IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TAYLEUR RAYE PICKUP, *et al.* Plaintiffs, v. THE DISTRICT COURT OF NOWATA COUNTY, OKLAHOMA, *et al.* Defendants.	**Case No. 20-cv-346-JED-FHM**

DEFENDANTS THE DISTRICT COURT OF NOWATA COUNTY, THE DISTRICT COURT OF WASHINGTON COUNTY, THE DISTRICT COURT OF DELAWARE COUNTY, THE DISTRICT COURT OF CRAIG COUNTY, THE DISTRICT COURT OF MAYES COUNTY AND THE DISTRICT COURT OF ROGERS COUNTY's REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendants The District Court of Nowata County, The District Court of Washington County, The District Court of Delaware County, The District of Craig County, The District Court of Mayes County and The District Court of Rogers County (collectively "The District Courts" or Defendants), by and through the undersigned counsel, hereby request submit their Reply to Plaintiffs' Response ([Doc. No. 75]) to the District Courts' Motion to Dismiss.]Doc. 18]. In support of their Motion, Defendants show the Court the following:

BACKGROUND

Plaintiffs' Complaint does not comply with the pleading standards and in the context of a civil rights complaint specificity in pleading is essential. A complaint must clearly state what each defendant--typically, a named government employee--did to violate Plaintiff's civil rights. *See Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976) (stating personal participation of each named defendant is essential allegation in civil-rights action). "To state a claim, a complaint must 'make clear exactly

who is alleged to have done what to whom.'" *Stone v. Albert*, 338 F. App'x 757, 759 (10th Cir. 2009) (emphasis in original) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008)).

Again, Plaintiffs do not identify Movants as Defendants in the section of the complaint identifying the individual defendants by name. Plaintiffs then generally lump all defendants together in the other paragraphs making allegations. Plaintiffs further seek relief in their Response that is nowhere in their Complaint. These deficiencies do not comport with pleading standards.

The Complaint is further flawed in that it facially raises standing and other jurisdictional issues, i.e. justiciable controversy, that cannot be overcome through amendment. Subject matter jurisdiction is something that cannot be cured and cannot be overcome despite argument about how important the issues raised by Plaintiffs are.

PROPOSITION I: THE DISTRICT COURTS ARE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY AS *EX PARTE YOUNG* DOES NOT APPLY.

Eleventh Amendment immunity applies to suits against a state or an arm of the state regardless of whether the relief sought takes the form of damages, an injunction, or a declaration. *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007). The Supreme Court has recognized an exception to the Eleventh Amendment where a plaintiff seeks **prospective** enforcement of his or her federal rights. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). Such actions challenging the conduct of a **state officer** enforcing state law are not suits against the state itself. *Green v. Mansour*, 474 U.S. 64, 68 (1985). *Young* makes it clear that this exception "may not be used to obtain a declaration that a state officer has violated a plaintiff's federal rights in the past." *Buchwald v. Univ. of New Mexico School of Med.*, 159 F.3d 487, 495 (10th Cir. 1998)(citations omitted and emphasis added). Accordingly, to the extent Plaintiffs seek such a declaration their claims would be barred by the Eleventh Amendment. *See Johns v. Stewart*, 57 F.3d 1544, 1553 (10t Cir. 1995)("The Eleventh Amendment does not permit judgments

against state officers declaring that they violated federal law in the past.")(citations and internal quotation marks omitted).

Plaintiffs have not sufficiently pled facts in the Complaint at issue that would permit them to seek prospective relief, because they fail to name a "state actor"[1] or allege that they are "suffering a continuing injury or … under a real and immediate threat of being injured in the future." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004). A simple claim for a future injury constitutes mere speculation or conjecture and does not warrant invocation of jurisdiction. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) ("The speculative nature of [plaintiff's] claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled."). Plaintiffs here are pleading harm from past acts, i.e. criminal convictions, such that *Ex Parte Young* is not applicable and Eleventh Amendment immunity applies. To the extent, Plaintiffs' Response argues some "future injury" is at issue, Plaintiffs have not alleged a realistic imminent threat to themselves, the named Plaintiffs, individually such that they do not have standing to assert a claim for prospective relief. *See Cowan v. Oklahoma*, No. 15-CV-117-JHP-PJC, 2016 WL 7665590, *5 (N.D. Okla. Feb. 8, 2016) ("Cowan's past manslaughter conviction does not present a case or controversy based on imminent threat of direct injury. *See, City of Los Angeles*, 461 U.S. at 103. The prospect of immediate injury rests on the possibility that Cowan will again be arrested for homicide in Oklahoma, and that he will again be subjected to, what Cowen contends is, constitutionally-deficient judicial decisions regarding self-defense. As the court noted in *City of Los*

