

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JUSTIN HOOPER,

Plaintiff/Appellant,

v.

CITY OF TULSA,

Defendant/Appellee.

Case No. 22-5034

SUPPLEMENTAL BRIEF BY APPELLEE CITY OF TULSA

On Appeal from the United States District Court
For The Northern District of Oklahoma
The Honorable William P. Johnson, United States District Judge
District Court Case No. 21-CV-165-WPJ-JFJ

RESPECTFULLY SUBMITTED,

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May 9, 2023

Appellee City of Tulsa does not dispute that Appellant Justin Hooper has met his burden of proof at the pleading stage to demonstrate standing to bring the declaratory judgment action presently on appeal before this Court.

In evaluating whether the Plaintiff has established a justiciable case such that the Court has subject matter jurisdiction to decide the merits, the Court looks to “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant relief.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 at 127, 127 S. Ct. 764, 771, 166 L. Ed. 2d 604 (2007)(internal quotation omitted) Cases on this issue out of the United States Supreme Court require “that the dispute be ‘definite and concrete, touching the legal relations of parties having adverse legal interests’; and that it be ‘real and substantial’ and ‘admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’” *Id.*

In this case, the Appellant has alleged that he remains under continued threat of prosecution by the City of Tulsa for violations of City ordinances. The Supreme Court has made clear that “where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.” *Id.* at 128 – 129. “The plaintiff’s own action (or inaction) in failing to violate

the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.” *Id.*

When enacted in 1898, Section 14 of the Curtis Act provided various rights and privileges to municipalities. Initially, Section 14 established a mechanism for pre-statehood cities and towns to incorporate pursuant to the Curtis Act and, once done, those cities “shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas.” However, Section 14 did more than just incorporate the laws of the State of Arkansas to these covered cities. This section of the Curtis Act established a procedure for elections and schools.

Section 14 also established that “all inhabitants of such cities and towns, without regard to race, ***shall be subject to all laws and ordinances*** of such city or town governments, and shall have equal rights, privileges, and protection therein” §14 (emphasis added).

While the Appellant’s speeding ticket and subsequent prosecution by the City sparked the present lawsuit challenging the City’s jurisdiction over Indians under the Curtis Act, the question of whether the City can enforce its municipal ordinances against Indians covers a much larger range of conduct than just traffic violations.

It is imperative that the City be able to enforce its ordinances against **all** inhabitants because of the wide variety of conduct that is covered under City ordinances. For example, building codes (Title 51), electrical codes (Title 52), mechanical codes (Title 59), plumbing codes (Title 56), health codes (Title 17) and

fire codes (Titles 13 and 14) are set by City ordinances and are enforceable by misdemeanor prosecution in municipal court. Noise and nuisance ordinances (Title 24 and 27) are also set by the City. Additionally, there are ordinances that regulate where you can and cannot discharge a firearm in the City (Title 27) and what kind of animals you can keep within City limits (Title 2).

The City agrees with the Appellant that many aspects of his daily life are likely subject to potential enforcement of municipal ordinances. Even actions such as jay walking or failing to yield to a pedestrian in a cross walk would subject the Appellant to potential prosecution in municipal court for violation of City ordinances (Title 37).

In other words, the threat of government action or prosecution by the municipality is continuing and imminent and thus, sufficient for Appellant to satisfy the standing requirements to allow this Court to reach the merits of this case.

Appellant, in his supplemental briefing, states that the City “has not disavowed any intention of exercising jurisdiction over Mr. Hooper for those violations.” [App. Supp. Brief, at p. 8]. The City agrees that it has not, and has no intention to, disavow any rights to enforce its ordinances. To do so would create safety issues amongst its residents and visitors as it would no longer have the ability to enforce building or electrical codes against Indians in order to ensure safe structures. It would lose the ability to enforce noise ordinances or nuisance ordinances which would allow citizens of Tulsa to freely disturb entire neighborhoods simply because they are Indian. A good example of the safety issues that would be created were the city to “disavow” its

right to enforce its ordinances is seen in the case of *City of Tulsa v. Marvin Keith Stitt*, currently on appeal to the Oklahoma Court of Criminal Appeals. (Case no. M-2022-984) In that case, Mr. Stitt was driving 78 miles per hour in a posted 50 miles-per-hour zone, which falls within the City's ordinance penalizing Aggravated Speeding. Mr. Stitt is seen on the officer's body-worn camera showing the officer his Cherokee Nation Tribal Citizenship card and suggesting it is his "get out of jail free card."

The safety issues created if the City cannot enforce its ordinances risks the safety of not only its Indian citizens but all of the inhabitants of Tulsa. Thus, the City has not, and will not "disavow" its right to enforce its ordinances.

In construing standing based on the pleadings, the United States Supreme Court has made clear it will "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party..." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109, 99 S. Ct. 1601, 1613, 60 L. Ed. 2d 66 (1979), quoting *Warth v. Seldin*, 422 U.S., at 501, 95 S.Ct., at 2206. "[A] liberal construction of a pleading is in line with Rule 8 of the Federal Rules of Civil Procedure." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506, 79 S. Ct. 948, 954, 3 L. Ed. 2d 988 (1959); quoting *Conley v. Gibson*, 355 U.S. 41, 47—48, 78 S.Ct. 99, 102—103, 2 L. Ed. 2d 80. A review of the Plaintiff's Complaint in this case establishes that he has plead an injury in fact sufficient to establish standing such that this Court should review the merits of the case and assist the parties in resolving this on-going dispute regarding the City's ability to enforce its ordinances against all inhabitants.

CONCLUSION

For the reasons set forth herein and those set out in the City’s Response Brief previously filed, the City respectfully requests this Court conclude that the Appellant has met his burden to establish standing and then determine based on the merits of the arguments present that the District Court accurately granted the City’s Motion To Dismiss.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Cisco Secure Endpoint version number 8.1.5.21322, last checked for security updates May 8, 2023 at 11:15 pm., and according to the program are free of viruses.

Date: May 9, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2023 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Mr. John M. Dunn
Mr. Brian R. Danker
Mr. Kevin W. Dellinger
Mr. David A. Giampetroni
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Date: May 9, 2023

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