No. 18-12094

In the United States Court of Appeals for the Eleventh Circuit

SEMINOLE TRIBE OF FLORIDA,
a federally-recognized Indian Tribe,

Appellant,

v.

LEON BIEGALSKI,
as Executive Director of the Department of Revenue of the State of Florida,

Appellee.

APPELLEE'S ANSWER BRIEF

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 0:16-CV-62775-RNS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee certifies that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

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11. Scola, Hon. Robert N., *district judge*
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ORAL ARGUMENT STATEMENT

The Executive Director respectfully submits that oral argument is unnecessary to decide the straightforward issue of res judicata presented in this case, particularly in light of one of the policies animating res judicata—conserving the resources of the parties and the judiciary by preventing multiple lawsuits regarding the same cause of action.

STATEMENT OF THE ISSUES

1. Whether res judicata applies when, in an earlier case where the court adjudicated the same cause of action, the plaintiff did not seek solely a declaratory judgment but also sought coercive relief, namely a permanent injunction.

2. Whether res judicata bars a case in which a party concedes that it seeks the same declaratory judgment and injunction as it sought in an earlier case, when that request was denied in a final judgment issued in the earlier case.

3. Whether a free-floating equitable exception to res judicata exists and, if it does, whether that exception relieves a party from its failure to establish its cause of action in the earlier case and from its failure to appeal the final judgment in that earlier case.

STATEMENT OF THE CASE

Procedural History

1. The State of Florida imposes a tax "on gross receipts from utility services that are delivered to a retail consumer" in Florida. Fla. Stat. § 203.01(1)(a)(1) (the

"Utility Tax"). In 2012, the Seminole Tribe of Florida, a federally recognized Indian Tribe, filed a lawsuit ("*Seminole I*") against the Executive Director of Florida's Department of Revenue, in which the Tribe contended (as relevant here) that under federal law, utility services provided to the Tribe on Tribal Land are not subject to the Utility Tax.

The Tribe presented alternative arguments in *Seminole I*. First, it argued that under *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), Florida was prohibited from collecting the Utility Tax from the Tribe because the legal incidence of the tax fell on the Tribe. Second, the Tribe contended that even if the legal incidence fell instead on the utility companies, the Utility Tax was preempted under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

2. Following discovery, the district court granted the Tribe's motion for final summary judgment. *See Seminole Tribe of Fla. v. Florida*, 49 F. Supp. 3d 1095 (S.D. Fla. 2014). In doing so, the district court reached only the Tribe's first argument, concluding that "federal law prohibits Florida from collecting the Utility Tax from the Tribe since the legal incidence of the Utility Tax falls on the Seminole Tribe." *Id.* at 1108.

3. This Court reversed. *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1346-52 (11th Cir. 2015). It disagreed with the district court's conclusion and held that the legal incidence of the tax falls on the utility companies, not on the Tribe. *Id.*

As a result, the Court went on to address the Tribe's alternative argument not considered by the district court: "whether federal law preempts imposition of the Utility Tax on non-Indian utility companies operating on-reservation" under *Bracker*. *Id.* at 1352. Emphasizing the "particularized' and 'flexible' . . . nature of the *Bracker* inquiry," and "[a]fter careful consideration," the Court "h[e]ld that the Utility Tax does not violate federal law." *Id.* at 1352-53.

Because the Tribe did "not introduc[e] evidence of a substantial federal interest in regulating Indians' utility use specifically," and because it did "not develop further argument with respect to electricity use in specifically regulated on-reservation activities," the Court "conclude[d] that [the Tribe] ha[d] not established that Florida's Utility Tax is generally preempted as a matter of law in this case." *Id.* at 1353. Thus, the Court remanded to the district court. *Id.*

4. On remand, the Executive Director moved for final judgment. In opposition, the Tribe sought an opportunity to do what it had failed to do at final summary judgment: "develop . . . argument with respect to electricity use in specifically regulated on-reservation activities" and "introduce evidenc[e] of a substantial federal interest in regulating Indians' utility use specifically." *Id.* at 1353. The Tribe requested that the district court conduct a new preemption analysis as to a list of fourteen specific on-reservation activities that, in the Tribe's view, were subject to the requisite federal oversight and thus preempted. *Seminole I*, Opp'n to

Mot. for J., No. 0:12-cv-62140, ECF No. 106, at 9-11 (S.D. Fla. Aug. 2, 2016) (Suppl. App'x Tab 106).

The district court, however, rejected the Tribe's request for a second chance to prove its case, noting that "[i]t was the Seminole Tribe's decision to present its *Bracker* arguments in a specific manner," and "[i]t cannot now escape the consequence of that choice." *Seminole I*, Order, No. 0:12-cv-62140, ECF No. 110, at 8 (S.D. Fla. Sept. 30, 2016) (App'x Tab 110). Thus, the court granted the Executive Director's motion and entered final judgment against the Tribe.

The district court ruled that this Court had held that the Tribe failed to prove its case: On appeal, the Court had "engaged in the *Bracker* analysis based on the activities that the Seminole Tribe had argued and pled up [to] that point and found that the Seminole Tribe had failed to prove preemption." *Id.* at 6. "[A]llow[ing] further evidence," the court reasoned, "would contradict [this Court's] long-held stance against allowing parties to present new arguments on remand that were previously available." *Id.* (citing *United States v. Cauley*, 199 F. App'x 893, 894 (11th Cir. 2006)). For that reason, the court did not allow the Tribe to "present new arguments with the benefit of [this Court's] analysis because its previous evidence was rejected." *Id.* And "even if the Mandate permitted [the district court] to consider new arguments" from the Tribe (such as the evidence and arguments that this Court found to be absent or undeveloped), the district court "decline[d] to exercise its

discretion to allow new arguments which were not raised by the Seminole Tribe prior to the *final* summary judgment sta[g]e." *Id.* at 1, 7-8.

5. The Tribe did not appeal the district court's final judgment. Instead, it filed this lawsuit ("*Seminole II*") against the same defendant, the Executive Director of Florida's Department of Revenue. In its complaint, the Tribe listed the same fourteen activities as in its opposition to final judgment in *Seminole I*. (App'x Tab 1). The Executive Director moved to dismiss the complaint based on res judicata.[1] The district court granted that motion.

As the district court explained, "the essential facts in both cases are the same: the Tribe uses utilities, including electricity, on its Tribal Land; Florida imposes a utilities tax on the utilities services provided to the Tribe." *Seminole II*, Order, No. 0:16-cv-62775, ECF No. 41, at 5 (S.D. Fla. Oct. 12, 2017) (App'x Tab 41). Indeed, "every single one of the fourteen particular activities listed by the Tribe in its second complaint is encompassed by the broader allegations presented in *Seminole I*." *Id.* "All of the specific activities presented in *Seminole II* could have been offered to support the Tribe's overly-generalized claims . . . in *Seminole I*" and, indeed, were so offered in opposition to the Executive Director's motion for judgment. *Id.* at 6.

[1] For consistency, this brief uses the term "res judicata," rather than "claim preclusion," to refer to the doctrine that "bars the filing of claims which were raised or could have been raised in an earlier proceeding." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990).

