IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BURREL JONES, *Plaintiff*, v. ALABAMA-COUSHATTA TRIBE OF TEXAS AND NASKILA GAMING, *Defendants.*	§ § § § § § § § § § §	No. 9:20-CV-63

THE TRIBE'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT

Indian tribes like the Alabama-Coushatta Tribe of Texas (the "Tribe") are "domestic dependent nations" that exercise "inherent sovereign authority." *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citation omitted). That includes "the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citation omitted). Thus "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

Because no such abrogation or waiver exists here, there is no jurisdiction for Plaintiff's claims related to a slip and fall at the bingo facility operated by the Tribe on its Indian lands. The suit against the Tribe—a sovereign, self-governing Indian nation with immunity like any other government entity—is foreclosed and must be dismissed for lack of subject-matter jurisdiction.[1]

[1] There is no difference between the Tribe and Naskila Gaming for immunity purposes, and Plaintiff does not attempt to show otherwise. The Supreme Court does not "draw[] a distinction between governmental and commercial activities of a tribe" when deciding whether there is tribal immunity from suit. *Kiowa*, 523 U.S. at 754–55. A tribe-created entity that functions as an arm of a tribe shares in the tribe's immunity. *See, e.g.*, *Alabama v. PCI Gaming Auth.,* 801 F.3d 1278,

Plaintiff contends—incorrectly—that any declaratory suit against the Tribe opens the doors of the courthouse to his damages suit and that the First Amendment mandates that he have a remedy against the Tribe for his alleged personal injuries. Even assuming that the First Amendment applies to the Tribe, the Supreme Court has expressly refuted Plaintiff's central premise: tribal immunity may leave a plaintiff without a remedy at all. *Kiowa*, 523 U.S. at 758-59. Plaintiff's theory would unravel sovereign immunity altogether, only requiring plaintiffs to plead their tort cases under the First Amendment's Petition Clause. The paradigm shift he seeks in sovereign immunity jurisprudence is unsupported in law and logic, and should be rejected.

BACKGROUND

1. The Alabama and Coushatta Indian Tribes have existed as sovereign entities for centuries. Following their relocation from the Southeastern United States to Texas in the 1800s, the Tribes settled on lands near their current reservation in east Texas. After federal recognition, the United States held the east Texas lands in trust for the Tribes until 1954, at which time the federal government terminated its powers over the Tribes and the Secretary of the Interior transferred the tribal lands to be held by the State of Texas in trust for the benefit of the Tribe. 25 U.S.C. §§ 721–728, 68 Stat. 768 (Aug. 23, 1954) (omitted from U.S. Code).

In 1983, however, the Texas Attorney General called into doubt the validity of the trust relationship between the Tribe and the State. That development set off a years-long effort in Congress to "restore" the Tribe's federal trust status, culminating in passage of The Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89,

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1287–88 (11th Cir. 2015) (collecting cases). Naskila indisputably is an arm of the Tribe. *See* Briones Dec. ¶ 8 (Ex. D).

101 Stat. 666 (Aug. 18, 1987) (the "Restoration Act") (Ex. A.).[2] The Restoration Act reestablished the trust relationship between the Tribe and the federal government, restored various federal legal rights that the Tribe previously had enjoyed, and recognized the Tribe's Constitution and governing Council. *Id.* §§ 203–04, 206. The Alabama-Coushatta Tribe of Texas is among the Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs. 85 Fed. Reg. 5462, 5462 (Jan. 30, 2020). The federal government also acknowledges the Tribe "to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States." *Id.*

2. In addition to reestablishing the Tribe's relationship with the federal government, the Restoration Act establishes the parameters for gaming that may take place on tribal lands. It provides that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." 101 Stat. 666, § 207(a). At the same time, it prohibits Texas from asserting either criminal or civil regulatory control over gaming occurring on the Tribe's lands. *Id.* § 207(b). The Restoration Act vests federal courts with exclusive jurisdiction over cases involving alleged violations of its gaming provisions, granting the State—and only the State—standing to seek an injunction against such violations. *Id*. § 207(c).

In 2015, the Tribe sought and received permission from the National Indian Gaming Commission, the federal agency that administers the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721, to conduct bingo gaming on its reservation under IGRA. The Tribe then opened Naskila Gaming, an electronic bingo facility located on its tribal lands. The State and the

[2] The Restoration Act also reestablished the trust relationship between the United States and the Ysleta del Sur Pueblo tribe (the "Pueblo") near El Paso, Texas. *See* §§ 101–08

Tribe also jointly reopened a dormant case about tribal gaming, which was assigned to Magistrate Judge Keith Giblin, *Texas v. Alabama-Coushatta Tribe of Tex.*, No. 9:01-CV-299.

