

**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.

Case No. 24-CV-552-CVE-CDL

SHANNON BUHL,
KODY FISHER,
ERIN FAULKENBERRY,
BRYAN SMITH, special administrator of
the estate of BRIAN CATCHER, deceased,
and
UNITED STATES OF AMERICA,

Defendants.

MOTION TO DISMISS BY DEFENDANT UNITED STATES OF AMERICA

The Defendant, United States of America, by and through Clinton J. Johnson,
United States Attorney for the Northern District of Oklahoma, and Rachel D.
Parrilli, Assistant United States Attorney, requests this Court dismiss this action
pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

I. BACKGROUND

This case arises from the attempted lawful arrest of Frances Englebright, Jr.
Englebright was accused of Rape – First Degree, Child Sexual Abuse and a warrant
was issued for his arrest. Cherokee Marshalls attempted to arrest Englebright, but
after hours of standoff and repeated attempts to extract the suspect, he exited the

residence with a firearm and was shot by multiple officers. Plaintiffs, parents of Mr. Englebright, now sue various individual officers of the Cherokee Nation and the United States of America for violations of the Constitution and citing the Federal Tort Claims Act (FTCA). Dkt. 9. However, the United States has not waived its sovereign immunity to be sued for alleged constitutional violations and Plaintiffs fail to state any tort claim under the FTCA. As such, the Plaintiffs have not met their burden to establish subject matter jurisdiction and the case against the United States should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and Rule 12(b)(6).

II. STANDARDS OF REVIEW

A. Standard for dismissal under Rule 12(b)(1)

Fed. R. Civ. P. 12(b)(1) analysis concerns “the very power of the district court” to hear a claim. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002) (quoting *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999)). Federal courts are courts of limited jurisdiction and are empowered to act on claims against the United States or its agencies only in those specific instances when the Constitution or a statute unequivocally waives the federal government’s sovereign immunity from suit. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Castenada v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994). The plaintiff bears the burden of establishing that subject-matter jurisdiction is proper. *Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291, 1299 (D. Kan. 2004). When jurisdiction is challenged, the plaintiff bears the burden of showing why the case should not be dismissed. *Id.* The Court has wide discretion to consider affidavits and other documents to resolve disputed

jurisdictional facts, and reference to such evidence does not convert a motion to dismiss into a motion for summary judgment. *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1296 (10th Cir. 2003) (citations omitted).

B. Standard for dismissal under Rule 12(b)(6)

Rule 12(b)(6) analysis requires courts to determine whether the complaint is legally and factually sufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009). “A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 678 (quotations omitted). “Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.” *Id.* (quotations omitted). The standard requires “enough facts to state a claim to relief that is plausible on its face,” and not merely “speculative.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (citations omitted). The Court must accept all well-pleaded, non-conclusory allegations as true and construe them in the light most favorable to the plaintiff. *Id.* at 555. However, the Court “need not accept mere conclusions characterizing pleaded facts or ‘unwarranted inferences drawn from the facts or footless conclusions of law predicated upon them.’” *Torres v. Pueblo Bd. of Cnty. Comm’rs*, 229 F.3d 1165, 2000 WL 1346347, at *1 (10th Cir. 2000) (quoting *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990)).

III. ALLEGATIONS IN THE FIRST AMENDED COMPLAINT

Plaintiffs allege:

6. On or about the 29th day November, 2022, Defendants, and each of them, violated the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution by directing and conducting unreasonable searches and seizures upon Plaintiffs and their decedent and further exercised excessive force in directing and conducting the shooting and killing of Francis A.L. Englebright, Jr., who was unarmed and not dangerous, and in destruction of Plaintiffs' real and personal property. *See* Dkt. 9, page 2.

14. Defendant USA is liable for the actions of members of the Cherokee Nation Marshal Service by virtue of 25 CFR and their contract under the Indian Self-Determination and Education Assistance Act. 25 CFR 900.180 *et seq.*; 25 CFR 1000.270 *et seq.* *See* Dkt 9, page 3.

IV. ARGUMENTS & AUTHORITIES

A. The United States has not waived its sovereign immunity for Plaintiffs' only alleged claims of constitutional violations.