And "the Tribe [did] not allege that anything has changed regarding the manner in which the tax is imposed or the way in which the Tribe is burdened by the tax since the filing of *Seminole I*," or "any changes in the federal framework that might now alter the preemption analysis." *Id.* at 6-7. The court also rejected the Tribe's argument that applying res judicata would result in a manifest injustice. *Id.* at 8.

The Tribe moved for reconsideration, but the district court denied that motion. *Seminole II*, Order, No. 0:16-cv-62775, ECF No. 48 (S.D. Fla. Apr. 20, 2018) (App'x Tab 48). The district court explained that the Tribe had "simply not persuaded the Court [that] it should be afforded a second chance to litigate its claim anew." *Id.* at 5.

This appeal followed.

Standard of Review

"A district court's conclusions as to res judicata are conclusions of law, and are thus reviewable de novo by this Court." *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990). This case involves "a federal question previously decided by a federal court," and therefore "it naturally follows that federal preclusion principles apply." *CSX Transp., Inc. v. Bhd. of Maint. of Way Employees*, 327 F.3d 1309, 1316 (11th Cir. 2003).

SUMMARY OF THE ARGUMENT

At its core, the Tribe's argument is that this is not the type of case in which res judicata applies. But it is. The declaratory judgment exception to res judicata does not apply because that exception applies only when a party sought *solely* declaratory relief in the earlier action. That makes sense—that party is not barred from seeking further relief should the declaratory judgment not resolve the dispute. But when, as here, a plaintiff initiates full-blown litigation in the earlier action by requesting any relief *other than* a declaratory judgment, res judicata applies, and here the Tribe sought an injunction in *Seminole I*. What's more, whether or not the precise arguments in favor of the Tribe's requested declaration and injunction were resolved *or even made* in *Seminole I* is wholly foreign to res judicata analysis; what matters is that the district court held that the declaration and injunction should not issue. As a result, the Tribe's invitation for a careful parsing of the holdings in *Seminole I* misses the mark. And no case holds that res judicata does not apply in cases involving "purely legal issues."

Moreover, applying res judicata here is a straightforward matter. In *Seminole I*, the Tribe sought a declaration (and an injunction) that the Utility Tax, as applied to specific activities, was preempted by federal law. The district court refused to grant that declaration (and refused to issue an injunction), and entered final judgment denying the Tribe the relief it requested. Now, the Tribe admits that

it seeks the exact same relief: A declaration (and an injunction) that the Utility Tax, as applied to a subset of the same activities, is preempted by federal law. The Tribe isn't asking a court to hold that some *other* tax, on some *other* service, on some *other* land, is preempted by federal law. The Tribe wants a court to hold that collecting the *same* Utility Tax on the *same* services on the *same* Tribal Land as in *Seminole I* is preempted by federal law. But the Tribe had its chance in *Seminole I* to prove that cause of action; this Court held that it failed to do so; and the district court refused its invitation for a mulligan. The Tribe's only option at that point was to appeal *in that case*. It didn't.

Finally, the Supreme Court held long ago that res judicata does not have a free-floating equitable exception that would allow parties to escape its preclusive effect if it would cause "manifest injustice." Nor has this Court adopted such an exception. And applying res judicata here would not be manifestly unjust: The Tribe had a chance to prove its case in *Seminole I*, and it failed. Barring the Tribe's suit is no more "unjust" than barring any litigant that loses a case from filing another lawsuit to try again. In that respect, the Tribe's quarrel is with res judicata itself.

ARGUMENT

I. RES JUDICATA, NOT ISSUE PRECLUSION, APPLIES.

The core of the Tribe's argument is that this is an issue preclusion case, not a res judicata case. But this is a res judicata case: res judicata bars causes of action,

not arguments; the "declaratory judgment exception" to res judicata does not apply; and res judicata applies even where the court in the earlier case had to resolve only legal issues to decide the case. Once it is understood that res judicata, not issue preclusion, applies here, this is an easy case—as demonstrated below in Part II, res judicata's four requirements are plainly satisfied here.

A. Res judicata bars causes of action, not arguments.

In the Tribe's view, to decide this appeal, the Court must engage in a careful parsing of what arguments were presented and decided in *Seminole I* and compare those to the arguments the Tribe advances here. *See* Init. Br. 27-32. If the arguments were not ruled on in *Seminole I*, the Tribe contends, it can assert them here. Therefore, the Tribe says, it should be allowed to press the same cause of action in this new case because the district court purportedly did not "resolv[e]" its specific arguments regarding the fourteen activities in *Seminole I*. Init. Br. 26; *see id.* 26-32. But the Tribe is mistaken: Res judicata does not bar arguments. It bars causes of action. And the Tribe's cause of action was resolved in *Seminole I*.

First, some familiar background on the difference between the two doctrines. If a party is issue-precluded, it is only barred from making arguments that the earlier court actually rejected. *Agripost, Inc. v. Miami-Dade Cty.*, 195 F.3d 1225, 1230 n.11 (11th Cir. 1999). By contrast, if res judicata applies, a party is barred from asserting *all claims that were or could have been asserted* in the earlier action. *Davila v. Delta*

Air Lines, Inc., 326 F.3d 1183, 1187 (11th Cir. 2003). A party cannot advance the same cause of action in a new case by using other claims or arguments that could have been advanced earlier. *See Maldonado v. U.S. Att'y. Gen.*, 664 F.3d 1369, 1377 (11th Cir. 2011) (courts are "obliged to look at the common nucleus of operative fact and ask what legal theories were used or could have been employed in the first proceeding"). Whether the earlier court resolved any particular issue is thus expressly not part of the inquiry: Res judicata bars even a claim or argument that was not even *asserted*, and thus necessarily not "resolved." This is the key distinction between issue preclusion and res judicata.

Throughout its brief, however, the Tribe mischaracterizes this distinction as a "rule that extends the doctrine of claim preclusion to claims that were not resolved on the merits in the prior proceeding." Init. Br. 16. But that "rule" is not, as the Tribe contends, a "special rule" (Init. Br. 17); it is the definition of res judicata, as distinct from issue preclusion. *See also* Init. Br. 30 (addressing "the rule that extends the doctrine of claim preclusion to claims that were not resolved on the merits"). If res judicata applies, no "extension" of the doctrine is required—all claims that were or could have been asserted are barred. *Davila*, 326 F.3d at 1187. And it is wrong to say that this principle "applies only to claims that the plaintiff failed to assert in the prior proceeding" (Init. Br. 30), because it also applies if the plaintiff *did* assert that claim in the prior proceeding. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S.

394, 398 (1981) ("A final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action.").