In the proceedings that followed, Judge Giblin decided to first rule on whether the Tribe's current gaming is governed by the "Class II" gaming provisions of IGRA. The Fifth Circuit, affirming a 2018 ruling by Judge Giblin, decided last year that IGRA does not apply to the Tribe's gaming. *Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440, 449 (5th Cir. 2019). Those rulings did not address whether the Tribe's gaming constitutes "gaming activities which are prohibited by the laws of the State of Texas" under § 207(a) of the Restoration Act. Proceedings to address that issue, among others, recently resumed in Judge Giblin's court. In April, Judge Giblin entered a scheduling order for this second phase of the case; the State and the Tribe currently are in discovery, with trial set for March 1, 2021. *See* Sched. & Disc. Order (Post Appeal) [DE 152], *Alabama-Coushatta*, No. 9:01-CV-299 (E.D. Tex. filed April 13, 2020).[3]

3. The Plaintiff here alleges that he visited Naskila Gaming in October 2019 and was injured in a fall from the staircase at the facility's entrance. FAC ¶¶ 16–20. He also alleges that he communicated with various individuals about filing a lawsuit in tribal court and was told that the Tribe "was not subject to suit in the tribal court." *Id.* ¶ 21. After seeking more information, he could not find the tribal court's website and was told by the Tribe's Deputy Administrator that "both the Casino and the Tribe 'had sovereignty,' and that there was no way to seek remedy for Plaintiff's injuries in tribal court." *Id.* ¶¶ 21–24. Plaintiff ultimately concluded that the Tribe's "court was either dysfunctional or non-existent." *Id.* ¶ 24. This left him "without an operational

[3] Plaintiff recounts part of this procedural history in the Introduction to his lawsuit against the Tribe, FAC ¶¶ 9–15, but it no longer plays a role in his legal claims. *See id.* at ¶¶ 26–35 (Argument and Authorities) & ¶¶ 36–40 (Causes of Action).

tribal court in which to adjudicate his premises liability claim and, therefore, no mechanism for obtaining relief." *Id.* ¶ 25.

Plaintiff seeks damages for his injuries and declarations that (1) the Tribe's sovereign immunity "violates Plaintiff's right to petition under the First Amendment of the U.S. Constitution due to the lack of an active Alabama-Coushatta tribal court in which Plaintiff can bring his premises liability claim"; and (2) Plaintiff is not barred by sovereign immunity from bringing his premises liability claim in federal or state court. *Id.* ¶¶ 37, 44.

LEGAL STANDARD

The party invoking federal jurisdiction bears the burden to show standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). If a court cannot remedy a party's alleged injuries, there is no Article III case or controversy to support federal jurisdiction. *Id.* at 568–71. A federal court must dismiss a case for lack of subject-matter jurisdiction if it lacks statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). To that end, "sovereign immunity is not merely a defense on the merits—it is jurisdictional in nature. If sovereign immunity exists, then the court lacks both personal and subject-matter jurisdiction to hear the case and must enter an order of dismissal." *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985). Without an independent basis of federal subject-matter jurisdiction, a court cannot exercise supplemental jurisdiction over state-law claims. *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 221–22 (5th Cir. 2012).

ARGUMENT

Absent express congressional authorization, "Indian Nations are exempt from suit." *Santa Clara v. Martinez*, 426 U.S. 49, 58 (1978) (quoting *United States v. U.S. Fid. & Guar. Co.*, 309

U.S. 506, 512 (1940)). Because Plaintiff cannot point to any such authorization or waiver here, tribal sovereign immunity bars this action.

Plaintiff acknowledges that the Tribe has sovereign immunity, FAC ¶¶ 4, 6, 29, but offers two proposals for circumventing that immunity here: (1) the First Amendment's Petition Clause, FAC ¶¶ 26–31; and (2) an Alabama Supreme Court case that held tribal immunity waived "in the interest of justice" to prevent a plaintiff from having a right without a remedy, *id.* ¶¶ 32–35 (citing *Wilkes v. PCI Gaming Auth.*, 287 So. 3d 330, 335 (Ala. 2017), *cert. denied*, *Poarch Band of Creek Indians v. Wilkes*, 139 S. Ct. 2739 (2019)).

