UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EDUARDO HOLGUIN,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. 3:21-CV-00067-DB
	§	
YSLETA DEL SUR PUEBLO, TIGUA TRIBAL POLICE DEPARTMENT, ERIKA AVILA, RAUL CANDELARIA, and OFFICERS JOHN AND JANE DOE,	§	
	§	
Defendants.	§	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS PLAINTIFF'S ORIGINAL PETITION

COME NOW, Defendants Ysleta del Sur Pueblo, Tigua Tribal Police Department, Erika Avila, Raul Candelaria, and Officers John and Jane Doe (collectively "Defendants") and file this Reply to Plaintiff's Response to Motion to Dismiss the Original Petition filed by Plaintiff Eduardo Holguin ("Holguin") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and would respectfully show the Court as follows:

I.
INTRODUCTION

1. Holguin did not abide by the Court's earlier admonishment to "investigate the law underlying his claims" and the explicit warning that "continued submission of frivolous pleadings may result in sanctions."[1] (*See* ECF No. 9). In spite of these warnings, Holguin rehashed the merits of his motion to remand, wrongfully accusing Defendants of "playing fast and loose with the Rules

[1] In his Response, Holguin maintains that Defendants have "grossly misrepresent[ed] applicable law and the facts of this case" to the Court. (Pl.'s Resp. to Defs.' Mot. to Dismiss ¶ 1). Holguin has equally claimed that "Defendants' filings [are] rife with logical inconsistencies, demonstrably false factual representations never contained in Plaintiff's petition, conveniently clipped excerpts from applicable caselaw coupled with gross misrepresentations of their facts and holdings." (*Id.*). Despite making these outlandish claims, Holguin did not provide any evidence to the Court in his Response to substantiate his allegations.

of Civil Procedure to hoodwink this Court into improperly disposing of Plaintiff's claims (i.e., removing a case stating this Court has subject matter jurisdiction and subsequently representing that this Court lacks subject matter jurisdiction)." (*See* ECF No. 9); *see also* Pl.'s Resp. to Defs.' Mot. to Dismiss ¶ 1). However, in denying Holguin's motion to remand, the Court correctly explained that "[s]overeign immunity may later act to destroy a court's subject-matter jurisdiction but will not deprive a court of removal jurisdiction, which exists whenever 'a federal court would have original jurisdiction had [the plaintiff] initially filed it there." (ECF No. 9) (quoting *Wis. Dep't of Corr. V. Schacht*, 524 U.S. 381, 390 (1998)). Once again, because Holguin pled section 1983 claims, the Court has federal-question jurisdiction under 28 U.S.C. § 1331. Defendants were not required to prove that Holguin had Article III standing at the time of removal.

2. Furthermore, Holguin misrepresented to the Court that the Texas Supreme Court issued an emergency order that tolled the statute of limitations for his causes of action until February 1, 2021, due to the COVID-19 pandemic. Even though he does not cite or attach the order to his Response, it appears that Holguin may be relying on the 29th Emergency Order issued by the Texas Supreme Court on November 11, 2020. However, on its face, the emergency order does not explicitly toll any statutes of limitations. Holguin did not offer any evidence that any court or legal commentator has interpreted the 29th Emergency Order issued by the Texas Supreme Court to do so. Therefore, because Holguin filed this action past the applicable two-year statute of limitations for section 1983 and gross negligence claims, the Court should dismiss this case.

3. Finally, Holguin failed to address several of Defendants' arguments in his Response. Nowhere in his Response does Holguin address Defendants' argument that neither article 1, section 19 of the Texas Constitution, 28 U.S.C. § 1321, nor section 1983 effectively waive an Indian tribe's sovereign immunity for these claims. Holguin also failed to rebut that neither the Texas nor U.S. Constitutions apply to Indian tribes. Moreover, Holguin did not address Defendants' claim that they had the legal authority to stop and seize him under *Schmuck* and *Patch* to, at a minimum, conduct an

investigatory stop to determine whether Holguin was a tribal member. In fact, the Original Petition is silent regarding Holguin's tribal status. There are no allegations in the Original Petition—and Holguin submitted no evidence in his Response—demonstrating that he is a non-tribal member. Thus, absent any allegations in the Original Petition or evidence adduced by Holguin, the Court cannot categorically find that Holguin is a non-tribal member. In addition, Holguin did not deny that he received notice of the summons to appear before tribal court to address the traffic infractions and that he had a meaningful opportunity to be heard. Holguin failed to dispute that the Tribe never seized his vehicle and that he has not paid any traffic fines, thus putting into question whether he, in fact, has been deprived of a property interest in violation of his procedural and substantive due process rights. Accordingly, the Court should grant Defendants' motion to dismiss.