Here, to the extent that the Tribe contends that the district court in *Seminole I* never "resolved" its cause of action that the Utility Tax—as applied to specific activities—is preempted by federal law, that is wrong. *See* Init. Br. 30-32. The district court did exactly that: It rejected the Tribe's request for a declaration and injunction to that effect, and entered a final judgment. In so doing, the court held that the Tribe "failed to show that the Utility Tax was preempted by federal law." *Seminole I*, Order, No. 0:12-cv-62140, ECF No. 110, at 8 (S.D. Fla. Sept. 30, 2016) (App'x Tab 110). The Tribe's statement that "[w]hile a final judgment was rendered in *Seminole I*, it did not address the Tribe's request for a declaration that Utilities Tax is preempted to the extent it is applied to federally regulated activities" (Init. Br. 17 n.12; *see also* Init. Br. 27) is thus incorrect. The district court not only addressed that request, it *denied* that request. No declaration issued. The only thing the court did not "resolve" was an alternative argument in favor of issuing that declaration, because the Tribe had already had a chance to develop that argument and failed to do so. That is why this is a res judicata case, not an issue preclusion case.

In arguing that the court did not "resolve" its cause of action in *Seminole I*, the Tribe relies on cases where courts did not rule on the cause of action *at all*. Init. Br. 26.

For example, in *Oppong v. First Union Mortgage Corp.*, 215 F. App'x 114 (3d Cir. 2007) (applying Pennsylvania res judicata law), the court held that plaintiff's claim was not barred by res judicata. There, plaintiff moved to dismiss a foreclosure proceeding, arguing that the bank violated the Fair Debt Collection Practices Act. The court denied that motion as moot after the case was removed to federal court. And in ruling in the bank's favor on the foreclosure action, the court did not rule on the merits of plaintiff's FDCPA claim. As a result, because there was "no evidence" that the prior court ever considered that claim; because the court "never mentioned" it; and because the court could not even rule on the claim because it was "procedurally barred," res judicata did not bar plaintiff's claim. *Id.* at 118. In other words, plaintiff's claim was not barred because only the *defendant's* claim (the bank's foreclosure claim) was adjudicated in the prior action; plaintiff's FDCPA counterclaim was never ruled upon at all. *See also In re Piper Aircraft Corp.*, 244 F.3d 1289, 1297 (11th Cir. 2001) (earlier court did not rule on claim at all).

Similarly, in *In re DeFlora Lake Development Assocs., Inc.*, 571 B.R. 587, 596 (Bankr. S.D.N.Y. 2017), a dispute about special escrow funds, one of the parties asserted that both the district court and the Second Circuit had "determined [that]

neither party has an interest in the special escrow funds." The court rejected that assertion, explaining that the party "misstate[d] the Second Circuit's holding on the parties' respective interests in the escrow funds," and that it had instead "held that there had been no determination of the parties' interests in the special escrow funds." *Id.* In other words, the court merely rejected a party's erroneous assertion that a claim had been ruled on in a prior case.

Because the district court expressly ruled on the Tribe's cause of action in *Seminole I* by refusing to grant the Tribe its requested declaration and injunction, these cases are irrelevant.

* * *

The Tribe's real complaint is that, in its view, the district court committed error in *Seminole I* by refusing to address the Tribe's alternative argument because of the court's interpretation of this Court's opinion. *See, e.g.*, Init. Br. 6 ("the district court refused to address the unresolved legal issues on remand"); *see also id.* at 29, 36. The Tribe argues that the district court in *Seminole I* could not have held that the Utility Tax "never violates federal law" (Init. Br. 9) because that purportedly would have violated Supreme Court precedent. *See also* Init. Br. 14 (arguing that the district court should have interpreted this Court's opinion to conform to precedent). That is an argument the Tribe could have made on appeal from final judgment in *Seminole I*. In other words, following final judgment, the Tribe was not "forever barred" from

obtaining review of those arguments (Init. Br. 37); it had appellate rights, and it failed to exercise them.

Relatedly, any purported error in *Seminole I* provides no basis for the Tribe to escape res judicata. *See Moitie*, 452 U.S. at 398 ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.").

B. The "declaratory judgment exception" to res judicata does not apply because the Tribe sought injunctive relief in *Seminole I*.

Next, the Tribe contends that res judicata simply does not apply where the earlier case involved a request for a declaratory judgment. Init. Br. 19-30. And because it sought a declaratory judgment in *Seminole I*, the Tribe argues, the Court should apply issue preclusion and undertake a careful analysis of the precise issues presented and decided in *Seminole I*; conclude that the merits of the Tribe's specific argument were not decided there; and hold that issue preclusion does not bar its claim.

1. This argument rests on a foundational misunderstanding of the "declaratory judgment exception" to res judicata. "Federal courts have consistently held that the declaratory judgment exception applies *only* if the prior action *solely* sought declaratory relief." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 164 (4th

Cir. 2008) (emphasis added).[2] That includes the cases on which the Tribe relies. *See* Init. Br. 20-22. In *ASARCO, LLC v. Montana Res., Inc.*, 858 F.3d 949, 956 (5th Cir. 2017), *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992), *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir. 1988), and *Minneapolis Auto Parts Co. v. City of Minneapolis*, 739 F.2d 408, 410 (8th Cir. 1984), the courts all recognized that the declaratory judgment exception applies *only* when the party sought *only* declaratory relief in the earlier case. And in *Smith v. City of Chicago*, 820 F.2d 916, 919 (7th Cir. 1987), which the Tribe also cites, the court recognized that "the limited scope of this exception is obvious," and

[2] *E.g.*, *ASARCO, LLC v. Montana Res., Inc.*, 858 F.3d 949, 956 (5th Cir. 2017) ("[I]n a case involving both declaratory claims and ones seeking coercive relief, the former will not serve as an antidote that undoes the preclusive force that traditional claims would ordinarily have."); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010) ("the declaratory judgment exception to the application of the doctrine of res judicata applies when 'the prior action involved *only* a request for declaratory relief'" (quoting *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992))); *Mascarenas Enters., Inc. v. City of Albuquerque*, 494 F. App'x 846, 852 (10th Cir. 2012) (same); *Harborside*, 959 F.2d at 372 (recognizing that the "exception to ordinary res judicata principles [applies] where . . . the prior action involved *only* a request for declaratory relief" (emphasis added)); *Tri-State Truck Ins., Ltd. v. First Nat. Bank of Wamego*, 564 F. App'x 345, 351 (10th Cir. 2014) ("The declaratory judgment exception applies when the prior action involved *only* a request for declaratory relief." (internal quotation marks omitted)); *see also Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. 1983) ("permitting Mandarino to proceed with his federal lawsuit would not further the purpose of declaratory actions, since his state court action did not seek 'solely' declaratory relief").

did not apply this "rarely encountered exception" there because the party sought an injunction in the prior case.

Indeed, the Restatement on which the Tribe relies expressly incorporates this important limitation. *See* Init. Br. 20. Comment c. to Restatement (2d) of Judgments § 33 provides that it is only "[w]hen a plaintiff seeks *solely* declaratory relief" that the plaintiff "may pursue further declaratory or coercive relief in a subsequent action." (emphasis added); *see Giannone v. York Tape & Label, Inc.*, 548 F.3d 191, 194 (2d Cir. 2008) (Restatement § 33 "makes clear that the limit [on preclusive effect] applies '[w]hen a plaintiff seeks *solely* declaratory relief.'" (emphasis added)).

