivey I*—indeed, it was the judgment. ROA.209-10; *see Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) (The elements of issue preclusion are: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision."). A state court would be bound under the doctrine of issue preclusion by the *Spivey I* and *II* holdings on sovereign immunity because "'[t]he preclusive effect of a federal-court judgment . . . is determined by federal common law'"—not state law. *Comer*, 718 F.3d at 467 n.8 (quoting *Taylor*, 553 U.S. at 891); *Foster*, 308 Fed. Appx. at 812 (state court must apply the federal law of claim or issue preclusion to a decision rendered in federal court). The same is true for Chitimacha Tribal Court, which gives "binding effect" to federal law. Chitimacha Comprehensive Codes of Justice, Title IV – Civil Procedure, Sec. 601.

3. Dismissal with Prejudice is Appropriate Because Spivey has Alleged his Best Case and the Jurisdictional Defects are Not Curable

Upon determining that *Spivey II* should be dismissed on the same grounds as *Spivey I*, the district court had to balance two important jurisprudential interests. On the one hand, if a "jurisdictional problem is later fixed," then a suit could be refiled.

Bank of La. v. Fed. Deposit Ins. Corp., 33 F.4th 836, 838 (5th Cir. 2022). Dismissal without prejudice is appropriate in that circumstance. *Id*. On the other hand, not all jurisdictional problems can be fixed and courts should not allow repeated, futile, litigation of the same jurisdictional issue. With this context, the district court correctly relied on the "best case rule" to designate the dismissal in a manner that best reflects the preclusive effects of its decision: dismissal "with prejudice." ROA.210 (citing *Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021)).

Spivey admits, as he must, that *sua sponte* dismissal with prejudice, without notice or opportunity respond, is proper:

> "[I]f the plaintiff has [already] alleged his best case." A plaintiff has alleged his best case if the plaintiff has "(1) repeatedly declared the adequacy of that complaint in response to the defendant's motion to dismiss" and (2) "refused to file a supplemental complaint even in the face of a motion to dismiss."

Spivey Br. at 11 (citing *Carver*, 18 F.4th at 498 n.1 (quoting *Brown v. Taylor*, 829 F.3d 365, 370 (5th Cir. 2016)).

The preclusive effect of *Spivey I* reinforces the district court's application of the "best case" rule. Spivey did not just refuse to file an amended complaint in *Spivey II*—he insisted on litigating a complaint identical to what the district court dismissed in *Spivey I*.

Spivey's only argument against application of the "best case" rule is the claim that he "had no reason to know that filing a similar complaint in state court would

result in a dismissal with prejudice in federal court." Spivey Br. at 11. Spivey's position is not credible. Removal to federal court is always a possibility in cases with federal claims, and dismissal with prejudice is a possible outcome in any litigation. Assuming that Spivey truly did not know at the time of filing the *Spivey II* Complaint that dismissal with prejudice was a possible outcome, that does not explain his failure to apprehend the point after the Tribal Defendants challenged the adequacy of the Complaint and the district court dismissed an identical complaint in *Spivey I*. Spivey expressly acknowledged to the district court the defects in his Complaint and did not suggest any possible cure—he admitted that the district court ruled on sovereign immunity and its decision should stand. ROA.198. Even before this Court, Spivey does not articulate any allegations, claims, or legal theories that would avoid the threshold issue of sovereign immunity for claims based on the referral.[1] The unstated, but fundamental, premise of Spivey's argument is that a state court might apply the law of sovereign immunity incorrectly to reach a different conclusion on the same allegations that were before the district court. Spivey Br. at 16-17. Spivey is asking this court to facilitate the possibility of an "inconsistent decision" that

[1] Spivey filed the complaint in *Spivey II* after the Tribal Defendants moved to dismiss *Spivey I*. That is, Spivey was fully aware of the deficiencies in the complaints, but did not attempt to cure them. That was not Spivey's last opportunity to amend. He had 21 days after Defendants answered to file an amended complaint as of right in *Spivey II*. Fed. R. Civ. P. 15(a)(1). He could have sought leave to file and amended complaint after that.

would undermine "reliance on judicial action." *Taylor*, 553 U.S. at 892 (internal quotations omitted). That is not a justification for allowing further litigation.

There can be no doubt that ruling in Spivey's favor would lead to additional futile litigation that burdens Defendants and the courts. If Spivey were to file his claim in state court, the Tribal Defendants would remove to federal court, and seek dismissal on issue preclusion and sovereign immunity grounds, just like they did in this case—removal of the "with prejudice" designation would not alter the underlying basis for the judgment. If Spivey abandoned his federal claims so the action would not be removable, the Tribal Defendants would move to dismiss in state court on the same grounds. The state court would be bound to the same controlling federal law as the federal court. In this context, there can be no doubt that it was appropriate for the district court to apply the "with prejudice" designation. Indeed, it would be misleading to characterize the judgment as "without prejudice" given the assessment of its actual preclusive effect.

C. Tribal Sovereign Immunity is a Proper Basis for Dismissal with Prejudice When Such Immunity is an Absolute Bar to the Claims at Issue

Even if this case represented the first dismissal of Spivey's claims, dismissal with prejudice would be appropriate. Spivey is wrong about the treatment of dismissals on the basis of tribal sovereign immunity under Rule 12(b)(1). He contends that dismissal with prejudice is never proper, under any circumstances, and

that the district court created "a new rule for sovereign immunity dismissals in favor of Indian tribes." Spivey Br. at 13. This statement is an oversimplification of the caselaw, including Fifth Circuit precedent.