Plaintiff's arguments fail for multiple reasons, but fundamentally they are both rooted in the same mistaken contention: that Plaintiff's premises liability claim must be heard in some court. The very nature of sovereign immunity is to foreclose claims. The existence of a tribunal for a premises liability claim is of no consequence when that claim is barred by tribal sovereign immunity. In *Kiowa*, for example, the Supreme Court explicitly acknowledged that tribal sovereign immunity could leave tort victims without remedies against Indian tribes. *See* 523 U.S. at 758–59. That conclusion was based on tribal immunity, not the existence (or nonexistence) of a tribal court. The First Amendment's Petition Clause does not alter that conclusion. To hold otherwise would fundamentally alter immunity jurisprudence and functionally end sovereign immunity.

Because the underlying assumption driving Plaintiff's arguments is faulty, they must fail. The Court lacks subject-matter jurisdiction over Plaintiff's declaratory-relief claims and supplemental jurisdiction over Plaintiff's tort claim.

But even if jurisdiction existed for Plaintiff's declaratory action—and it does not—his damages claim for premises liability still must be dismissed. *TTEA v. Ysleta del Sur Pueblo*, 181

F.3d 676, 680–81 (5th Cir. 1999) ("[T]he district court correctly dismissed the damages claim based on sovereign immunity[.]"). Although the Fifth Circuit has acknowledged a narrow band of cases to which tribal sovereign immunity does not extend, those declaratory actions involve only prospective equitable relief. *See id.* at 680. Here, Plaintiff seeks tort damages that cannot be brought against the Tribe. *See id.* at 680–81. Federal law is settled on this point, and the First Amended Complaint must be dismissed.

I. Plaintiff's First Amendment Claim Cannot Circumvent Tribal Sovereign Immunity.

Plaintiff first looks to bootstrap a premises liability claim to a declaratory claim that the First Amendment allows him to sue under a premises liability theory. He argues that allowing the Tribe to have sovereign immunity violates the First Amendment's Petition Clause because the Tribe does not have a functioning tribal court. FAC ¶¶ 27-31. This argument fails for multiple reasons.

1. First, sovereign immunity necessarily places damages claims against the Tribe outside the Petition Clause's reach by creating situations in which a plaintiff has no remedy. *See, e.g.*, *Hoffmeister v. United Student Aid Funds, Inc.*, 2020 WL 3422864, at *3 (June 23, 2020 10th Cir.) ("[W]e have held that sovereign immunity is not foreclosed by either the Declaration of Independence or the constitutional right to petition for redress of grievances." (citing *Christensen v. Ward*, 916 F.2d 1462, 1471-73 (10th Cir. 1990)). Were that not the case, Plaintiff's theory would unlock immunity against any sovereign entity—whether it be the federal government, the state, or an Indian tribe. If sovereign immunity cannot overcome the Petition Clause, sovereign immunity ceases to exist.

Plaintiff assumes that the Petition Clause guarantees him a right to litigate his premises liability suit. FAC ¶¶ 30–31. But that assumption has been repeatedly rejected by the Supreme

Court. In *Kiowa*, the Court explicitly acknowledged that tribal sovereign immunity could leave tort victims without remedies against Indian tribes. *See* 523 U.S. at 758-59.

After *Kiowa*, Congress considered legislation to modify tribal immunity. *See Bay Mills*, 572 U.S. at 801–02. Congress even considered bills that would have directly waived tribal immunity from tort claims, such as the American Indian Tort Liability Insurance Act, S. 2302, 105th Cong. (1998), and the American Indian Equal Justice Act, S. 1691, 105th Cong. (1998). Neither passed. Instead, Congress passed the much narrower Indian Tribal Economic Development and Contract Encouragement Act, § 2, 114 Stat. 46 (codified at 25 U.S.C. § 81(d)(2)), which mandates only that certain contracts with Indian tribes either disclose or waive immunity if they require federal approval. *Bay Mills*, 572 U.S. at 802.

The Supreme Court recently reiterated in *Bay Mills* that only Congress has the authority to develop exceptions to tribal sovereign immunity. There, the Court found it important that Congress has considered the doctrine on multiple occasions and generally has opted to preserve it. *Id.* at 802–03.