Thus, if the prior action involved a request for any relief *other than* a declaratory judgment, the declaratory judgment exception to res judicata does not apply at all. *See Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010) ("[in the earlier case] there were claims other than those for declaratory relief and . . . those claims had the effect of disqualifying this case from the declaratory judgment exception"); *Cimasi v. City of Fenton, Mo.*, 838 F.2d 298, 299 (8th Cir. 1988) ("where a party seeks declaratory relief as well as affirmative relief through a coercive remedy, the [declaratory judgment] exception . . . does not apply"); *Tri-State Truck Ins., Ltd. v. First Nat. Bank of Wamego*, 564 F. App'x 345,

351 (10th Cir. 2014) ("If any party seeks coercive relief—whether in a claim or counterclaim—then the declaratory judgment exception does not apply.").

That includes cases where, like here, a party requested declaratory and injunctive relief in the earlier action. *See Giannone*, 548 F.3d at 194 ("Because Giannone's State Action sought injunctive relief as well as a declaratory judgment, he may not avail himself of the 'declaratory judgment exception' to the doctrine of res judicata."); *Laurel Sand & Gravel*, 519 F.3d at 164 ("By asking for coercive relief (the injunction) in the first suit, the plaintiff lost the right to invoke the declaratory judgment exception."); *Rollock v. LaBarbera*, 383 F. App'x 29, 30 (2d Cir. 2010) ("Because Rollock's prior claim sought injunctive as well as declaratory relief, the declaratory judgment exception is unavailable." (citation omitted)); *Regan v. Metro. Life Ins. Co.*, 80 F. App'x 718, 721-22 (2d Cir. 2003) (where plaintiff sought monetary damages and an injunction, declaratory judgment exception was not available); *Mascarenas Enters., Inc. v. City of Albuquerque*, 494 F. App'x 846, 852 (10th Cir. 2012) ("The district court correctly concluded that Mascarenas brought claims for injunctive relief in the first suit and that those claims therefore disqualified the second suit from the declaratory judgment exception."); *Stericycle, Inc. v. City of Delavan*, 120 F.3d 657, 660 (7th Cir. 1997) ("under the Restatement, a plaintiff who *seeks* an injunction cannot later seek other coercive relief on the same claim"); *Horn & Hardart*, 843 F.2d at 549 ("where a plaintiff's original action seeks

coercive or injunctive, as well as declaratory, relief, traditional rules of claim preclusion may apply to bar later actions").

This limited exception to the normal principles of res judicata is sensible. "A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief." Restatement (2d) of Judgments, § 33 comment c; *see Harborside*, 959 F.2d at 373 (describing declaratory judgment actions as "preliminary suit[s] limited to a declaration of the rights of the parties"). Declaratory actions allow parties to resolve their disputes at a preliminary stage. In that way, they share common purposes with res judicata: "litigation reduction and the conservation of judicial resources." *Harborside*, 959 F.2d at 373. Declaratory judgment actions can help parties to avoid "full-blown litigation," while res judicata avoids multiple lawsuits, conserves judicial resources, and encourages reliance on adjudication by avoiding inconsistent outcomes. *See id.*

It should come as no surprise, then, that if a party obtains a declaratory judgment, that judgment is not a bar to seeking *further* relief, including injunctive relief or monetary damages, in a subsequent suit. *See Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction."); *Horn & Hardart*, 843 F.2d at 549 ("the prevailing party in a declaratory judgment may seek further relief in the form of damages or an injunction"); *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*,

575 F.2d 530, 537 (5th Cir. 1978) (same); *see also* 28 U.S.C. § 2202. In other words, if a plaintiff wins a declaratory judgment and is still unable to resolve its dispute with the defendant, further remedies are not foreclosed. (Conversely, if a plaintiff *loses* a declaratory action, issue preclusion is sufficient to foreclose additional litigation by precluding the plaintiff from establishing the foundation for such further remedies.)

So if a court were to apply res judicata to a judgment in a case where a party sought *only* "a ruling on a preliminary legal issue before devoting the resources of 'full-blown litigation,'" parties would be discouraged from seeking only a declaratory judgment and instead would seek all available relief, lest they be precluded from doing so in a future suit—thereby thwarting the purpose of litigation reduction. *ASARCO*, 858 F.3d at 956; *see Harborside*, 959 F.2d at 373 (applying res judicata in such circumstances "would subvert the very interests in judicial economy that the doctrine was designed to serve"). By contrast, "when coercive claims are added to declaratory actions" to begin with, "the policy underlying the declaratory judgment exception must give way to the policy underlying traditional res judicata principles, namely, to protect defendants and the courts from a multiplicity of suits arising from the same cause of action." *ASARCO*, 858 F.3d at 956 (internal quotation marks omitted). Put differently, once a party files a lawsuit that seeks anything more

than a preliminary declaration of the parties' rights, it has initiated "full-blown litigation" to which standard res judicata principles apply.

2. Citing *Mandarino v. Pollard*, 718 F.2d 845 (7th Cir. 1983), the Tribe briefly acknowledges this critical limitation on the declaratory judgment exception, but contends that in *Mandarino*, the court relied on other factors in refusing to apply res judicata. *See* Init. Br. 22 n.14. The Tribe's reading of *Mandarino* is incorrect (and, as discussed above, *Mandarino* is far from the only case to recognize this limitation). According to the Tribe, the court in *Mandarino* refused to apply the declaratory judgment exception only because "all of the facts" with respect to the issue at hand "had to be determined in ruling on the request for the injunction." Init. Br. 22 n.14. Yet the court in *Mandarino* instead held that the "declaratory judgment exception' argument [wa]s not properly before" it and that Illinois law did not recognize it. 718 F.2d at 848. And in ruling in the alternative, the court did not rely on a need for any factual determination, but instead on the fact that the plaintiff's "request for a judicial declaration was coupled with a request for a preliminary injunction." *Id.* Because of that request for an injunction, and because of the policy reasons for not applying the exception discussed above, the exception did not apply. *See id.* In other words, whether the additional relief requested in the prior suit required the "determination of any facts" (Init. Br. 22 n.14) plays no role in

determining whether the exception applies; the only relevant question, as shown above, is whether a party sought relief *other than* a declaratory judgment.

None of this Court's precedents are to the contrary. In *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 533-536 (5th Cir. 1978), on which the Tribe relies heavily, the prior judgment that the Court held to have only limited preclusive effect involved *only* a request for declaratory relief. As a result, *Kaspar* fits squarely within the contours of the exception as described above. *See also Citibank*, 904 F.2d at 1504 (explaining that *Kaspar* addressed the preclusive effect of "consent judgments"). So too does *Empire Fire & Marine Ins. Co. v. J. Transp., Inc.*, 880 F.2d 1291, 1292, 1297 (11th Cir. 1989), where the earlier judgment declared only the respective rights of two insurance companies regarding an accident. In sum, nothing in this Court's precedents extends the declaratory judgment exception to all cases in which a party included a request for a declaratory judgment. Doing so, moreover, would contradict the policy reasons behind the exception. Instead, those precedents fall in line with the other circuits, which uniformly hold that the exception applies only where a party sought *nothing but* a declaratory judgment in the prior action.

3. Whether the declaratory judgment exception to res judicata applies is therefore a straightforward inquiry in this case. In *Seminole I*, the Tribe requested a permanent injunction, so the exception does not apply.

