

Case No. 22-55637

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

STEPHEN P. VILLASENOR,

Plaintiff-Appellant,

v.

TORRES MARTINEZ DESERT CAHUILLA INDIANS, a federally
recognized Indian tribe,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. EDCV 21-1835 JGB (SHKx)

Hon. Jesus G. Bernal

APPELLEE’S ANSWERING BRIEF

Thomas Weathers (CA 171422)
The Law Offices of Thomas Eagle Weathers, P.C.
1000 Fourth St., Suite 425
San Rafael, CA 94901
(415) 226-4035
tom@thomasweatherslaw.com

*Attorneys for Appellee Torres Martinez Desert Cahuilla Indians,
a federally recognized Indian tribe*

DISCLOSURE STATEMENT

The Torres Martinez Desert Cahuilla Indians is a federally recognized Indian tribe, a governmental body without an ownership structure.

TABLE OF CONTENTS

	Page
DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED.....	1
PERTINENT STATUTE	1
STATEMENT OF THE CASE.....	5
SUMMARY OF THE ARGUMENT	6
STANDARD OF REVIEW	6
ARGUMENT.....	7
I. THIS COURT SHOULD DISMISS THIS APPEAL AS UNTIMELY.....	7
II. THIS COURT SHOULD AFFIRM THE DISMISSAL OF THIS LAWSUIT BASED ON TRIBAL SOVEREIGN IMMUNITY.....	8
A. Villasenor Has the Burden to Establish Jurisdiction.....	8
B. The Tribe Enjoys Sovereign Immunity from Suit	9
C. Congress Did Not Abrogate the Tribe’s Sovereign Immunity Through the Indian Civil Rights Act	13
CONCLUSION.....	16
STATEMENT OF RELATED CASE	17

CERTIFICATE OF COMPLIANCE	17
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. Gold Country Casino</i> , 464 F.3d 1044 (9th Cir. 2006)	10
<i>Alvarado v. Table Mountain Rancheria</i> , 509 F.3d 1008 (9 th Cir. 2007).....	7
<i>Bodi v. Shingle Springs Band of Miwok Indians</i> , 832 F.3d 1011 (9th Cir. 2016)	10
<i>Boe v. Fort Belknap Indian Cmty. of Ft. Belknap Rsrv.</i> , 642 F.2d 276 (9th Cir. 1981)	14
<i>Bowles v. Russell</i> , 551 U.S. 205 (2007)	7
<i>Cherokee Nation v. Babbitt</i> , 117 F.3d 1489, 1499 (D.C. Cir. 1997)	11
<i>Coeur d'Alene Tribe v. Hawks</i> , 933 F.3d 1052, 1055 (9th Cir. 2019)	9
<i>Cook v. AVI Casino Enterprises, Inc.</i> , 548 F.3d 718 (9th Cir.2008)	11
<i>Demontiney v. United States</i> , 255 F.3d 801 (9th Cir. 2001)	11, 15
<i>Deschutes River All. v. Portland Gen. Elec. Co.</i> , 1 F.4th 1153 (9th Cir. 2021)	11, 16
<i>Engasser v. Tetra Tech, Inc.</i> , 519 F.Supp.3d 703 (C.D. Cal. 2021).....	9, 11
<i>Grondal v. United States</i> , 37 F.4th 610 (9 th Cir. 2022).....	7, 8, 11

<i>Imperial Granite Co. v. Pala Band of Mission Indians</i> , 940 F.2d 1269, 1271 (9th Cir.1991)	11
<i>Ingrassia v. Chicken Ranch Bingo & Casino</i> , 676 F.Supp.2d 953 (E.D. Cal. 2009)	10
<i>Jamul Action Comm. v. Simermeyer</i> , 974 F.3d 984, 991 (9th Cir. 2020)	10, 12
<i>Johnson v. Gila River Indian Cmty.</i> , 174 F.3d 1032, 1035 (9th Cir. 1999)	14
<i>Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.</i> , 523 U.S. 751 (1998)	16
<i>Kokkonen v. Guardian Life Ins. Co. of Am.</i> , 511 U.S. 375 (1994)	8
<i>Larimer v. Konocti Vista Casino Resort, Marina & RV Park</i> , 814 F. Supp.2d 952 (N.D. Cal. 2011)	12
<i>Las Vegas Tribe of Paiute Indians v. Phebus</i> , 5 F.Supp.3d 1221 (D. Nev. 2014)	13, 14
<i>Lewis v. Norton</i> , 424 F.3d 959 (9th Cir. 2005)	15
<i>Linneen v. Gila River Indian Cmty.</i> , 276 F.3d 489 (9 th Cir. 2002)	6
<i>Makah Indian Tribe v. Verity</i> , 910 F.2d 555 (9th Cir. 1990)	16
<i>Manzano v. S. Indian Health Council, Inc.</i> , 2021 WL 2826072 (S.D. Cal. July 7, 2021).....	9
<i>Michigan v. Bay Mills Indian Cmty.</i> , 572 U.S. 782 (2014)	11, 15