II.
ARGUMENT

4. Holguin did not offer any proof to the Court that the traffic infraction occurred outside the Reservation. As proof that the traffic infraction occurred on the Reservation, Defendants offered in their Motion the statement of the tribal police. Absent any proof rebutting this evidence, the Court should deny Holguin's claims.

A. HOLGUIN HAS FAILED TO REBUT THAT THE TRAFFIC INFRACTION OCCURRED ON THE INDIAN RESERVATION

5. Holguin violated the Tribe's traffic laws while driving on the Reservation. According to tribal police, Holguin was driving westbound on the 9100 block of Socorro Road while using his cell phone:

> **This incident occurred within boundaries of District 1 in Ysleta Del Sur Pueblo Indian Reservation.**

* * *

> **On time and date above I, Officer E. Avila #217 working for YDSP Tribal Police while conducting routine patrol witnessed D-1 (Holguin) driving westbound on the 9100 Block of Socorro in V-1 (Texas Handicap Plates: 6MCGM) while using his cell phone and I**

(Defs.' Ex. E: YDSP Report) (emphasis added).

6. The 9100 block of Socorro Road is in the Reservation. Holguin has not provided the Court any evidence to rebut Defendants' claim—not even a sworn affidavit from him. Indeed, the tribal court, which is on the Reservation, is also on Socorro Road—only a few blocks away from where the traffic infraction occurred on 9100 Socorro Road:

SUMMONS

YOU ARE HEREBY NOTIFIED that your presence is ordered before the Tribal Court of Ysleta del Sur Pueblo at the following time and place:

On 01/30/2019 at 04:00 P. M., at the Judicial Facility of the Ysleta del Sur Pueblo Reservation located at 9241 Socorro Road, El Paso, Texas 79907, to provide testimony for pending case of YSLETA DEL SUR PUEBLO v. EDUARDO HOLGUIN for a violation of the Ysleta del Sur Pueblo Tribal Code of Laws. If you have any inquiries regarding this matter please feel free to contact Tribal Court.

(Defs' Ex. B: Summons) (emphasis added).

7. Indeed, through Google Maps and the zoning map from the City of El Paso Planning Department, the Court can take judicial notice how Socorro Road traverses through the Reservation.[2]

[2] Defendants respectfully request the Court to take judicial notice of Defendants' Exhibit F, which consists of a zoning map from the City of El Paso Planning Department and Google Maps depicting the address and location of the sites where the traffic infraction occurred, the Tribe's government offices, and the tribal court, all of which are within the Reservation. FED. R. EVID. 201(b). Federal courts have routinely taken "judicial notice of a Google map and satellite image as a 'source[ ] whose accuracy cannot reasonably be questioned.'" *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2020) (quoting *United States v. Perea–Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012); *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1218 n.2 (10th Cir.2007) (taking judicial notice of an online distance calculation that relied on Google Maps data); *United States v. Piggie*, 622 F.2d 486, 488 (10th Cir. 1980); *Crandall v. Starbucks Corp.*, 249 F. Supp. 3d 1087, 1099 (N.D. Cal. 2017); *American Atheists, Inc. v. Levy County*, 2017 WL 6003077, at *1 n.2 (N.D. Fla. Dec. 3, 2017); *Magee v. Glacier Water Services, Inc.*, Cause No. 16-4364, 2017 WL 396287, at *11 n. 29 (E.D. La. Jan. 30, 2017); *United States v. Brown*, 636 F. Supp. 2d 1116, 1124 n. 1 (D. Nev. 2009); *United States v. Sessa*, 2011 WL 256330 (E.D.N.Y. 2011); *see also* David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 COLO. LAW. 19, 24 (2010) ("Most courts are willing to take judicial notice of geographical facts and distances from private commercial websites such as MapQuest, Google Maps, and Google Earth."). For a journalistic description of Google Maps' process to prove its reliability, please see Alexis C. Madrigal, *How Google Builds its Maps—and What it Means for the Future of Everything*, THE ATLANTIC (Sept. 6, 2012).

(Defs.' Ex. F: Zoning and Google Maps). As seen in the attached Google Maps, the 9100 block of Socorro Road is on the Reservation and less than 0.50 miles from the tribal court and the offices of the Tribe.[3] (Defs.' Ex. F: Zoning and Google Maps).

