IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WENDELL S. FORTSON, II, JD, PHD,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 25-2058
(Judge Edward H. Meyers)

DEFENDANT'S REPLY TO OPPOSITION TO MOTION TO DISMISS

Pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply to the response to the Government's dismiss the complaint filed *pro se* by plaintiff Wendell S. Fortson, II, JD, PHD.

In our motion to dismiss, we demonstrated that this Court does not possess jurisdiction to entertain Mr. Fortson's complaint for a litany of reasons. In his opposition, Mr. Fortson contends that he is presenting a Fifth Amendment Takings claim against the United States, not a tort or Due Process claim; that his claims fall within the statute of limitations; and that he can raise third party claims in this Court. Mr. Fortson is incorrect on all counts. His claims are not Fifth Amendment Takings claims, as they are not based upon any properly cognizable property rights; even if he presented a valid Takings claim, the statute of limitations for his claims has long since run; and he cannot bring third party claims in the Court of Federal Claims. Accordingly, we respectfully request that the Court dismiss Mr. Fortson's complaint for lack of subject matter jurisdiction, as set forth in our initial motion.

ARGUMENT

Once this Court's jurisdiction is challenged, the plaintiff bears the burden of establishing that jurisdiction is proper. *Newby v. United States*, 57 Fed. Cl. 283, 289 (2003). Courts cannot

waive jurisdictional requirements in *pro se* cases, even though *pro se* litigants are generally afforded leniency in pleading formalities. *Dethlefs v. United States*, 60 Fed. Cl. 810, 811 (2004). Although "the Court must examine the pleadings to see if Plaintiff has a cause of action, even if not clearly articulated . . . there is no duty on the part of the trial court to create a claim which [the plaintiff] has not spelled out in his pleading." *Raney v. United States*, 78 Fed. Cl. 666 (2007) (citations omitted). Because Mr. Fortson fails to satisfy his burden of demonstrating that this Court possesses jurisdiction to entertain his claims, the Court should dismiss the complaint for lack of subject matter jurisdiction.

I. Mr. Fortson Fails To Present A Properly Cognizable Takings Claim

Although Mr. Fortson characterizes his claim as a Fifth Amendment Taking claim, rather than a tort claim or a Due Process claim, "the 'mere recitation of a basis for jurisdiction [is] not ... controlling' and courts 'must look to the true nature of the action in a district court in determining jurisdiction.'" *Chemsol, LLC v. United States*, 755 F.3d 1345, 1354 (Fed. Cir. 2014) (quoting *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008)). Here, Mr. Fortson's claim is not based upon the takings of any property for Government use, but is based upon harm inflicted upon a class of persons by specific acts associated with slavery. At its core, this claim is not a Takings claim, but is more akin to a tort or Due Process claim, neither of which provide a cause of action within this Court's jurisdiction. *See Straw Est. of Stevens v. United States*, 710 F. App'x 881, 882 (Fed. Cir. 2017) ("We are not aware of any case that establishes a property interest in freedom from bodily harm."); *Ali-Bey v. United States*, 169 Fed. Cl. 729, 734–35 (2024), *aff'd*, No. 2024-1629, 2025 WL 855751 (Fed. Cir. Mar. 19, 2025).

In his response, Mr. Fortson contends that the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857), *superseded* (1868), confirms that this case concerns property

interests. Pl. Resp. at 14. Mr. Fortson observes that the Supreme Court in *Dred Scott* treated enslaved individuals as property, rather than persons. However, problematically for Mr. Fortson's theory of recovery, *Dred Scott* did *not* recognize that such enslaved individuals possessed a property right in themselves; instead, the Supreme Court recognized that such individuals were the property of slaveholders. *Id.* at 451. More importantly, *Dred Scott* has been overturned by the enactment of the Thirteenth Amendment. *See Straw Estate of Stevens*, 710 F. App'x at 882 (providing that *Dred Scott* has been "overturned by the abolishment of slavery in the Thirteenth Amendment."). *Dred Scott* is no longer good law and cannot provide the basis for a valid Takings claim. Contrary to Mr. Fortson's arguments, Pl. Resp. at 12-13, the Federal Circuit has noted that claims that are based upon bodily harms are "ultimately premised on the government's alleged breach of its duty not to harm ... [and] are based in tort, not property." *Straw Estate of Stevens*, 710 F. App'x at 882.