The United States has not waived its sovereign immunity for any alleged violation of the United States Constitution. The Federal Tort Claims Act does not apply to claims “brought for a violation of the Constitution of the United States.” 28 U.S.C. § 2679(b)(2)(A). Indeed, in *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471 (1994), the Supreme Court explicitly held that a “constitutional tort claim is not ‘cognizable’” under the FTCA. *Id.* at 477–78 (quoting *Loeffler v. Frank*, 486 U.S. 549,

562 (1988) (referring to 28 U.S.C. § 2679)). Plaintiffs allege that the individually named Defendants, played a role in the attempt to apprehend Englebright pursuant to a warrant for Rape and Child Sexual Abuse and in the course of that event, violated the constitutional rights of the Plaintiffs. However, the United States, even if liable for the actions of the other named Defendants, cannot be liable for alleged constitutional violations and has expressly not waived its sovereign immunity for the only allegations Plaintiffs claim against the United States. Without a waiver, sovereign immunity shields the United States from suit. *Loeffler v. Frank*, 486 U.S. 549, 554, 108 S.Ct. 1965, 1968, 100 L.Ed.2d 549 (1988); *Federal Housing Administration v. Burr*, 309 U.S. 242, 244, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940). Sovereign immunity is jurisdictional in nature. Indeed, the “terms of [the United States’] consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *United States v. Sherwood*, 312 U.S. 584 (1941). Sovereign immunity means that the United States may not be sued without its consent and the existence of consent is a prerequisite for jurisdiction. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The Court in *Mitchell* explained, “[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.” *Id.* Seeing as the only claims are constitutional claims, the United States has not waived its sovereign immunity and the case should be dismissed.

B. Plaintiffs fail to allege a state law tort claim and thus fail to secure subject matter jurisdiction under the FTCA.

The FTCA requires the application of the tort law of the state in which the alleged tortious conduct occurred for substantive liability and defenses. See 28 U.S.C. § 1346(b)(1); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 478 (1994). Since the incident giving rise to Plaintiffs' injuries occurred in Oklahoma, Oklahoma tort law applies to these claims. *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1117 (10th Cir. 2004). Instead of referring to or alleging any claims brought under Oklahoma law of torts, the complaint alleges only violations of the U.S. Constitution. Specifically, paragraph 6 alleges that the defendants violated the Fourth, Fifth and Fourteenth Amendments through unreasonable searches and seizures and use of excessive force. Nowhere in the Amended Complaint do the Plaintiffs allege any state law tort claims. Again, constitutional violations are not cognizable claims under the FTCA. See *F.D.I.C. v. Meyer*, 510 U.S. 471, 477-478 (1994); *D'Addabbo v. United States*, 316 F. App'x 722, 726 (10th Cir. 2008) ("[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims.") (citations and internal quotations omitted); *Lankford v. United States Dep't of Justice*, No. 1:17-CV-668 WJ/GBW, 2017 WL 5564568, at *4 (D.N.M. Nov. 17, 2017) ("However, the FTCA does not provide a cause of action for constitutional torts, such as violations of due process."); *Pesnell v. United States*, 64 F. App'x 73, 74–75 (9th Cir. 2003) ("The FTCA does not include a waiver of sovereign immunity for constitutional tort claims."); *United States*, 390 Fed. Appx. 326, 329 (5th Cir. 2010)

(“[T]he United States has not, in the FTCA or elsewhere, waived sovereign immunity with regard to alleged civil rights or constitutional violations, i.e., violations of due process.”) Because it appears that Plaintiff has alleged only constitutional tort claims against the United States and no state law tort claim, Plaintiffs have truly failed to state a claim for which relief can be granted and this Court should dismiss the United States pursuant to Fed. R. Civ. P. 12(b)(6).

V. CONCLUSION

The Plaintiffs’ Amended Complaint, as currently constituted, alleges only violations of the U.S. Constitution, which claims are not viable under the FTCA. The Amended Complaint also fails to identify any state law tort claim that would waive the sovereign immunity of the United States. This case should be dismissed.

Respectfully submitted,

UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2025, the foregoing document was electronically transmitted to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record.

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