[1] The fiction that must be adhered to when suing for prospective injunctive relief under *Ex Parte Young* is to sue the state actor in their official capacity. The District Courts are not officials. *See Cowan v. Oklahoma*, No 15-CV-117-JHP-PJC, 2016 WL 7665590, *3 (N.D. Okla. Feb. 8, 2016)("To pursue a *Young* claim, however, there are certain requirements: the Plaintiff 'must name as defendant a state official who is responsible for enforcing the contested statute in her official capacity; a claim for prospective relief against the state itself, or a state agency, will be barred by the Eleventh Amendment.'" (emphasis omitted)).

Angeles, it is not sufficient to show an existing controversy that one anticipates violating lawful criminal statutes and being tried for his offense. The threat to Plaintiff is not 'sufficiently real and immediate to show an existing controversy.' *City of Los Angeles*, 461 U.S. at 103."). Plaintiffs have other standing problems as addressed below based upon the current Complaint.

Plaintiffs cite to *Hill v. Kemp* as supporting their claim but the portions cited specifically dealt with prospective relief for non-monetary relief against state actors named in their official capacity, which is not the same as the relief Plaintiffs seek here.[2] 478 F.3d 1236, 1257 (10th Cir. 2007). Plaintiffs here seek a payment of money from the District Courts (not specific state actors acting in their official capacity) for past convictions. *Hill* does not actually support Plaintiff's position.

To the extent, Plaintiffs are arguing that the District Courts are not an arm of the State such that Eleventh Amendment immunity does not apply ([Doc. 75 at p. 17]), they are mistaken, *see infra* Proposition II. Eleventh Amendment immunity applies and this case must be dismissed.

PROPOSITION II: THE DISTRICT COURTS ARE NOT POLITICAL SUBDIVISIONS OF THE STATE BUT ARE AN ARM OF THE STATE SUCH THAT *MONELL* IS NOT APPLICABLE.

"As a general matter, state courts are considered arms of the state." *Large v. Beckham Cnty. Dist. Ct.*, 2014 WL 235477, at *3 (W.D. Okla. Jan. 22, 2014) (quoting 13 Charles A. Wright et al., Federal Practice & Procedure § 3524.2, at 324-25 (3d ed. 2008)); *see, e.g., Lewis v. Mikesic*, 195 F. App'x 709, 710 (10th Cir. 2006) (Kansas probate judge in his official capacity is not a "person[ ] against whom a claim for damages can be brought pursuant to § 1983"); *Harris v. Champion*, 51 F.3d 901, 906 (10th Cir. 1995) ("[T]his and other circuit courts have held that a state court is not a 'person' under § 1983."), superseded by statute on other grounds; *Heffington v. Dist. Ct. of Sedgwick Cnty.*, 2005 WL 1421530, at

[2] Claims 5 and 6 in *Hill* were against state officials in their official capacity such that at plaintiff at least nominally adhered to the formalities required to meet the *Ex Parte Young* exception to Eleventh Amendment immunity. 478 F.3d at 1257. That is not the case here as Plaintiffs are trying to sue the State directly by naming "the District Courts."

*5 (D. Kan. Jun. 17, 2005) (Sedgwick County, Kansas District Court is not a person under Section 1983); *Craker v. Tanner*, No. CIV-18-305-JHP-SPS, 2019 WL 3046100, *2 (E.D. Okla. July 11, 2019).

Plaintiffs argue that *Monell* somehow allows their claim against the District Courts to proceed. This is simply not true. *Monell* applies to political subdivisions of the State. *See Murphy v. City of Tulsa*, 950 F.3d 641, 644 (10th Cir. 2019)(listing five sources of municipality liability under *Monell*). The District Courts are not municipalities or political subdivisions, *see* OKLA. STAT. tit. 51 § 152(10)-(11); *Steadfast, supra*, at 1253 (factors considered to determine whether an entity is an arm of the state), but an arm of the State as addressed by the preceding paragraph. Further, the challenged acts of judges[3] in individual criminal cases are not policy decisions for purposes of *Monell*. "[A] judge acting in his judicial capacity to enforce state law does not act as a municipal official or lawmaker." *Mackey v. Helfrich*, 442 F.App'x 948, 950 (5th Cir. 2011), *citing Pembaur v. Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292 (1986); *see Burns v. Mayes*, 369 F.App'x. 526, 531 (5th Cir. 2010), *quoting Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995) (per curiam) (A "local judge acting in his or her judicial capacity is not considered a local government official whose actions are attributable to the county."); *Granda v. City of St. Louis*, 472 F.3d 565, 569 (8th Cir. 2007) (A "judicial order incarcerating [plaintiff] was not a final policy decision of a type creating municipal liability under § 1983."). For these reasons, Plaintiffs have failed to state a claim for relief under §1983.