Nor does Mr. Fortson's unsupported assertion that such assaults amount to "sexual genocide for profit ... that falls outside the scope of ordinary tort law," Pl. Resp. at 13, transform Mr. Fortson's claims into Takings claims within the ambit of the Tucker Act. Genocide is a criminal act based upon violations of international law, and this Court "has no jurisdiction to adjudicate any claims whatsoever under the federal criminal code." *Joshua v. United States*, 17 F.3d 378, 379 (Fed. Cir. 1994), *see also Clifford v. United States*, No. 10-774C, 2011 WL 5508980, at *3 (Fed. Cl. Nov. 8, 2011), nor does the Tucker Act contain any "language permitting this court to entertain jurisdiction over claims founded upon customary international law." *Phaidin v. United States*, 28 Fed. Cl. 231, 234 (1993); *see also Ali-Bey*, 169 Fed. Cl. at 736.

Finally, to the extent that Mr. Fortson is asserting equitable principles to establish this Court's jurisdiction over his claims, the Court of Federal Claims is a court of law, not a court of equity. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 313 (2011) (stating that the United States Court of Federal Claims "has no general power to provide equitable relief against the Government or its officers"). Although this Court may provide equitable relief in certain collateral or incident circumstances that are not applicable here, *see* 28 U.S.C. §§ 1491(a)(2), (b)(2), equitable estoppel does not provide an independent basis for this Court to assert jurisdiction over a claim. *See Roth v. United States*, 378 F.3d 1371, 1384 (Fed. Cir. 2004). A plaintiff "cannot be permitted to establish this crucial element of their case on the basis of estoppel." *Gregory v. United States*, 37 Fed. Cl. 388, 396 (1997).

II. Mr. Fortson's Untimely Claims Are Barred By The Statute Of Limitations

Mr. Fortson complaint, which is based upon actions that occurred "between 1790 and 1865," Pl. Resp. at 1, 2, was filed "hundreds of years beyond the statute of limitations." *See Marshall v. United States*, No. 24-1981, 2025 WL 457274, at *4 (Fed. Cl. Feb. 11, 2025) (holding that claims based upon slavery fall outside of this Court's statute of limitations). In order to fall within this Court's statute of limitations, a claim must be "filed within *six years* after such claim first accrues." 28 U.S.C. § 2501 (emphasis added). This Court's statute of limitations serves as "an express limitation on the Tucker Act's waiver of sovereign immunity," *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990); *see also Block v. North Dakota*, 461

U.S. 273, 287 (1983), and is an absolute "jurisdictional" bar to claims that are filed outside of this six-year period. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008).[1]

As set forth in our opening brief, a claim first accrues "when all the events which fix the government's liability have occurred and the plaintiff was or should have been aware of their existence." *San Carlos Apache Tribe v. United States*, 629 F.3d 1346, 1350 (Fed. Cir. 2011). Thus, "it is not necessary that the damages from the alleged [wrong] be complete and fully calculable before the cause of action accrues." *Fallini v. United States*, 56 F.3d 1378, 1382 (Fed. Cir. 1995). Here, Mr. Fortson's claims accrued at the time of the alleged acts; 1865 at the latest.

In his response, Mr. Fortson argues that liability was not fixed until July 2023, when he discovered the consequences of "all the natural and unavoidable genetically based harms." Pl. Resp. at 8. However, "[t]he proper focus for statute of limitations purposes is upon the time of the defendant's *acts*, not upon the time at which the *consequences* of the acts became most painful." *Goodrich v. United States*, 434 F.3d 1329, 1333–34 (Fed. Cir. 2006) (citation modified) (emphasis in original); *see also Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011) ("the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts [become] most painful.'") (quoting *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)). The acts at issue here occurred "from approximately 1790 to 1865," Pl. Resp. at 1, 2, well outside of the six-year limitations period.