It is unsurprising that Plaintiff does not point to a case showing that a right to sue under the Petition Clause is absolute. Even the sole authority he cites for his argument recognizes that the right to petition—like any other First Amendment freedom—is circumscribed. *See Eggenberger v. W. Albany Tp.*, 820 F.3d 938, 943 (8th Cir. 2016) (noting that, "[a]lthough filing a lawsuit is generally a protected activity under the First Amendment right to petition for the redress of grievances," plaintiff's lawsuit did not qualify as protected activity). Sovereign immunity is one of the limitations to the Petition Clause, and Plaintiff's argument that jurisdiction must exist in some court so that he has redress for his tort claims defies established federal law.

2. Second, and relatedly, Plaintiff's theory cannot be squared with the history and structure of the Constitution. Immunity was a well-known concept for the Founders who drafted the Constitution, including the Petition Clause. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) ("'An integral component' of the States' sovereignty was 'their immunity from private suits.' This fundamental aspect of the States' 'inviolable sovereignty' was well established and widely accepted at the founding." (citing *Fed. Maritime Comm'n v. S. Car. Ports Auth.*, 535 U.S. 743, 751–52 (2002); *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961))). Yet sovereign immunity has never once been held to be in conflict with the Petition Clause, even though immunity has foreclosed lawsuits continually for almost 250 years. Allowing the Petition Clause to override sovereign immunity would fundamentally transform constitutional law and create a right that has never existed in First Amendment jurisprudence.

Moreover, not only has sovereign immunity always existed alongside the First Amendment, immunity has also been held consonant with the due process clauses and privileges/immunities provisions of the Constitution—provisions that may also be used to justify access to the courts. *See, e.g.*, *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000) ("Access to the courts is a constitutionally protected fundamental right and one of the privileges and immunities awarded citizens under Article IV and the Fourteenth Amendment."). In no case has sovereign immunity been trumped by any of the other constitutional guarantees that also support a right to litigate a claim. *See FDIC v. Meyer*, 510 U.S. 471, 483–86 (1994) (holding Fifth Amendment's due process clause does not provide a substantive claim upon which relief can be granted against the United States); *Christensen*, 916 F.2d at 1473 ("Accordingly, we find that the doctrine of sovereign immunity, as embodied in the common law . . . is constitutional. If applicable to these cases, the doctrine will not deny plaintiff any rights guaranteed by the Constitution of the

United States."). Regardless of the constitutional provision a plaintiff uses to argue for "access to the courts," sovereign immunity remains unaffected.

3. Third, Plaintiff assumes incorrectly that the First Amendment applies to the Tribe. Under his theory, it is the failure of the Tribe to have a functioning tribal court to hear his tort claim that violates the Petition Clause. But because the Tribe is not subject to the First Amendment, his declaratory claim fails.

The First Amendment begins with the familiar words "Congress shall make no law . . ."; it says nothing about what Indian tribes may do. Although the states also have been held subject to the strictures of the First Amendment, that takes place only by its incorporation through the Fourteenth Amendment. *See De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (recognizing First Amendment rights to assemble and petition as enforceable against the state). But the Fourteenth Amendment makes no reference to Indian tribes either. As a result, other courts have found that the First and Fourteenth Amendments do not apply to tribes. *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134–35 (10th Cir. 1959).

All this is in line with the Supreme Court's direction that, "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). That was why, for example, the Court held previously that the Cherokee Nation was not bound by the Fifth Amendment. *Talton v. Mayes*, 163 U.S. 376, 384 (1896). Because the First Amendment applies to federal authorities and the Fourteenth Amendment makes the First Amendment applicable to state authorities, those provisions are by their own terms specific limitations on those specific sovereigns—not Indian tribes. *See Santa Clara Pueblo*, 436 U.S. at 56.

Plaintiff indirectly (and incorrectly) references Congress as the source of authority for the Tribe's immunity (in the form of the Restoration Act). His claim is virtually an "as applied" challenge to the lack of a tribal court. FAC ¶ 31. He faults the Restoration Act, *id.* ¶ 37, but it is the functionality of the tribal court that is the genesis of his claim here—and that has nothing to do with anything Congress passed. The claim is against the Tribe for creating the supposed First Amendment violation by not letting him sue the Tribe for tort damages (either in tribal court or any other court). But because the Tribe is not subject to the First Amendment, its actions cannot be in violation of the Petition Clause, and the declaratory claim fails for this reason, too.[4]

4. Fourth, contrary to Plaintiff's assumption, the Petition Clause does not guarantee that he must have a remedy even if he could bring a lawsuit against a sovereign. Plaintiff argues that his "First Amendment right to sue is infringed upon by the practical effect" of the Tribe's immunity. *Id.* ¶ 28. But the right to petition does not guarantee that the petition will result in a remedy for the plaintiff on the merits. *See, e.g.*, *Minn. St. Bd. for Cmty. Coll. v. Knight*, 465 U.S. 271, 285 (1984); *see also* Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW.