8. Socorro Road is in Indian Country. As defined by 18 U.S.C. § 1151, "Indian Country" is defined as "all land within the limit of any Indian reservation . . . , **including rights-of-way running through the reservation**." 18 U.S.C. § 1151 (emphasis added); *see, e.g.*, *DeCoteau v. Dist. County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975) (land within reservation is subject to tribal and federal jurisdiction including rights-of-way); *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991); *Ortiz–Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975) ("Rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police.") (citing *Gourneau v. Smith*, 207 N.W.2d 256 (N.D. 1973)); *Enriquez v. Superior Court*, 565 P.2d 522 (Ariz. Ct. App. 1977) (granting of easement for public highway running through reservation does not alter status as "Indian country"); *Bressi v. Ford*, 575 F.3d 891, 896 (9th Cir. 2009); COHEN'S HANDBOOK OF FEDERAL LAW, § 4.01[2][e] at 221–22 (2012 ed.) ("Access by . . . the public on federal roads would seem to be subject to reasonable regulation by the tribe if a significant tribal interest, such as health and safety, requires that access be limited."). In the end, dismissal is warranted because Holguin's allegations, together with Defendants' undisputed facts, do not establish the Court has subject-matter jurisdiction. *See Saraw P'ship v. United States*, 67 F.3d 567, 569 (5th Cir. 1995). Because Holguin has not offered any

[3]For an online version of Exhibit F of the Google Maps and City of El Paso Planning Department, please see the following links: http://gis.elpasotexas.gov/planning/index.html (last visited on May 16, 2021); https://www.google.com/maps/dir/31.6892961,-106.3279093/9241+Socorro+Rd,+El+Paso,+TX+79907/@31.689241,-106.325888,447m/data=!3m1!1e3!4m9!4m8!1m0!1m5!1m1!1s0x86e742c2a3c5afc5:0x7e4ad2b3327d85e0!2m2!1d-106.3232649!2d31.6876051!3e0; (last visited on May 16, 2021); https://www.google.com/maps/@31.6890966,-106.3301657,232a,35y,90h,48.24t/data=!3m1!1e3 (last visited on May 16, 2021).

evidence to controvert Defendants' claim that the traffic infraction occurred on the Reservation, the Court should dismiss his claims for lack of subject-matter jurisdiction.

9. Yet, even assuming that Socorro Road was outside or not part of the Reservation, the Supreme Court has found that Indian tribes, like the Tribe here, still retain sovereign immunity for off-reservation activities or matters involving non-tribal members. *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 785 (2014) (finding that Indian tribe retained sovereign immunity for casino gambling activities outside Indian lands); *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) (holding that Indian tribe had immunity despite entering into promissory note outside the reservation and finding that the Supreme Court has "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred."); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (recognizing sovereign immunity from suit over taxation of cigarette sales to non-tribal members). Accordingly, the Court should dismiss this case.

B. HOLGUIN HAS NEITHER ALLEGED IN HIS ORIGINAL PETITION—NOR PROVEN IN HIS RESPONSE—THAT HE IS A NON-TRIBAL MEMBER

10. Holguin contends that the "facts as alleged clearly establish that [he] never entered the reservation, and it is undisputed that he is a non-member." (Pl.'s Resp. to Defs.' Mot. to Dismiss ¶ 32). Both claims are untrue. Indeed, nowhere in Holguin's Original Petition is there an allegation that Holguin is *not* a member of the Tribe. Without an allegation in his Original Petition or any evidence attached to his Response, Holguin's tribal status is unknown. In fact, this was precisely the issue encountered by tribal police during the traffic stop. As noted by tribal police in their report and as admitted by Holguin in his Original Petition, he refused to identify himself during the traffic stop:

> moving his hands in and out of the window. I attempted to explain that Tribal Police does have jurisdiction on Socorro and questioned if he is refusing to provide identification. D-1 (Holguin) continued to talk over me stating I did not have any authority and fled the scene

* * *

> After Plaintiff Holguin safely parked, TTPD Officer Jane Doe approached Plaintiff Holguin's driver side window, asked Plaintiff to identify himself, and provide proof of his identity. Plaintiff Holguin, admittedly with some colorful language, refused the TTPD demand

(*See* Defs.' Ex. E: YDSP Report; *see also* Pl.'s Orig. Pet. p. 4) (emphasis added).