Spivey's contention, that dismissal with prejudice on the basis of sovereign immunity is never proper, is incorrect. Courts have dismissed claims with prejudice on the basis of tribal sovereign immunity, and those decisions were upheld on appeal. *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 696 (8th Cir. 2019) ("We affirm the dismissal with prejudice of claims against the Tribe and the [tribal officer] defendants acting in their official capacities because those claims are barred by the Tribe's sovereign immunity."). This Court has confirmed that lack of subject matter jurisdiction based on sovereign immunity may warrant dismissal with prejudice. *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 290 (5th Cir. 1993) (holding that "Transnave is entitled to foreign sovereign immunity" and dismissing the case with prejudice); *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 186 (5th Cir. 1992) (dismissing action with prejudice after finding the court had no subject matter jurisdiction over foreign defendant).

Dismissal with prejudice based on sovereign immunity is appropriate when it would "better serve the interests of justice" than dismissal without prejudice. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (internal quotations omitted). Sovereign immunity is an "absolute" bar to Spivey's claims; "no other court has the

power to hear the case," and there is no way for Spivey to redraft his claims to avoid the bar. *Frigard v. U.S.*, 862 F.2d 201, 204 (9th Cir. 1988); *Niblock v. Davis*, 1:19-CV-01184, 2020 WL 5820546, at *4 n.5 (E.D. Va. Sept. 30, 2020) ("because [plaintiff] cannot plead around the absence of a waiver of sovereign immunity, and because jurisdiction would also be lacking in state court, the court will dismiss this [removed] action [with claims arising under state law] with prejudice"); *Maibie v. U.S.*, 3:07-CV-0858-D, 2008 WL 4488892, at *3-4 (N.D. Tx. Oct. 7, 2008).

Spivey's reliance on *Mitchell v. Bailey* is misplaced. 982 F.3d 937, 944 (5th Cir. 2020). In that case, the district court dismissed claims with prejudice on the basis of sovereign immunity. *Id.* On appeal, this Court affirmed dismissal on other grounds, holding that "the district court lacked original jurisdiction" because there was no federal question or diversity jurisdiction. *Id.* The district court exceeded its jurisdiction by addressing immunity at all. *Id*. That case is not relevant here because this action does involve federal questions, and it was properly removed from state court on that basis.

Spivey also relies on this Court's statement in *Carver* that "a jurisdictional dismissal must be without prejudice to refiling in a forum of competent jurisdiction." *Carver v. Atwood*, 18 F.4th 494, 498 (5th Cir. 2021) (emphasis omitted). That is a general rule, but it is not relevant to the circumstances here, where Spivey *already* re-filed, unsuccessfully, in state court. In *Carver*, unlike this case,

the court noted that there were plausible options for amending that complaint to establish jurisdiction and state viable claims. *Id*. at 498. But when there are no plausible options for amending the Complaint to state viable claims in another forum, or the options have been exhausted, then rules favoring amendment give way to the rules against relitigating resolved issues. *Id*. (referring to the "best case" rule). As explained in Part II.B.-C., above, this element of *Carver* supports the district court's dismissal of the action with prejudice.

III. The District Court Cannot Remand Federal Causes of Action to State Court

Spivey appeals the district court's denial of his motion to remand the case to state court. Remand is not even a legally permissible outcome in this case, and the district court therefore committed no error in denying Spivey's motion for remand.

The Tribal Defendants' removal of this action properly invoked the court's jurisdiction even if only to resolve their sovereign immunity defense. *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1018 (9th Cir. 2016) (citing *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015)). The district court's finding that sovereign immunity bars further proceedings on claims that are otherwise within the court's jurisdiction is not the same as a finding that the court had no subject matter jurisdiction at all. Indeed, the district court "has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). And because the district court had subject-matter jurisdiction over a matter, it had no discretion to

remand. *Buchner v. F.D.I.C.*, 981 F.2d 816, 821 (5th Cir. 1993) (a "district court's subject matter jurisdiction over those claims [arising under the laws of the United States] is mandatory so it has no discretion to remand them to state court"). This is true even after the district court confirmed the Tribal Defendants' immunity. A federal court should not remand an action if the same defects that required dismissal in federal court would also apply in state court, or if the claims are futile. *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990) (affirming dismissal of action and denial of remand to state court because the state court would not have jurisdiction over all parties and claims in the action).[2]

Spivey does not dispute that his assertion of federal claims made the action removable or that the district court properly exercised jurisdiction to adjudicate sovereign immunity. Instead, he shifts to the argument that these principles do not "support[] defendants' position that all claims in this case should be dismissed with prejudice." Spivey Br. at 15. Neither the district court nor Defendants relied on the removal cases to justify dismissal with prejudice. Spivey does not identify a single case where a federal court found that it did not have jurisdiction over a federal cause of action and so remanded the federal claim to state court.

[2] Spivey argues incorrectly that *Nolan* was decided only on the basis of *forum non conveniens*. The court specifically relied on lack of jurisdiction in state court as the basis for dismissing rather than remanding the case. 919 F.2d at 1070.

CONCLUSION

This Court should affirm the judgment of the district court for dismissal with prejudice of all of Plaintiff-Appellant's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 24, 2022, the foregoing document was served via the Court's CM/ECF electronic filing system, pursuant to Fed. R. App. P. 25(c)(2), upon the following registered CM/ECF users:

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1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th CIR. R. 32.1, this document contains 6,697 words.

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October 24, 2022

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