<i>Noriega v. Torres Martinez Desert Cahuilla Indian Tribe</i> , 2010 WL 11601191 (C.D. Cal. Sept. 14, 2010)	12
<i>Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991)	9
<i>Pan Am. Co. v. Sycuan Band of Mission Indians</i> , 884 F.2d 416 (9th Cir. 1989)	15
<i>Phillips v. Salt River Police Dep't</i> , 2013 WL 1797340 (D. Ariz. Apr. 29, 2013)	10
<i>Pistor v. Garcia</i> , 791 F.3d 1104 (9th Cir. 2015)	9
<i>Plantan v. Cadida Tr.</i> , 483 F. App'x 322 (9th Cir. 2012)	7
<i>Randall v. Yakima Nation Tribal Ct.</i> , 841 F.2d 897 (9th Cir. 1988)	14
<i>Robinson v. United States</i> , 586 F.3d 683 (9th Cir.2009)	9
<i>Salton Sea Venture, Inc. v. Ramsey</i> , 2011 WL 4945072 (S.D. Cal. Oct. 18, 2011).....	12
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	10, 13, 14
<i>Stock W., Inc. v. Confederated Tribes</i> , 873 F.2d 1221 (9th Cir. 1989)	8
<i>Tavares v. Whitehouse</i> , 851 F.3d 863, 865 (9th Cir. 2017)	13
<i>United States ex rel. Hoggett v. Univ. of Phoenix</i> , 863 F.3d 1105 (9th Cir. 2017)	7

<i>White v. Univ. of California</i> , 765 F.3d 1010 (9th Cir. 2014)	12
--	----

<i>Williams v. Pyramid Lake Paiute Tribe of Pyramid Lake Rsrv.</i> , 625 F. Supp. 1457, 1458 (D. Nev. 1986).....	14
---	----

Statutes

28 U.S.C. § 1331.....	1
28 U.S.C. § 1291.....	1
25 U.S.C. § 1302.....	1, 14

Rules

Fed. R. App. P 4(a)(1)	7
------------------------------	---

Other Authorities

86 Fed. Reg. 7554 (Jan. 29, 2021)	
-----------------------------------	--

JURISDICTIONAL STATEMENT

The U.S. District Court had jurisdiction under 28 U.S.C. § 1331 to determine that it lacked jurisdiction because of tribal sovereign immunity. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291.

On March 4, 2022, the lower court entered its Order granting the motion to dismiss and vacating the hearing. On May 13, 2022, the lower court entered its Order denying Villasenor's motion for reconsideration.

On June 30, 2022, Plaintiff/Appellant filed his Notice of Appeal from the final order dismissing his complaint and disposing of his claims.

ISSUES PRESENTED

1. Whether this Court must dismiss this appeal as untimely?
2. Whether the U.S. District Court erred in dismissing this lawsuit for lack of jurisdiction based on the tribal sovereign immunity of the Torres Martinez Desert Cahuilla Indians, a federally recognized Indian tribe?

PERTINENT STATUTE

25 U.S.C. § 1302 (Indian Civil Rights Act)

(a) In general

No Indian tribe in exercising powers of self-government shall--

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));
- (7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
- (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;
- (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or
- (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence,

and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

(1) to serve the sentence--

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term “offense” means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

STATEMENT OF THE CASE

On December 13, 2021, Stephen Villasenor filed his first amended complaint against the Torres Martinez Desert Cahuilla Indians (“Tribe”) seeking \$2.73 million in compensatory and punitive damages for claimed violations of equal protection laws and due process. (ER-9). His claim was based on the process used by the Tribe to terminate him from his employment. (ER-10).

Villasenor recognized in his first amended complaint the problem with jurisdiction given the Tribe’s sovereign immunity. So, he alleged that “the sovereign immunity of tribes may be abrogated through constitutional powers granted to Congress where a federal law is determined to be ‘appropriate legislation’, *ipso jure*.” (ER-10). He then asserted throughout the case and on appeal that the Indian Civil Rights Act (“ICRA”) is that “appropriate legislation” to abrogate sovereign immunity and permit jurisdiction. (See Opening Brf. at 5).

On January 31, 2022, the Tribe moved to dismiss for lack of jurisdiction based on tribal sovereign immunity and failure to state a claim. (ER-22). The district court granted the motion based on tribal sovereign immunity and dismissed the lawsuit for lack of jurisdiction. (ER-13). The district court declined to decide whether Villasenor had stated a viable claim. (ER-14).

On March 7, 2022, Villasenor moved for reconsideration. (ER-22). On May 13, 2022, the district court denied the motion. (ER-3). On June 30, 2022, Villasenor filed his Notice of Appeal. (ER-12).