As to the Utility Tax, the Tribe "demanded . . . a judgment declaring that utility services provided to the Tribe on Tribal Land are not subject to Utilities Tax," *and* "a permanent injunction precluding further imposition or collection of Utilities Tax on utility services provided to the Tribe on Tribal Land." *Seminole I*, Compl. at 1-2.[3] In fact, the Tribe also requested "other such relief as the Court deems appropriate." *Id.* ¶¶ 55(b); 58(b). The Tribe maintained its request for an injunction throughout the litigation.[4] The Tribe admits as much. *See* Init. Br. 22 n.14 (acknowledging that "the Tribe coupled its request for prospective declaratory relief with a request for an injunction").

Because it is undisputed that the Tribe chose to initiate "full-blown litigation" in *Seminole I*, the declaratory judgment exception to res judicata does not apply. *Harborside*, 959 F.2d at 373. Having lost, and having failed to appeal, it cannot circumvent the important principles of res judicata and try again.

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[3] *See also* Compl. Count 4 ("INJUNCTION – UTILITIES TAX"); *id.* ¶ 58 ("The Tribe is entitled to injunctive relief . . . Plaintiff, Tribe, requests that the Court enter permanent injunctive relief in favor of the Tribe and against Defendants"); *id.* ¶ 58(a) (requesting that the court "[e]njoin the Department and Executive Director").

[4] *E.g.*, *Seminole I*, ECF No. 34, at ¶ 8 (Pl.'s Statement of Facts) (Suppl. App'x Tab 34) ("The Tribe filed its Complaint . . . seeking declaratory and prospective injunctive relief"); *Seminole I*, ECF No. 58, at ¶ 8 (Pl.'s Revised Statement of Facts) (Suppl. App'x Tab 58) (same); *Seminole I*, ECF No. 59, at 2 (Pl.'s Mot. for Summ. J.) (Suppl. App'x Tab 59) ("The Tribe also seeks to enjoin the future imposition, assessment, and collection of these taxes.").

C. No court has held that res judicata does not apply in cases involving "purely legal issues."

Finally, the Tribe argues that this case purportedly involves "purely legal issues," which, the Tribe maintains, can never be the subject of res judicata. Init. Br. 32-35. The district court appropriately rejected this "creative" contention for which the Tribe did not provide "any actual support." *Seminole II*, ECF No. 41, at 3 (App'x Tab 41). On appeal, the Tribe again fails to provide any actual support for this; it cites no case where a court held that res judicata does not apply to cases involving "purely legal issues." And as explained above, the declaratory judgment exception does not turn on whether only "purely legal issues" are involved but on whether only a request for a declaratory judgment is asserted.

Imagine, as the district court did, if the Tribe were right about this. The Tribe "could continue re-litigating the exact same cause of action, infinitely, so long as there were no disputed issues of material fact and the case involved only questions of law." *Seminole II*, ECF No. 41, at 3 (S.D. Fla. Oct. 12, 2017) (App'x Tab 41). A plaintiff could challenge a law on Equal Protection grounds and, after losing, could file another suit challenging the same law on Due Process grounds, and so on. The Tribe's argument would also mean that cases decided on summary judgment have no preclusive effect—a plaintiff could argue that only purely legal issues were resolved in such cases because no disputed material facts existed, and therefore that a new action presenting those same undisputed material facts is not precluded so

long as the plaintiff cooks up a new legal theory. That is not the law, which is why the Tribe identifies no case holding that it is.

II. RES JUDICATA BARS THE TRIBE'S COMPLAINT.

This is not only a res judicata case but a straightforward res judicata case. A judgment bars a subsequent claim when "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the judgment was final and on the merits; (3) both cases involve the same parties or those in privity with them; and (4) both cases . . . involve the same causes of action." *Borrero v. United Healthcare of N.Y., Inc.*, 610 F.3d 1296, 1306 (11th Cir. 2010) (internal quotation marks omitted). Res judicata "serves several important policy functions." *Id.* at 1307. It "further[s] the public interests of preventing inconsistent results, tamping down the cost and vexation of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication." *Reddy v. Gilbert Med. Transcription Serv., Inc.*, 588 F. App'x 902, 903 (11th Cir. 2014). After all, permitting the litigation of related claims would allow plaintiffs "a second bite at the apple." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1240 (11th Cir. 1999).

The Tribe does not dispute either that the judgment in *Seminole I* was rendered by a court of competent jurisdiction or that both cases involve the same parties.[5]

[5] The defendant in *Seminole I* was—as here—the Executive Director of the Florida Department of Revenue in his official capacity.

Instead, the Tribe contends that the other two elements of res judicata—whether the cases involve the same causes of action and whether the earlier judgment was a final judgment on the merits—are not satisfied here. The Tribe is wrong on both counts.

A. Both cases involve the same cause of action.

The Tribe presented the same cause of action in *Seminole I* and in this case. In both, the Tribe contended that imposing the Utility Tax on services provided to the Tribe on Tribal Land violates federal law. And in both, it sought a declaratory judgment to that effect, as well as an injunction barring the tax's imposition or collection.

The shorthand for this element of res judicata ("same cause of action") is a bit of a misnomer because res judicata actually sweeps far more broadly. For example, if a victim of a car accident sues the defendant on one legal theory and loses, the victim cannot sue the defendant again for damages suffered in the same car accident on another legal theory by arguing that it is a different "cause of action" (e.g., negligence versus an intentional tort). *See Piper Aircraft*, 244 F.3d at 1295 (noting that application of res judicata "does not turn on the nature of a party's alternative legal theories"). Instead, the question that courts ask is whether the cause of action in the later action was or *could have been* asserted in the earlier action. *Moitie*, 452 U.S. at 398 ("A final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that

action."); *Davila*, 326 F.3d at 1187 ("Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding." (internal quotation marks and citation omitted)). This is the "key inquiry." *Maldonado*, 664 F.3d at 1377. It is only when a new claim "is based on a new theory not otherwise available at the time of the prior proceeding" that a party may assert a new legal theory regarding the same matter. *Id*.

In applying this inquiry, moreover, the Court must keep in mind several principles. The Court must apply "a pragmatic approach to this analysis by comparing the substance of the actions, not their form." *Batchelor-Robjohns v. United States*, 788 F.3d 1280, 1286 (11th Cir. 2015); *Citibank*, 904 F.2d at 1503 (same). And the inquiry "turns primarily on the commonality of the *facts* of the prior and subsequent actions, not on the nature of the remedies sought." *Piper Aircraft*, 244 F.3d at 1295. Thus, "[r]ather than attempting to define the 'transaction' at issue in the first case," the Court must "line up the former and current cases side-by-side to assess their factual similarities." *Borrero*, 610 F.3d at 1309.

Performing this "key inquiry" here, by lining up the two cases "side-by-side," is a simple task. To begin with, the Tribe itself maintains that it actually asserted the cause of action at issue here in *Seminole I*. Even to the extent that it did not, the Tribe both "could have" and "should have" asserted that claim in *Seminole I*. Either way, res judicata bars its claim here.

