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

FRANCIS A.L. ENGLEBRIGHT, and ROSELLA ENGLEBRIGHT, individually and as co-special administrators of the estate of FRANCIS A.L. ENGLEBRIGHT, JR., Plaintiffs, v. SHANNON BUHL, KODY FISHER, ERIN FAULKENBERRY, BRYAN SMITH, special administrator of the estate of BRIAN CATCHER, deceased, and UNITED STATES OF AMERICA, Defendants.	Case No.: 24-CV-552-CVE-CDL

MOTION TO DISMISS OF THE CHEROKEE DEFENDANTS

In their Amended Complaint ("Complaint," Dkt. No. 9), Plaintiffs Francis A.L. Englebright and Rosella Englebright allege that Cherokee Nation officers Shannon Buhl, Kody Fisher, Erin Faulkenberry, and Brian Catcher (the "Cherokee Defendants") violated Plaintiffs' constitutional rights and the rights of their son in connection with a November 2022 incident in which their son died. Sovereign immunity bars these claims. Moreover, Plaintiffs have failed to state a claim for relief against the Cherokee Defendants. Thus, the Court should dismiss all claims against the Cherokee Defendants.

FACTUAL ALLEGATIONS[1]

Plaintiffs allege that on or about November 29, 2022, their son, Francis A.L. Englebright, Jr. ("Decedent"), was shot and killed by "sharpshooters for the Cherokee Nation Marshal Service

[1] The Cherokee Defendants dispute the vast majority of the allegations in the Amended Complaint but recite some of these disputed allegations here for purposes of this Rule 12 motion only.

. . . .” Compl. ¶¶ 6, 12. Plaintiffs assert that Defendant Shannon Buhl was the Cherokee Nation Marshal who headed the group of law enforcement officers at the scene. *Id.* ¶ 7. They contend that Defendant Kody Fisher was the Cherokee Nation Assistant Marshal who was “second in charge at the scene.” *Id.* ¶ 8. Plaintiffs allege Defendant Erin Faulkenberry was a member of the Cherokee Nation Attorney General’s office who “was at the scene to direct the arrest of the decedent.” *Id.* ¶ 9. They assert that “Brian Catcher and/or others . . . . are the persons who . . . shot the decedent.” *Id.* ¶ 2.

Plaintiffs contend that in addition to killing Decedent, the Cherokee Defendants also violated their rights by handcuffing Mr. Englebright, removing Mrs. Englebright from the property, and entering the house and destroying Plaintiffs’ real and personal property. *Id.* ¶ 13.

Plaintiffs filed this action against the Cherokee Defendants and the United States of America, asserting that the Defendants “have violated Plaintiffs’ constitutional rights” and that the United States is liable under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*

ARGUMENTS AND AUTHORITIES

I. Sovereign immunity bars Plaintiffs’ claims against the Cherokee Defendants.

In 1831, Chief Justice John Marshall labeled Indian tribes “domestic dependent nations” who exercise inherent sovereign authority. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25 (1831). One of the “core aspects” of this sovereignty is the “‘common-law immunity from suit traditionally enjoyed by sovereign powers.’” *Mich. v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (citation omitted); *see Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 890 (1986) (noting that sovereign immunity is a “necessary corollary to Indian sovereignty and self-governance”). Thus, “an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its sovereign immunity.” *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998). The United States Supreme Court has “time

and time again" recognized that tribal sovereign immunity is "settled law" and has consistently dismissed suits brought against tribes without congressional authorization or a waiver by the tribe. *Bay Mills*, 572 U.S. at 789. Where, as here, sovereign immunity exists, a court must dismiss any claim against the tribe for lack of subject matter jurisdiction. *See E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302-03 (10th Cir. 2001) (holding that tribal sovereign immunity "is a matter of subject matter jurisdiction"); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007) ("Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1).").

It is also well established that a tribe's sovereign immunity extends to tribal officials and officers who are sued for actions taken in their official capacities. *See, e.g., Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1154 (10th Cir. 2011); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288, 1292-93 (10th Cir. 2008) ("Absent congressional abrogation or an express waiver by the tribe, sovereign immunity deprives the federal courts of jurisdiction to entertain lawsuits against an Indian tribe, its subdivisions, or its ***officials acting within their official capacities***." (emphasis added)); *Dry v. United States,* 235 F.3d 1249, 1253 (10th Cir. 2000) (dismissing all claims against tribal officials because "suits against tribes or ***tribal officials in their official capacity*** are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress." (emphasis added)). Indeed, federal courts routinely hold that sovereign immunity bars claims, including claims for excessive force, that are brought against tribal law enforcement officers for actions taken in their official capacities. *See, e.g.*, *Archambault v. United States*, 641 F. Supp. 3d 636, 644 (D.S.D. 2022); *Estate of Gonzales ex rel. Gonzales v. Brown*, 2014 WL 4748604, at *5 (N.D. Okla. Sept. 23, 2014) (Dowdell, J.);

Ouart v. Fleming, 2010 WL 1257827, at *6 (W.D. Okla. Mar. 26, 2010); *Lantry v. McMinn*, 2010 WL 11629661, at *7-9 (D. Nev. 2010).

The reason for this is simple. If tribal officers do not share in the tribe's sovereign immunity, then plaintiffs could circumvent tribal immunity by seeking relief from the tribe through its officers. *See Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997) (holding that members of the Osage Tribal Council were entitled to sovereign immunity because the relief requested would run against the tribe itself); *see Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269 (W.D. Okla. 2009) (concluding that monetary relief requested from a tribal official would run against the tribe, causing the claims to be dismissed under sovereign immunity), *aff'd*, 625 F.3d 1279 (10th Cir. 2010).