11. Regardless, even if he is not a member of the Tribe, Defendants still had the right to conduct an investigatory stop. In his Response, Holguin did not dispute or otherwise distinguish *Schmuck* or *Patch*, both of which held that tribal and state police may lawfully conduct traffic stops on an Indian reservation to, at a minimum, ascertain the tribal status of the driver. Because Holguin refused to provide any identification, Defendants did not know the tribal status of Holguin at the time of the traffic stop.

12. Despite not alleging or proving his non-tribal status, Holguin maintains that the Tribe cannot govern the conduct of nonmembers on Socorro Road. (Pl.'s Resp. to Defs.' Mot. to Dismiss ¶ 32). In making this proposition, Holguin relies on *Strate*. However, the issues addressed in *Strate* are entirely different from the issues before the Court. *Strate* concerned "the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members." *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997). Here, contrary to *Strate*, the defendants are tribal members and this case is not one for personal injury. More importantly, in *Strate*, the Supreme Court favorably cited *Schmuck* and cautioned that it did not question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway:

> **We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway**, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law. *Cf. State v. Schmuck*, 121 Wash. 2d 373, 390, 850 P.2d 1332, 1341 (en banc) (recognizing that a limited tribal power "to stop and detain alleged offenders in no way confers an unlimited authority to regulate the right of the public to travel on the Reservation's roads"), *cert. denied*, 510 U.S. 931, 114 S. Ct. 343, 126 L.Ed.2d 308 (1993).

Strate, 520 U.S. 438, 456 n.11 (emphasis added).

13. Indeed, the Supreme Court in *Montana v. United States* held that Indian tribes may, in some circumstances, govern the conduct of non-tribal members on Indian reservations. 450 U.S. 544 (1981). The Court found that "Indian tribes retain inherent sovereign power to exercise some forms of *civil jurisdiction* over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565 (emphasis added). A tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* The traffic citations issued here by the Tribe against Holguin are civil in nature.

YSLETA DEL SUR PUEBLO
TRIBAL COURT

YSLETA DEL SUR PUEBLO) CASE NO. 18YDSP1523 - TJD1801523
Petitioner)
v.) CIVIL INFRACTION FINDING ORDER
HOLGUIN,EDUARDO)
Respondent)

The above-named Respondent came before the Court on the 30th day of January, 2019 charged with the following offense(s):

(Defs.' Ex. C: Default Judgment) (emphasis added). Therefore, by driving while on his cell phone, engaging in reckless driving, evading tribal police, and endangering the tribal members on the Reservation, the Tribe had civil jurisdiction over Holguin's conduct because it affected the health and welfare of the Tribe, even assuming he is not a tribal member.

C. DEFENDANTS HAVE SOVEREIGN AND/OR QUALIFIED IMMUNITY

14. Holguin alleges that his allegations "establish *clear constitutional violations* involving the Defendants' misuse of a police force to perform off-reservation pretextual stops of nonmember citizens and the subsequent misuse of a court system operating outside its clearly established jurisdictional boundaries." (Pl.'s Resp. to Defs.' Mot. to Dismiss ¶ 31) (emphasis added). However, even assuming that section 1983 applies to Defendants, which it does not, they would be entitled to qualified immunity. Courts "evaluate qualified immunity under a two-part test: (1) 'whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right,' and (2) 'whether the right

at issue was clearly established at the time of [the] defendant's alleged misconduct.'" *Marquez v. Garnett*, 567 Fed. Appx. 214, 216 (5th Cir. 2014).

15. Here, the facts in the Original Petition do not make out a violation of constitutional right because the U.S. Constitution does not apply to Indian tribes, agencies, or officials. *Santa Clara Pueblo*, 436 U.S. at 56; *see Kaul v. Battese*, No. 03-4203-SAC, 2004 WL 1732309 (D. Kan. July 27, 2004). Moreover, neither Indian tribes nor their tribal officials are a "person" acting under color of state law to make a cognizable claim under section 1983. *See, e.g., Inyo Cnty., Cal. v. Paiute–Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 704 (2003). In addition, Holguin has not proven that any right at issue was "clearly established" at the time of Defendants' alleged misconduct. To the contrary, as previously noted, *Schmuck* and *Patch* allow tribal police to conduct stops for traffic violations on Indian reservations or involving non-tribal members to determine, at a minimum, the tribal status of the driver. Holguin did not dispute this in his Response. Furthermore, Holguin concedes in his Original Petition that he received a summons notifying him of the hearing in tribal court regarding his traffic infractions. (Pl.'s Orig. Pet. p. 6). Yet, despite receiving notice and having an opportunity to be heard, Holguin opted not to appear before the tribal court. (*Id.*). In his Original Petition, Holguin claims that he was entitled to a forfeiture proceeding. However, this is not a clearly establish right given that tribal courts can exercise in rem jurisdiction against non-tribal members. *See, e.g., Scott v. Doe*, 199 Wash. App. 1039 (2017). As with all other matters, Holguin did not dispute this. Accordingly, the Court should dismiss this case.