1. It is the *Tribe's position* that it asserted the same cause of action in *Seminole I* and *Seminole II*. As the Tribe itself notes, in *Seminole II*, "it requested a declaration to prospectively resolve *the same purely legal issues*" at issue "in *Seminole I* (i.e., whether the federal regulation of one or more of the Tribe's specific activities is sufficiently exclusive and pervasive to preempt the application of Utilities Tax to electricity used to conduct the activity)." Init. Br. 6 (emphasis added); *see id.* at i, 1, 6, 7, 26, 36, (stating that *Seminole I* and *Seminole II* involve the "same purely legal issues"). Indeed, as the Tribe admits, in *Seminole I* it sought "a declaration that Utilities Tax is preempted to the extent it is applied to electricity used to conduct specific activities." Init. Br. 31 ("the Tribe requested that declaration in *Seminole I*"); *see also id.* at 3, 4 n.5, 10 (same); *Seminole I* Compl. ¶¶ 44, 46, 48, 49, 53, 54 (alleging that the Utility Tax burdens three specific activities and that it is therefore preempted). That, of course, is precisely the declaration the Tribe seeks in this case. It seeks a judgment "[d]eclaring that the application of the Utilities Tax to utilities services that the Tribe uses" to conduct fourteen specific activities "is prohibited by federal law," *Seminole II* Compl. ¶¶ 29.a, 39.a, 49.a, 59.a, 69.a, 79.a, 89.a, 99.a, 108.a, 117.a, 126.a, 135.a, 143.a, 152.a; because "[a]s applied to utilities services that the Tribe uses to conduct" those activities, "the Utilities Tax is preempted by federal law," *id.* ¶¶ 25, 35, 45, 55, 65, 75, 85, 95, 105, 114, 123, 132, 141, 150. So in *Seminole I*, the Tribe sought a declaration that as applied to activities

conducted on Tribal Land, the Utility Tax is preempted; in *Seminole II*, the Tribe sought a declaration that, as applied to a *subset* of those specific activities, the Utility Tax is preempted.[6]

As the Tribe points out, this Court has already acknowledged that the same cause of action raised here was presented in *Seminole I*: "[T]his Court acknowledged the Tribe's request for a declaration that Utilities Tax is preempted to the extent it is applied to electricity used to conduct specific federally regulated activities." Init. Br. 28 (citing *Stranburg*, 799 F.3d at 1352); *see also id.* at 5 (same). But because the

[6] Further side-by-side comparison reveals the same. In *Seminole I*, the Tribe requested a declaratory judgment that "utility services provided to the Tribe on Tribal Land are not subject to Utilities Tax," and "a permanent injunction precluding further imposition or collection of Utilities Tax on utility services provided to the Tribe on Tribal Land." Compl. 1-2. In *Seminole II*, the Tribe requested a declaratory judgment that "the application of Utilities Tax to utilities services, specifically electricity, that the Tribe uses on its reservations and other property held in trust for its benefit by the United States of America (collectively, 'Tribal Land') in the conduct of" enumerated activities "is prohibited by federal law," and "a permanent injunction enjoining the further imposition or collection of Utilities Tax on utilities services used to conduct any of those activities." Compl. 1-2.

Compare Seminole I Compl. ¶ 55.a (requesting declaration "that the utility services that are provided to the Tribe on Tribal Land are not subject to Utilities Tax") *& with, e.g., Seminole II* Compl. ¶ 29.a (requesting declaration "that the application of the Utilities Tax to utilities services that the Tribe uses to conduct law enforcement activities is prohibited by federal law"); *compare Seminole I* Compl. ¶ 58.a (requesting that the court "enjoi[n] the Department and Executive Director from further imposition or collection of Utilities Tax on utility services provided to the Tribe on Tribal Lands") *with, e.g., Seminole II* Compl. ¶ 29.b (requesting that the court "enjoi[n] the Executive Director from the further imposition or collection of the Utilities Tax on utilities services that the Tribe uses to conduct law enforcement activities").

Court concluded that the Tribe failed to establish its case, it held that the Utility Tax was not preempted. That the same cause of action was presented there is why "the Tribe asked the district court" on remand in *Seminole I* "to determine whether the federal regulation of any specific activity" preempted the Utility Tax, which is exactly what the Tribe wants the Court to do here. *Id.* And in asking the district court to consider that question in *Seminole I*, the Tribe listed the same fourteen specific activities that it lists in its complaint here. *See Seminole I*, Opp'n to Mot. for J., No. 0:12-cv-62140, ECF No. 106, at 9-11 (S.D. Fla. Aug. 2, 2016) (Suppl. App'x Tab 106).

In sum, the Tribe's own position—which is borne out by the record—is that the Tribe asserted the same cause of action in *Seminole I* as in *Seminole II*. As a result, res judicata's requirement that "both cases . . . involve the same causes of action" is easily satisfied here. *Borrero*, 610 F.3d at 1306 (internal quotation marks omitted).

2. Although the Tribe admits that it presented the same cause of action in *Seminole I*, it asserts that more is needed. It advances a strict transactional approach, which would require the Court to consider whether the two cases involve "identical facts relating to the same discrete transaction." Init. Br. 33; *see also id.* at 33 ("same transaction"); *id.* at 34 ("transactional nucleus of fact"); *id.* at 35 ("The identical facts must relate to the same transaction"). This Court, however, has expressly rejected

this approach. In *Borrero*, the Court engaged in a careful analysis of the Circuit's approach to "judg[ing] the similarity of two causes of action." 610 F.3d at 1307-09. The Court noted that although some circuits have adopted the "transactional approach," this Court has "never formally adopted it as an exclusive comparative framework." *Id.* at 1308. Instead, "the general analytical method in [this Court's] cases involves not an explicit transactional approach but an evaluation of any commonality in the 'nucleus of operative facts' of the actions." *Id.* at 1308. Thus, "[r]ather than attempting to define the 'transaction' at issue in the first case, [the Court] line[s] up the former and current cases side-by-side to assess their factual similarities." *Id.*

This is "a pragmatic approach," in which the Court "compar[es] the substance of the actions, not their form." *Batchelor-Robjohns*, 788 F.3d at 1286. For example, when comparing two cases where the claims "stem[med] from [plaintiff's] contention that [defendants] violated the terms of [a] class settlement by demanding that he sign a release or permit a home visit," the Court applied res judicata even though the two lawsuits were based on different demands—i.e., different transactions. *Langermann v. Dubbin*, 613 F. App'x 850, 854 (11th Cir. 2015). Similarly, in *Serpentfoot v. Rome City Comm'n*, 426 F. App'x 884, 886 (11th Cir. 2011), res judicata applied where the plaintiff alleged that a certain development project would destroy a gravesite, and in a previous lawsuit had alleged that different

development projects would destroy the gravesite—the cases involved "the same factual predicate that commercial development would destroy the gravesite." *See also Morris v. Bell*, 208 F. App'x 742, 744 (11th Cir. 2006) (applying res judicata where plaintiff contended that "he should receive higher monthly retirement benefits" under his retirement plan, even though he was younger when he filed his first suit for higher benefits). In short, the technical, transactional approach that the Tribe advocates is not this Court's approach.