[4] To be clear, the Tribe has a functioning tribal court that has existed for at least two decades. *See* 2000 Amendments to Alabama-Coushatta Tribe Const. art. IX (Ex. B); Alabama-Coushatta Tribe Const. art. XIII (2016 ed) (Ex. C); Briones Dec. (Ex. D); Hourigan Dec. (Ex. E). Plaintiff is merely dissatisfied with the—correct—direction he received from the Administrator that "both the Casino and the Tribe 'had sovereignty,' and that there was no way to seek remedy for Plaintiff's injuries in tribal court." FAC ¶ 24. The existence of the tribal court, however, is irrelevant in this case as it has no bearing on Plaintiff's claims. The Tribe's immunity forecloses a remedy in any court.

As support for his jurisdictional arguments, Plaintiff relies (at ¶ 5) on *Comstock Oil & Gas Inc. v. Alabama & Coushatta Tribes of Tex.*, 261 F.3d 567 (5th Cir. 2001), which in part considered arguments about whether the Tribe's court existed at the time the action was filed or was improperly constituted thereafter, *id.* at 572–73. While "the civil jurisdiction of a tribal court" is a "federal question under § 1331," *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985), that consideration is not relevant here because the Tribe has not sought to compel the Plaintiff, a non-Indian, into tribal court. Because the tribal court has not sought to exercise jurisdiction over Plaintiff after an affirmative attempt by the Tribe to sue him in tribal court, there is no federal question as to whether or not the tribal court should be able to exercise jurisdiction over him. Plaintiff lacks standing to challenge this aspect of the Tribe's government.

U. L. REV. 739, 765 (1999) ("One can have a perfectly meaningful right to petition even in a regime in which petitions seeking redress from the government need not be granted as a matter of law.").

5. Fifth, a declaratory claim that there is no sovereign immunity is improper because it is simply an insufficient coercive claim masquerading as a declaratory claim. In asking for a declaration that he can sue for damages, Plaintiff is claiming that the Tribe has waived its recognized immunity by not having a tribal court. FAC ¶ 31. But any waiver of sovereign immunity must be unambiguous and strictly construed—and the Petition Clause does not constitute waiver of immunity. *See, e.g.*, *Gould v. United States*, 2007 WL 2325177, at *6 (W.D. Va. Aug. 9, 2007) ("Plaintiff's citation of his First Amendment right to petition the government for redress of grievances does not achieve a waiver of sovereign immunity in light of the cases, cited above, demanding an unambiguous waiver, to be strictly construed. He certainly has every right to complain to the government about his taxes, but he cannot maintain a suit in the absence of jurisdiction."); *see also Meyer*, 510 U.S. at 483-86 (rejecting claim of immunity waiver based on due process clause).

The Tribe's immunity is a common-law right that exists independent of the Restoration Act and, like the immunity belonging to states, it is subject to express modification by Congress or the Tribe itself (which does not exist here). *See Bay Mills*, 572 U.S. at 788. That immunity, as an immunity from suit, has always been understood to foreclose plaintiffs from bringing claims against sovereigns altogether—whether the plaintiff has a remedy or not. *Kiowa*, 523 U.S. at 758–59. Plaintiff has not shown a clear and unambiguous waiver of immunity here, and his claim must therefore be rejected.

II. Plaintiff's Appeal To The "Interest Of Justice" Does Not Overcome Tribal Sovereign Immunity Either.

In addition to his faulty First Amendment argument, Plaintiff claims that this Court should not uphold the Tribe's immunity given the circumstances here because "[s]erious questions of equity arise when . . . a tribe has no active court to hear the kinds of claims a plaintiff wants to make against that tribe." FAC ¶ 32. This argument reflects a fundamental misunderstanding of tribal sovereign immunity against personal injury claims. *See Kiowa*, 523 U.S. at 754.