[1] To the extent that Mr. Fortson's complaint is based upon acts that occurred from 1790 through 1857, this Court's statute of limitations, which first appeared in the Act of March 3, 1863, ch. 92, 12 Stat. 765, allowed for claims that had accrued six years prior to the passage of the 1863 Act to proceed "if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act." *Id.* Mr. Fortson's complaint was filed outside of this three-year period.

Nor does it matter that Mr. Fortson did not personally become aware of the alleged "intergenerational genetically based consequences" of the acts of sexual violence at issue in the complaint until July 2023, with the publication of an academic paper in *Genetics*. Pl. Resp. at 8. Mr. Fortson does not contend that the Government concealed the acts of violence at issue in the complaint, nor that the injury was inherently unknowable. *Japanese War Notes Claimants Ass'n of Phil., Inc. v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967); *see also Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985) (noting that the accrual suspension rule "is strictly and narrowly applied."). Instead, Mr. Fortson describes the injury as the "natural and unavoidable" consequence of "sanctioned, encouraged, and facilitated" sexual violence. Pl. Resp. at 7-8. While a July 2023 paper may have described in detail the full genetic consequences of the acts of sexual violence detailed in the complaint, this paper merely provided Mr. Fortson with "additional ammunition with which to pursue his claim." *See Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003).

Mr. Fortson also claims that his claim is timely based upon the "stabilization doctrine" articulated by the Supreme Court in *United States v. Dickinson*, 331 U.S. 745 (1947). "The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated for public use." *United States v. Dow*, 357 U.S. 17, 27 (1958). The Federal Circuit has observed that the "*Dickinson* stabilization principle ... does not apply outside its context. Later cases have essentially confined the stabilization doctrine to the class of flooding cases from which it originated." *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998). Indeed, a broader interpretation of *Dickinson* would put it in "unending conflict with the statute of limitations." *Gustine Land & Cattle Co. v. United*

States, 174 Ct. Cl. 556, 656 (1966). We are not aware of any cases that apply *Dickinson* to purported "intergenerational genetically based consequences."

Accordingly, Mr. Fortson's claims are barred by the statute of limitations.

III. A Pro Se Plaintiff May Not Bring Third Party Claims In This Court

Finally, Mr. Fortson fails to demonstrate that he is authorized to bring suit on behalf of the "American Negro Community." *Hymas v. United States*, 141 Fed. Cl. 144, 157 (2018) ("[A p]ro se plaintiff ... cannot represent a class") (citing RCFC 83.1(a)(3)), *appeal dismissed*, No. 19-1763, 2019 WL 12021685 (Fed. Cir. June 17, 2019); *accord Rouse v. United States*, No. 18-1980, 2022 WL 17821102, at *2 (Fed. Cl. Dec. 20, 2022); *Rodgers v. United States*, 153 Fed. Cl. 538, 541 (2021); *Ghaffari v. United States*, 125 Fed. Cl. 665, 668 (2016). Although Mr. Fortson cites to a number of cases that dealt with third party claims in state and various United States district courts that were appealed to the Supreme Court, Pl. Resp. at 5-7, none of the cited cases discuss *this* Court's jurisdiction over third party claims or the limitations that a pro se plaintiff has to represent a class in this Court. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 (2004) (United States District Court for the Eastern District of California), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Singleton v. Wulff*, 428 U.S. 106, 109 (1976) (United States District Court for the Eastern District of Missouri); *Craig v. Boren*, 429 U.S. 190, 192 (1976) (District Court for the Western District of Oklahoma); *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (appeal from Connecticut state court); *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 454 (1958) (appeal from Alabama state court).

CONCLUSION

For these reasons and the reasons set forth in our opening brief, the Government respectfully requests that the Court dismiss the complaint filed by Wendell S. Fortson, II, JD, PHD.

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General

PATRICIA M. McCARTHY
Director

s/ Steven Michael Mager
STEVEN MICHAEL MAGER
Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
(202) 616-2377
Steven.Mager@usdoj.gov
Attorneys for Defendant

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