Instead, the Court's decisions show that its view of the "same cause of action" requirement is far broader than the Tribe portrays. The Court looks to the *basic* facts shared by the two suits. *E.g.*, *Kizzire v. Baptist Health Sys., Inc.*, 441 F.3d 1306, 1309 (11th Cir. 2006) (applying res judicata where plaintiffs asserted in both cases that they "received emergency medical care . . . and were charged what they believed to be unreasonable rates"); *Draper v. Atlanta Indep. Sch. Sys.*, 377 F. App'x 937, 940 (11th Cir. 2010) (applying res judicata where the earlier case involved the same cause of action—that the defendant "failed to properly educate" plaintiff—even though the suits involved different statutory schemes for relief); *Gustafson v. Johns*, 213 F. App'x 872, 877 (11th Cir. 2007) (applying res judicata where plaintiffs sought to invalidate the same redistricting plans based on population deviations).[7]

[7] Despite the Tribe's argument that res judicata depends on facts "determined" in the earlier action (Init. Br. 19), no such requirement exists (and the Tribe cites no case holding that such a requirement exists). For example, if a plaintiff asserts claims

Here, the same basic facts are identical. In both cases, the Tribe contends that the imposition or collection of the Utility Tax for activities conducted on Tribal Land is illegal. In *Seminole I*, the Tribe argued that it was illegal as to all utilities used for all activities or, in the alternative, as to three categories of activities. In *Seminole II*, the Tribe argues that it is illegal as to a subset of what it challenged in *Seminole I*: tax on electricity used for fourteen categories of activities. Yet the Tribe does not challenge the imposition or collection of a different tax; or the imposition or collection of the Utility Tax on different utilities (*Seminole I* included *all* utilities); or the imposition or collection of the Utility Tax on different activities (*Seminole I* involved *all* activities on Tribal Land); or the imposition or collection of the Utility Tax on activities conducted on land other than Tribal Land. Thus, the causes of action are the same.

The Tribe argues, however, that to establish that the Utility Tax is preempted it must *prove* more specific facts than it did in *Seminole I*. But the question is not whether the Tribe must *prove* the same facts; it is whether the same nucleus of operative facts underlies both cases. The Tribe's argument is akin to a plaintiff

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arising out of a slip-and-fall, and a court grants a motion to dismiss for failure to state a claim, with prejudice, the plaintiff may not file a new suit asserting different claims based on that slip-and-fall by arguing that the court accepted all of the plaintiff's allegations as true in the earlier suit and thus did not "determine" any facts.

arguing that because he lost by failing to prove damages with specificity, he can file another suit because the specific facts relating to his damages claim were not before the court in the earlier case. Or, as another example, the negligence plaintiff cannot again sue the same defendant over the same incident by asserting an intentional tort and arguing that the facts he is required to prove are entirely different.

3. Even if the Court were to conclude that the Tribe did not assert the same cause of action in *Seminole I*—for example, because the Tribe's complaint in *Seminole II* is more specific than that in *Seminole I* (i.e., it alleges that the Utility Tax burdens fourteen specific, not three broad, activities)—res judicata would still apply.[8] That is because, as discussed, res judicata bars even claims that were not asserted in the earlier action but could have been. And the Tribe makes no effort at all to claim that it *could not have* asserted the same cause of action in *Seminole I*. Indeed, all of the material facts in *Seminole II* were present when *Seminole I* was filed: The State was imposing and collecting Utility Tax on all of the activities alleged here.

In other words, no new legal theory or factual scenario has arisen that gives the Tribe a new cause of action that it did not have when it filed *Seminole I*. *See*

[8] Such a conclusion would be incorrect: As the district court explained, that the Tribe included more specific allegations regarding a subset of the activities alleged in *Seminole I* does not mean that the causes of action are different; the factual overlap is total. *See Seminole II*, ECF No. 41, at 4-7 (App'x Tab 41).

Maldonado, 664 F.3d at 1377 (explaining that a party may assert a new claim related to the same cause of action only if it "is based on a new theory not otherwise available at the time of the prior proceeding"). The Tribe could have, and should have, filed the more specific complaint that it filed here in *Seminole I*. And a "party cannot escape . . . res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982).

B. In *Seminole I*, the district court entered a final judgment on the merits.

The judgment in *Seminole I* was plainly a final judgment on the merits of the Tribe's claims for purposes of res judicata. Following remand from this Court, Defendants "move[d] for final judgment" on Counts 3 and 4 of the Tribe's Amended Complaint. *Seminole I*, Mot. for J., No. 0:12-cv-62140, ECF No. 105, at 1 (S.D. Fla. Sept. 30, 2016) (Suppl. App'x Tab 105). In so doing, Defendants "assert[ed] that the only thing left for [the district court] to do is enter judgment for the Defendants on Plaintiff's claim that the utilities tax is preempted by federal law." *Id.* In ruling on the motion, the district court noted that it and this Court both "considered fully-briefed and extensive cross-motions for *final* summary judgment," following the completion of discovery. *Seminole I*, Order, No. 0:12-cv-62140, ECF No. 110, at 6 (S.D. Fla. Sept. 30, 2016) (App'x Tab 110). The district court concluded that this Court "found that the Seminole Tribe failed to show that the Utility Tax was

preempted by federal law" (*id.* at 8) and, as a result, "granted summary judgment for [Defendants] on Count 3 and Count 4" and "enter[ed] judgment in favor of the Defendant and against the Plaintiff" on those counts. *Seminole I*, Judgment, No. 0:12-cv-62140, ECF No. 111 (S.D. Fla. Sept. 30, 2016) (Suppl. App'x Tab 111). "Simply put, this analysis can only be considered a decision on the merits." *Davila*, 326 F.3d at 1189. After all, the court focused "on the substantive shortcomings in [the Tribe's] arguments," rather than on any jurisdictional shortcoming. *Id.*[9]

Indeed, the Tribe does not contend that the district court "dismissed [the] action for lack of subject matter jurisdiction, which plainly is not an adjudication on the merits that would give rise to a viable res judicata defense." *Davila*, 326 F.3d at 1188; *see id.* at 1190 (holding that because district court "did not base its dismissal on jurisdictional grounds," the dismissal "was a final judgment on the merits" that was "entitled to preclusive effect"). And in fact, the district court had earlier rejected jurisdictional arguments as to the Executive Director and as to the Tribe's challenge to the Utility Tax. *See Seminole I*, Order, No. 0:12-cv-62140, ECF No. 46 (S.D. Fla.

[9] That the district court exercised its discretion to refuse to allow the Tribe another chance at proving its claim is of no moment. *Cf. Christman v. Saint Lucie Cty., Fla.*, 509 F. App'x 878, 879 (11th Cir. 2013) ("The denial of leave to amend the Christmans' prior complaint was an adjudication on the merits as to the proposed claims."); *King v. Hoover Grp., Inc.*, 958 F.2d 219, 222-23 (8th Cir. 1992) ("It is well settled that denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading.").

Sept. 27, 2013) (Suppl. App'x Tab 46). The judgment in *Seminole I* was final and on the merits.