PROPOSITION III: PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR DECLARATORY RELIEF NOR A JUSTICIABLE CONTROVERSY.

Again, without waiving Eleventh Amendment immunity, Plaintiffs have failed to state a claim for declaratory relief. Plaintiffs in their Complaint seek a declaration that "the Cherokee Reservation has not been disestablished and therefore any action by the State of Oklahoma or its political

[3] Plaintiffs have not actually named any judges, but rather improperly seek relief from "District Courts".

subdivisions is void because the court would have lacked subject matter jurisdiction." *See* [Doc. 2 at p. 20, ¶ 85]. The Tenth Circuit has said that a declaratory judgment is not meant to proclaim liability for a past act, but to define the legal rights and obligations of the parties in anticipation of some future conduct. *See Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1266 (10th Cir. 2004) (McConnell, J., *concurring*) ("[A] declaratory judgment action involving past conduct that will not recur is not justiciable."); *Francis E. Heydt Co. v. United States*, 948 F.2d 672, 676–77 (10th Cir.1991). There is no other way to interpret the Complaint's request for relief than as one for a declaration about past acts such that Plaintiffs have failed to state a claim.

In the Response, Plaintiffs reframe their declaratory judgment claim as being sufficiently pled if the Court only declares that Cherokee Reservation has not been disestablished. *See* [Doc. 75 at p. 14]. However, a limited declaration on this one issue does not give rise to a justiciable case or controversy as it requires additional litigation. *See Columbian Financial Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1379-1381 (10th Cir. 2011) ("The [Supreme] Court made clear that generally one cannot bring a declaratory-judgment action just to resolve one isolated issue in a possible future controversy. A declaratory judgment that would not have practical consequences without later additional litigation is not proper."). Plaintiffs admit that this limited declaration would lead to a *habeas* petition. *See* [Doc. 75 at p. 14]. Therefore, the Court should not entertain Plaintiffs' reframed request as the Court lacks jurisdiction to make this type of declaration.

PROPOSITION IV: PLAINTIFFS' TORT CLAIMS ARE BARRED BY THE OKLAHOMA GOVERNMENTAL TORT CLAIMS ACT.

In their Response, Plaintiffs state in a conclusory fashion that the Oklahoma Governmental Tort Claims Act ("OGTCA") does not apply. Plaintiffs then cite the *Sholer* case again for the proposition that a claim for money had and received is not barred by the OGTCA. Plaintiffs do not address how the definition of "tort" has been amended by the Oklahoma State Legislature since the *Sholer* decision. The definition of "tort" has clearly been expanded by the Legislature who should be

given deference. *See Barrios v. Haskell County Public Facilities Authority; Foutch v. Turn Key Health*, 432 P.3d 233, 244 (Okla. 2018). Sovereign immunity is only abrogated as set forth by this act and compliance with the act is strictly required. *See* OKLA. STAT. tit. 51 § 152.1 and § 153 (Amended by Laws 2014, HB 2405, c. 77, § 2, emerg. eff. April 21, 2014; Amended by Laws 2015, HB 1681, c. 308, § 1, emerg. eff. May 12, 2015). Compliance with the OGTCA is a jurisdictional requirement, not just a pleading requirement, depriving this Court of subject matter jurisdiction over this claim. *See* [Doc. 18 at p. 11-15]. Plaintiffs' "money had and received" claim therefore fails because they did not comply with the OGTCA.

PROPOSITION V: PLAINTIFFS CANNOT RELY ON UNNAMED CLASS MEMBERS TO CREATE STANDING FOR CLAIMS.

"Article III of the Constitution limits federal judicial power to 'Cases' and 'Controversies.' A party that cannot present a case or controversy within the meaning of Article III does not have standing to sue in federal court." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013) (en banc) (*aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)). Standing goes to this court's jurisdiction; thus, whenever a party's "standing is unclear, we must consider it *sua sponte* to ensure there is an Article III case or controversy before us." *Id.* To have standing, a party must have suffered an injury—"an invasion of a legally protected interest"— that is caused "by the conduct complained of" and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "If at any point in the litigation the plaintiff ceases to meet all three requirements for constitutional standing, . . . the federal court must dismiss the case for lack of subject matter jurisdiction." *United States v. Ramos*, 695 F.3d 1035, 1046 (10th Cir. 2012) (quoting *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1302 (11th Cir. 2011)).