The First, Second, Fourth, Sixth, Eighth, and Tenth Circuit Courts of Appeals, have unanimously applied tribal sovereign immunity to claims sounding in tort. *See Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians*, 917 F.3d 451, 453 (6th Cir. 2019) (affirming sovereign-immunity dismissal of fraudulent-transfer claims); *Santana v. Muscogee (Creek) Nation*, 508 F. App'x 821, 822–24 (10th Cir. 2013) (same; tort claims); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356–58 (2d Cir. 2000) (same; copyright-infringement claims); *Rosebud Sioux v. Val-U Constr. Co.*, 50 F.3d 560, 561 (8th Cir. 1995) (same; tort counterclaims); *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993) (same; off-reservation trespass claims); *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957) (same; tort claims). As the Fourth Circuit long ago observed, the "rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument." *Haile*, 246 F.3d at 297.

As his sole support to the contrary, Plaintiff relies on the Alabama Supreme Court's decision in *Wilkes*, 287 So. 3d at 335, which allowed tort claims to proceed against an Indian tribe in Alabama state courts. FAC ¶¶ 33–35. Aside from the fact that *Wilkes* is not binding on this Court, it also is distinguishable and incorrect. To begin, although *Wilkes* concerned tort claims and a non-Indian, the underlying conduct took place outside of tribal lands. 287 So. 3d at 335.

This fact—not present here—played a key role in the Alabama Supreme Court's expansion of *Kiowa*'s concern for those who "have no choice in the matter" when it comes to tribal sovereignty. *Id.* at 334 (quoting *Kiowa*, 523 U.S. at 758–60). Plaintiff here pleads that he was injured on the Tribe's land, which he knowingly and voluntarily entered. FAC ¶ 17.

Just as importantly, *Wilkes*'s flawed reasoning and refusal to apply binding precedent makes it unpersuasive authority. Rather than beginning with the governing presumption that sovereign immunity applies unless Congress has authorized suit or the Tribe has waived immunity, the *Wilkes* court searched for a case applying sovereign immunity to the exact fact pattern at issue. *See id.* at 333–35. Finding no Supreme Court case expressly addressing Wilkes's claims, the Alabama Supreme Court determined that it was free to chart its own course and judicially craft its own exception to tribal sovereign immunity. *Id.*

The First Amended Complaint provides no justification for applying that mistaken approach here. *Wilkes* is an outlier that addresses off-Indian-lands conduct and fails to apply tribal sovereign immunity jurisprudence. To hold otherwise would run afoul of *Kiowa*'s recognition that sovereign immunity can—and often does—foreclose alleged tort victims from obtaining relief against Indian tribes. *See Kiowa*, 523 U.S. at 758. That result is common; sovereign immunity frequently bars claims against federal, state, and local governments except as expressly allowed by tort-claims, *qui-tam*, and other immunity-abrogating statutes. And as the Supreme Court has explained, Congress—not courts—should create any such vehicles for circumventing tribal immunity. *Id.* at 758–59. Congress has not done so as to Plaintiff's claims and his requests for a declaratory judgment should be denied.

III. In All Events, Tribal Sovereign Immunity Forecloses Plaintiff's Tort Claims.

Without original jurisdiction over Plaintiff's claims for declaratory relief, the court cannot exercise supplemental jurisdiction over his premises-liability claims. *Arena*, 669 F.3d at 221–22.

But even if original jurisdiction did exist for one of Plaintiff's declaratory claims, tribal sovereign immunity still forecloses the tort claims here. *TTEA*, 181 F.3d at 680–81.

The Fifth Circuit noted in *TTEA* that the *Kiowa* Court extended tribal immunity to a contract action because it was "for damages, not a suit for declaratory or injunctive relief," explaining that "[t]his difference matters." *Id.* at 680. As a result, "the district court correctly dismissed the damages claim based on sovereign immunity" even though the "actions seeking declaratory and injunctive relief" could proceed. *Id.* at 680–81.

Comstock is not to the contrary. There, the Fifth Circuit held that "tribal officials [we]re not immune from suits for declaratory and injunctive relief." 261 F.3d at 570. The Court went on to find jurisdiction over the Tribe for the same claims because the "case present[ed] rare and unique circumstances sufficient for [the] exercise of pendent jurisdiction." *Id.* at 571. But the declarations sought were only for prospective relief and the Fifth Circuit focused on whether the oil companies sought declaratory or injunctive relief rather than damages. *Id.* at 571–72. Here, Plaintiff seeks to maintain only a claim for damages. And jurisdiction in federal court simply does not exist for such a claim against the Tribe.

CONCLUSION

The Tribe respectfully asks the Court to dismiss this case in its entirety for lack of subject-matter jurisdiction.

Dated: July 31, 2020

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Motion to Dismiss* was served upon the counsel listed below through the Court's CM/ECF system on July 31, 2020:

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