* * *

Because the Tribe presented the same cause of action in *Seminole I* as it does here—or, at least, it could have—and because the district court denied the Tribe's request for a declaratory judgment and for an injunction in *Seminole I*, and entered a final judgment on the merits, res judicata bars this action. To the extent that the Tribe disagrees with the district court's resolution of its cause of action in *Seminole I*, its only option was to appeal the district court's entry of final judgment—and it didn't.

III. RES JUDICATA DOES NOT HAVE A FREE-FLOATING EQUITABLE EXCEPTION, AND APPLYING RES JUDICATA HERE IS NOT MANIFESTLY UNJUST.

Lastly, the Court should reject the Tribe's invitation to both invent and apply an equitable exception to claim preclusion. Indeed, the Court has "previously rejected the argument that a manifest injustice exception should be applied" to prevent the application of res judicata. *Humphrey v. U.S. Dep't of Homeland Sec.*, 681 F. App'x 797, 799 n.2 (11th Cir. 2017); *see also Seminole II*, ECF No. 41, at 8 (App'x Tab 41).

This refusal to recognize a free-floating equitable exception to res judicata goes back to 1981, when the Supreme Court decided *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). There, the Court rejected the notion that

res judicata need not always be "rigorous[ly] appli[ed]," reasoning that "[t]here is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" *Id.* at 401-02 (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)). After all, "[t]he doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Id.* at 401.

As this Court explained shortly after *Moitie* was decided, "the Supreme Court [in *Moitie*] specifically rejected a general equitable or 'interests of justice' exception to the rule of res judicata." *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984) (citing *Moitie*, 452 U.S. at 399); *see also Griswold v. Cty. of Hillsborough*, 598 F.3d 1289, 1294 (11th Cir. 2010) (casting doubt on whether a "manifest injustice" exception "exist[s]" and noting that the Supreme Court "has cautioned against departing from accepted principles of res judicata" (citing *Moitie*, 452 U.S. at 401)); *Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 84 F.3d 1388, 1395 n.4 (11th Cir. 1996) (rejecting manifest injustice argument as "wholly without merit").

Against all this, the Tribe relies only on *Maldonado v. U.S. Attorney General*, 664 F.3d 1369, 1375 (11th Cir. 2011). But the list of the infirmities in the Tribe's argument on this point is long. To begin with, the Court in *Maldonado* did not even apply any "manifest injustice" exception; instead, it refused to apply res judicata because "an intervening change in the law . . . provided a wholly new legal basis [for

plaintiff's claim] that could not have been raised in the prior proceedings." *Id.* at 1380. So the Tribe instead relies on a statement that res judicata's "application is not strictly mechanical" and that "courts have some leeway in deciding whether or not res judicata bars a subsequent suit"—a statement that was necessarily dicta, given the Court's holding. *Id.* at 1375. And in any event, the Court in *Maldonado* was assessing res judicata in the context of *administrative proceedings*, not an earlier civil suit; as it explained, res judicata "applies even more flexibly in the administrative context." *Id.* at 1377.

Worse, the sole case on which the *Maldonado* Court relied for the proposition that courts have leeway to decide whether to apply res judicata was *Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594, 598 (5th Cir. 1977), which the former Fifth Circuit decided *before* the Supreme Court in *Moitie* clarified that res judicata does *not* have an equitable exception. 452 U.S. at 401. That is why, following *Moitie*, the Fifth Circuit retreated from *Moch*. *E.g.*, *Browning v. Navarro*, 887 F.2d 553, 562 (5th Cir. 1989) ("The Supreme Court in *Moitie* rejected the argument that equity could provide the basis for ignoring res judicata."); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1029 (5th Cir. 1982) (rejecting manifest injustice argument and noting that "[i]n civil court cases, while there might be isolated instances where the principles of res judicata do not apply with full force, . . . there is no general equitable exception to the doctrine" (citing *Moitie*, 452 U.S. at 401)).

Even this Court has cabined *Moch*. *See Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1504 (11th Cir. 1984) (characterizing *Moch* as "readily distinguishable . . . because [it] involved [a] moment[o]us chang[e] in important, fundamental constitutional rights"). In sum, *Maldonado* provides no basis to conclude that this Court has "expressly embraced" a "manifest injustice" exception (Init. Br. 37), particularly in light of the cases discussed above.

Even if there were a "manifest injustice" exception, without truly exceptional circumstances (such as a fundamental shift in a litigant's constitutional rights), applying res judicata cannot work a "manifest injustice." After all, the Tribe "could have advanced [its] later claims in the prior litigation." *Humphrey*, 681 F. App'x at 799 n.2; *see Griswold*, 598 F.3d at 1294 ("Even if a manifest injustice exception were to exist, the application of res judicata would not be unjust in this case. Griswold could have advanced [his] claims . . . during his control of the prior litigation and thus has already had his day in court."). Res judicata's requirement that a plaintiff could have asserted his new claim in the earlier action mitigates any potential unfairness of refusing to allow him to assert that claim in the later action.

That is the case here. Even if this Court were to recognize a free-floating equitable exception to res judicata, it should not apply that exception on these facts. As explained above, the Tribe had ample opportunity to advance its claims in *Seminole I*—and, in fact, it did so. There, the Tribe was "represented by able counsel

who made the tactical decision to initiate the Tribe's claims as presented." *Seminole II*, ECF No. 41, at 8 (App'x Tab 41). And to the extent that the district court in *Seminole I* denied the Tribe a second bite at the apple on remand from this Court, "the Tribe could have appealed that decision but chose not to," *Seminole II*, ECF No. 41, at 8 (App'x Tab 41); any resulting "predicament" from its failure to do so is therefore "of [the Tribe's] own making." *Moitie*, 452 U.S. at 401 ("[W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata."). Put another way, the Tribe was not "forever den[ied]" (Init. Br. 36) its right to litigate its claims or obtain review of its arguments until *after* the deadline to appeal passed.

And even if the Tribe had viewed this Court's opinion in *Seminole I* as leaving the door open for the Tribe to try again, the district court closed that door on remand. *See Stranburg*, 799 F.3d at 1353 n.22 ("[W]e offer no opinion on whether, if properly framed, the Tribe may be able to demonstrate that the Utility Tax is preempted with respect to some or all of the specific activities it has listed."); *Seminole I*, 0:12-cv-62140, ECF No. 110, at 5 (S.D. Fla. Sept. 30, 2016) (App'x Tab 110) (granting summary judgment, explaining that this Court "had the opportunity to specifically instruct [the district court] to allow the Seminole Tribe to start anew with new *Bracker* arguments," but it "chose not to"). Perhaps this Court would have re-opened it on appeal, but the Tribe made a strategic decision not to appeal.

In short, the Tribe "already had [its] day in court." *Humphrey*, 681 F. App'x at 799. Thus, foreclosing the Tribe from trying to establish the same cause of action again is no more "unjust" than it is to preclude any litigant who loses a case and wants to try again. Under res judicata, final judgments are final.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order dismissing the Tribe's case.

Respectfully submitted,

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I HEREBY CERTIFY that on July 27, 2018, I electronically filed the foregoing Answer Brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF, including:

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