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to hear this appeal because Villasenor did not file in a timely manner. He had 30 days from the order denying reconsideration in which to file his appeal. He waited 48 days. His appeal must be dismissed.

But even if this Court hears this appeal, the district court properly dismissed this lawsuit for lack of jurisdiction based on the Tribe's sovereign immunity. Villasenor does not dispute that the Tribe enjoys sovereign immunity from suit. Instead, he contends that Congress abrogated that immunity when it passed the Indian Civil Rights Act.

However, this Court has repeatedly held that the ICRA does not nullify a tribe's sovereign immunity except in the limited context of habeas corpus. Because Villasenor has sued for money damages based on equal protection and due process violations – not to test the legality of a detention by order of an Indian tribe – tribal sovereign immunity bars his lawsuit. This Court should affirm the district court.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's conclusion that it lacks subject matter jurisdiction. Linneen v. Gila River Indian Cmty., 276 F.3d 489, 492

(9th Cir. 2002). This Court also reviews *de novo* district court orders dismissing actions based on tribal sovereign immunity. Grondal v. United States, 37 F.4th 610, 616 (9th Cir. 2022). This Court may affirm a district court's judgment of dismissal on any grounds supported by the record. Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1019 (9th Cir.2007).

ARGUMENT

I. THIS COURT SHOULD DISMISS THIS APPEAL AS UNTIMELY

In a civil case, except where the United States is a party, the notice of appeal must be filed with the district clerk within 30 days after entry of the judgment or order appealed from. 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1). “[T]aking of an appeal within the prescribed time is mandatory and jurisdictional.” Bowles v. Russell, 551 U.S. 205, 209 (2007) (internal quotes omitted).

“If an appeal is untimely, the Court of Appeals lacks jurisdiction and must dismiss the appeal.” United States ex rel. Hoggett v. Univ. of Phoenix, 863 F.3d 1105, 1107 (9th Cir. 2017). This is true even if the appellant is pro se. See Plantan v. Cadida Tr., 483 F. App'x 322, 323 (9th Cir. 2012) (dismissing as untimely appeal filed by pro se plaintiff).

Here, the district court entered its order denying reconsideration of its dismissal on May 13, 2022. Assuming that motion to be one that extends the time to file an appeal, Villasenor still did not file his appeal until June 30, 2022 – 48

days later. Because he failed to file his appeal within the required 30 days, this Court lacks jurisdiction to hear this appeal and should dismiss.

II. THIS COURT SHOULD AFFIRM THE DISMISSAL OF THIS LAWSUIT BASED ON TRIBAL SOVEREIGN IMMUNITY

If for some reason this Court has jurisdiction to hear this appeal, it should nevertheless affirm the district court and still dismiss the lawsuit. Villasenor concedes in his brief that the Tribe enjoys sovereign immunity from suit. (See Opening Brf. at 4 n.10).

He argues, instead, that Congress abrogated that immunity through the ICRA. (See Opening Brf. at 5-6). Because Congress did not abrogate the Tribe's immunity in the ICRA, the district court properly dismissed this lawsuit based on tribal sovereign immunity.

A. Villasenor Has the Burden to Establish Jurisdiction

As courts of limited jurisdiction, federal courts are presumed to lack subject matter jurisdiction unless the party asserting jurisdiction establishes otherwise. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." Stock W., Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

Tribal sovereign immunity is a quasi-jurisdictional affirmative defense that is forfeited if not asserted by a tribe. Grondal, 37 F.4th at 617. "Although

sovereign immunity is only quasi-jurisdictional in nature, Rule 12(b)(1) is still a proper vehicle for invoking sovereign immunity from suit.” Pistor v. Garcia, 791 F.3d 1104, 1111 (9th Cir. 2015).

“Once a party has moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the opposing party bears the burden of establishing the court's jurisdiction.” Engasser v. Tetra Tech, Inc., 519 F.Supp.3d 703, 706 (C.D. Cal. 2021), *aff'd*, No. 21-55217, 2022 WL 3334632 (9th Cir. Aug. 12, 2022). “[T]he party asserting subject matter jurisdiction has the burden of proving its existence.” Robinson v. United States, 586 F.3d 683, 685 (9th Cir.2009) (citations omitted).

That means “the plaintiff must show that tribal sovereign immunity does not apply to bar suit.” Manzano v. S. Indian Health Council, Inc., 2021 WL 2826072, at *2 (S.D. Cal. July 7, 2021); *see also* Pistor, 791 F.3d at 1111 (party asserting subject matter jurisdiction has burden of proving immunity does not bar suit). And “[f]ederal question jurisdiction does not exist merely because an Indian tribe is a party.” Coeur d'Alene Tribe v. Hawks, 933 F.3d 1052, 1055 (9th Cir. 2019) (internal quotes omitted).