Here, the Complaint alleges constitutional violations occurred in connection with "law enforcement activity" undertaken by the Cherokee Defendants in their capacities as law enforcement officers of the Cherokee Nation. Compl. ¶¶ 7-13. Plaintiffs do not allege the Cherokee Defendants were acting outside their official capacities or authority in taking these actions. Nor do they purport to assert claims against the defendants in their individual capacities. The Cherokee Nation has not waived sovereign immunity for itself or its law enforcement officers, and Congress has not limited this immunity in any way.[2] Thus, sovereign immunity bars Plaintiffs' claims against the Cherokee Defendants, and the Court should dismiss the claims for lack of subject matter jurisdiction.

II. Plaintiffs have not stated a claim for relief against the Cherokee Defendants.

Even if sovereign immunity did not bar Plaintiffs' claims against the Cherokee Defendants, dismissal would still be required because Plaintiffs fail to state a cognizable claim

[2] Any congressional waiver of sovereign immunity must be unequivocal. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

for relief against those individuals. Aside from vague allegations of unconstitutional actions, Plaintiffs do not identify any statute or common-law claim under which they seek relief from the Cherokee Defendants. Nor do they allege facts supporting any claim. These omissions are glaring and compel dismissal.

A. Plaintiffs do not—and cannot—assert a claim under 42 U.S.C. § 1983.

Although 42 U.S.C. § 1983 is often used as a vehicle to remedy violations of constitutional rights, Plaintiffs' Complaint does not cite § 1983. Even if the Complaint were read to invoke § 1983, Plaintiffs do not have a viable claim under that statute because they do not allege the Cherokee Defendants acted under color of ***state*** law. To state a claim for relief under § 1983, a plaintiff must allege ***both*** that (1) "some person has deprived him of a federal right," ***and*** (2) "the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). "'The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1305 (10th Cir. 2001). Where, as here, a plaintiff alleges that tribal defendants acted pursuant to their authority under tribal law (not state law), a claim under § 1983 cannot lie. *See, e.g., Chavez v. Navajo Nation Tribal Courts,* 465 F. App'x 813 (10th Cir. 2012) (affirming dismissal of § 1983 complaint against tribal officials because the plaintiff alleged the officials acted under tribal law, not "under color of state law" as required by § 1983); *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (holding plaintiff failed to state claim against tribal officials under § 1983 "because they acted under color of tribal law as opposed to state law"): *Pounds v. Killion*, 35 F. App'x 819, 821 (10th Cir. 2002) (affirming dismissal of § 1983 claims brought against tribal officials in their individual capacities because the plaintiff did not allege the defendants "acted under color of

state law"); *Chavez v. Navajo Nation Tribal Courts,* 2011 WL 13174514, at *1, 2 (D.N.M. Sept. 14, 2011) (dismissing § 1983 claims against the Navajo Nation and Navajo courts because "those entities act under color of tribal law," not state law); *E.F.W. v. St. Stephen's Indian High Sch.,* 51 F. Supp. 2d 1217 (D. Wyo. 1999) ("It is well settled that a defendant's actions pursuant to Tribal authority are not 'under color of state law' for the purposes of maintaining an individual capacity suit against that defendant under 42 U.S.C. § 1983." (citing cases)). Thus, federal courts have held that § 1983 claims against tribal law enforcement officers should be dismissed unless the plaintiff alleges facts sufficient to show that the officers acted under color of state law. *See, e.g.*, *Archambault*, 641 F. Supp. 3d at 647; *Ouart*, 2010 WL 1257827, at *2; *Lantry*, 2010 WL 11629661, at *6.

Here, Plaintiffs do not allege the Cherokee Defendants acted under color of ***state*** law. Thus, even if they attempted to do so, Plaintiffs have failed to state a claim for relief under § 1983 against any of the Cherokee Defendants. The claims should be dismissed under Fed. R. Civ. P. 12(b)(6).

B. The Complaint does not allege the individual Defendants took actions that violated Plaintiffs' rights.

Even if Plaintiffs had otherwise pled a legally cognizable claim for relief against the Cherokee Defendants (which they have not), they have failed to allege that the conduct of these individuals caused the alleged harms.

A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim to relief is plausible on its face only if the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs' allegations fall far short of this standard.

First, Plaintiffs do not state a claim against Bryan Catcher's estate. Plaintiffs allege only "[u]pon information and belief" that Mr. Catcher "***and/or others*** were sharpshooters for the Cherokee Nation Marshall Service and are the persons who . . . shot the Decedent." Compl. ¶ 12 (emphasis added). This is the ***only*** allegation as to Mr. Catcher's purported conduct, and it falls far short of alleging that Mr. Catcher caused their son's death. At most, Plaintiffs allege that he ***may*** have fired the fatal shot, but this is not sufficient to state a claim under *Twombly* and *Iqbal*.

Second, the allegations of conduct by the remaining Cherokee Defendants are even less specific. Other than generally alleging that Marshals Buhl and Fisher and Ms. Falkenberry "jointly direct[ed] all activity" at the scene, Compl. ¶ 10, Plaintiffs do not assert that any of these individuals took a specific action that violated their constitutional rights or caused their alleged harms. Instead, they allege—"[u]pon information and belief"—that "the triumvirate" directed the sharpshooters to shoot Decedent and "acted in agreement and consultation as to the activity that took place at the scene, which resulted in decedent's death." *Id.* ¶ 13. The Complaint attributes no actions or instructions to any specific Defendant, nor does it provide facts to support these conclusory claims. As such, it fails to state a claim for relief against these Defendants.

CONCLUSION

For the reasons set forth above, Plaintiffs' claims against the Cherokee Defendants should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2025, 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 following ECF registrant:

Steven R. Hickman, *info@frasierlaw.com*

/s/ R. Trent Shores
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