D. HOLGUIN'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

16. Finally, even if the Court reaches the merits, Holguin's claims are barred by the two-year statute of limitations. In his Response, Holguin misrepresented to the Court that the Texas Supreme Court issued an emergency order that tolled the statute of limitations for his causes of action until February 1, 2021, due to the COVID-19 pandemic. Even though he does not cite or attach the

order to his Response, it appears that Holguin may be relying on the 29th Emergency Order issued by the Texas Supreme Court on November 11, 2020, which stated as follows:

> Subject only to constitutional limitations, **all courts in Texas may** in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:
>
> a. except as provided in paragraph (b), **modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than February 1, 2021**

https://www.txcourts.gov/media/1450050/209135.pdf (last visited on May 16, 2021) (emphasis added).

17. The above order does not explicitly state that it is tolling the statutes of limitations for Texas causes of action. It only modified or suspended certain deadlines and procedures. Admittedly, in prior emergency orders (i.e., the 12th and 21st Emergency Orders), the Texas Supreme Court did toll the statutes of limitations: at first until July 15, 2020, and then to September 15, 2020. However, in those prior orders—contrary to the 29th Emergency Order, the Texas Supreme Court expressly said so:

> **Any deadline for the filing or service of any civil case that falls on a day between March 13, 2020, and June 1, 2020, is extended until July 15, 2020.** This does not include deadlines for perfecting appeal or for other appellate proceedings, requests for relief from which should be directed to the court involved and should be generously granted.

https://www.txcourts.gov/media/1446470/209059.pdf (last visited May 16, 2021) (emphasis added).

> **Any deadline for the filing or service of any civil case that falls on a day between March 13, 2020, and September 1, 2020, is extended until September 15, 2020.** This does not include deadlines for perfecting appeal or for other appellate proceedings, requests for relief from which should be directed to the court involved and should be generously granted.

https://www.txcourts.gov/media/1449546/209091.pdf (last visited May 16, 2021) (emphasis added).

18. The 29th Emergency Order that Holguin apparently relies upon does not have language similar to the 12th and 21st Emergency Orders above explicitly tolling the statutes of limitations. Absent any tolling from the Texas Supreme Court, Holguin's claims are barred by the statute of limitations as they accrued on November 28, 2018, when tribal police stopped and cited

him after he was driving on his cell phone on the Reservation. (Pl.'s Orig. Pet. p. 4). Holguin received a summons on January 10, 2019, requesting him to appear to defend these charges in tribal court. At that time—at the latest, Holguin knew or should have known of the alleged injury forming the basis of his complaint. *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989). Because he waited until February 1, 2021, to file suit, Holguin's claims are entirely barred by the statute of limitations.

III.
REQUEST FOR RELIEF

Accordingly, for these reasons, Defendants Ysleta del Sur Pueblo, Tigua Tribal Police Department, Erika Avila, Raul Candelaria, and Officers John and Jane Doe respectfully request the Court to grant their Motion to Dismiss Plaintiff's Original Petition; dismiss the case for lack of subject-matter jurisdiction and/or for failure to state a claim upon which relief may be granted; and grant Defendants such other and further relief, at law or in equity, to which Defendants may be justly entitled.

Respectfully submitted,

SCOTTHULSE PC
1100 Chase Tower
201 E. Main St.
P.O. Box 99123
El Paso, Texas 79999-9123
(915) 533-2493
(915) 546-8333 Telecopier

By: */s/ Francisco J. Ortega*
FRANCISCO J. ORTEGA
fort@scotthulse.com
State Bar No. 24060365
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I filed this document electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing on this 17th day of May, 2021:

Adam Setra
ADAM SETRA LAW, PLLC
701 Magoffin Ave.
El Paso, Texas 79901
Attorney for Plaintiff

/s/ Francisco J. Ortega
FRANCISCO J. ORTEGA