To establish Article III standing, plaintiff must establish that (1) plaintiff has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of each defendant; and (3) it is

likely, as opposed to merely speculative, that the injury will be redressed by the relief requested. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180–81, 120 S. Ct. 693 (2000); *Tandy v. City of Wichita,* 380 F.3d 1277, 1283 (10th Cir. 2004); *Hunnicutt v. Zeneca, Inc.*, Case No. 10-CV-708-TCK-TLW, 2012 WL 4321392, *2-*3 (N.D. Okla. Sept. 19, 2012) ("Where there are multiple defendants, the named plaintiff must establish standing with respect to each defendant."). The party seeking to invoke federal jurisdiction bears the burden of establishing all three elements of standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S. Ct. 2130 (1992). If any one of these three elements—injury, causation, and redressability— is absent, then plaintiff has no standing under Article III to assert his claim. Article III standing is determined as of time at which plaintiff's complaint was filed. *See Nova Health Systems v. Gandy,* 416 F.3d 1149, 1154–55 (10th Cir. 2005).

In the Tenth Circuit, the matter of standing must be determined before any class certification determination may proceed which includes any proposed application of the juridical link doctrine. *Hunnicutt v. Zeneca, Inc.*, Case No. 10-CV-708-TCK-TLW, 2012 WL 113680, *6 (N.D. Okla. Jan. 13, 2012) (citations omitted). Defendants have not been able to find case law wherein the Tenth Circuit, in the context of class certification, has adopted the juridical link doctrine. However, this doctrine cannot be substituted for standing analysis. *Hunnicutt v. Zeneca, Inc.*, Case No. 10-CV-708TCK-TLW, 2012 WL 4321392, *3 n.3 (N.D. Okla. Sept. 19, 2012); *see Allee v. Medrano*, 416 U.S. 802, 828-829 (1974) ("Standing cannot be acquired through the back door of a class action.")(citations omitted); *see also* 1 *Newberg on Class Actions* § 2:5 (5th ed.) ("In multidefendant class actions, the named plaintiffs must show that each defendant has harmed at least one of them. Generally, class representatives do not have standing to sue defendants who have not injured them even if those defendants have allegedly injured other class members.") (footnotes omitted).

Plaintiffs clearly are relying on unnamed putative class members alleged injuries to create standing against the District Courts, that are not Mayes County. *See* [Doc. 75 at p. 6]. This is not a proper means for establishing standing.

PROPOSITION VI: PLAINTIFFS HAVE IMPROPERLY REQUESTED LEAVE TO AMEND IN A PERFUNCTORY MANNER THAT SHOULD BE DENIED.

"A response to a motion may not also include a motion or a cross-motion made by the responding party." *See* LCvR 7.2(e). However, Plaintiffs, in Section X, [Doc. 28 at p. 28], "pray to be granted leave to amend the Complaint in order to state a claim based upon the orders of the court." This perfunctory request should be denied. *See, e.g., Graham v. Fearon*, 721 F.App'x 429, 439 (6th Cir. 2018) ("[B]ecause Plaintiffs' request was perfunctory and did not point to any additional factual allegations that would cure the complaint, the district court did not abuse its discretion in denying a motion to amend."); *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 12- 2652, 2017 WL 82391, at *20 (S.D.N.Y. Jan. 6, 2017) (denying leave to amend where the request was cursory and failed to indicate how the complaint's defects would be cured). Plaintiffs are not entitled to a directive from the district court "informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies." *Begala v. PNC Bank, Ohio*, N.A., 214 F.3d 776, 784 (6th Cir. 2000)); *see also Louisiana Sch. Employees' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 486 (6th Cir. 2010).

CONCLUSION

For the reasons set forth above and as previously set forth in the District Courts' Motion, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint. [Doc. 2].

Respectfully submitted,

s/ Stefanie E. Lawson
STEFANIE E. LAWSON, OBA#22422
ERIN M. MOORE, OBA #20787
Assistant Attorneys General
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105
Tele: (405) 521-3921 Fax:(405) 521-4518
Email: stefanie.lawson@oag.ok.gov
erin.moore@oag.ok.gov
Attorneys for Defendants The District Courts

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants with entries of appearance filed of record.

/s/Stefanie E. Lawson
Stefanie E. Lawson