B. The Tribe Enjoys Sovereign Immunity from Suit

“Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories.” Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (quotations

omitted). As a result, “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). “The doctrine of tribal sovereign immunity derives from the status of Indian tribes as separate sovereigns preexisting the Constitution.” Bodi v. Shingle Springs Band of Miwok Indians, 832 F.3d 1011, 1016 (9th Cir. 2016) (internal quotes omitted).

A tribe's sovereign immunity will extend both to tribal governing bodies and to tribal agencies which act as arms of the tribe. Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006). “Tribal sovereign immunity is not dependent on a distinction between on-reservation and off-reservation conduct nor is it dependent upon a distinction between the governmental and commercial activities.” Ingrassia v. Chicken Ranch Bingo & Casino, 676 F.Supp.2d 953, 957 (E.D. Cal. 2009). “Tribal sovereign immunity extends to both the governmental and commercial activities of a tribe, whether undertaken on or off its reservation.” Jamul Action Comm. v. Simermeyer, 974 F.3d 984, 991 (9th Cir. 2020).

“Federal courts have applied sovereign immunity to bar civil rights and tort claims against Indian tribes.” Phillips v. Salt River Police Dep't, 2013 WL 1797340, at *3 (D. Ariz. Apr. 29, 2013). This immunity also extends to suits for declaratory and injunctive relief and is not defeated by an allegation that the tribe

acted beyond its powers. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir.1991).

“The Supreme Court has repeatedly declared a presumption favoring tribal sovereign immunity.” Demontiney v. United States, 255 F.3d 801, 811 (9th Cir. 2001). The inclusion of a tribe on the Federal Register list of recognized tribes is generally sufficient to establish its entitlement to sovereign immunity. Cherokee Nation v. Babbitt, 117 F.3d 1489, 1499 (D.C. Cir. 1997); Engasser, 519 F.Supp.3d at 707.

As a result, absent a clear waiver of sovereign immunity by the tribe or express authorization from Congress, a suit against an Indian tribe is barred by tribal sovereign immunity. Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 725 (9th Cir.2008). “Lawsuits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.” Grondal, 37 F.4th at 617 (internal quotes omitted). “There is a strong presumption against waiver of tribal sovereign immunity.” Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1159 (9th Cir. 2021) (internal quotes omitted).

And to abrogate immunity, Congress must unequivocally express that purpose in the statute. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014). “Indeed, when Congress intends to abrogate tribes' sovereign immunity, that intent cannot be implied, but must be unequivocally expressed in explicit

legislation.” White v. Univ. of California, 765 F.3d 1010, 1024 (9th Cir. 2014) (internal quotes omitted).

Here, there is no dispute that the Torres Martinez Desert Cahuilla Indians is an Indian tribe recognized by and eligible to receive services from the U.S. Bureau of Indian Affairs. See 86 Fed. Reg. 7554 (Jan. 29, 2021). Therefore, it is entitled to sovereign immunity. See Larimer v. Konocti Vista Casino Resort, Marina & RV Park, 814 F. Supp.2d 952, 955 (N.D. Cal. 2011) (“Inclusion of a tribe on the Federal Register list of recognized tribes is generally sufficient to establish entitlement to sovereign immunity.”)

The district courts in California have already recognized as much. See Salton Sea Venture, Inc. v. Ramsey, 2011 WL 4945072, at *5 (S.D. Cal. Oct. 18, 2011) (“As a federal recognized American Indian tribe, the Torres–Martinez tribe is likely entitled to tribal sovereign immunity”); Noriega v. Torres Martinez Desert Cahuilla Indian Tribe, 2010 WL 11601191, at *1 (C.D. Cal. Sept. 14, 2010) (because Torres-Martinez is a federally recognized Indian tribe, Torres-Martinez is entitled to sovereign immunity). Because the Tribe enjoys sovereign immunity from suit, the federal courts lack subject matter jurisdiction. See Jamul Action Comm., 974 F.3d at 993 (affirming dismissal of tribe included on list of recognized tribes based on sovereign immunity); Alvarado, 509 F.3d at 1015-16 (“tribal

immunity precludes subject matter jurisdiction in an action against an Indian tribe.”)

C. Congress Did Not Abrogate the Tribe’s Sovereign Immunity Through the Indian Civil Rights Act

In his attempt to show that tribal sovereign immunity does not bar his lawsuit, Villasenor argues somewhat confusingly that his claim for \$2.73 million in compensatory and punitive damages for allegedly violating his due process and equal protection rights may proceed under the Indian Civil Rights Act. In other words, he seems to be arguing that Congress abrogated the Tribe’s sovereign immunity when Congress passed the ICRA and that gives the district court jurisdiction. (See Opening Brf. at 5-6). Again, Villasenor is mistaken.

“As 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, 436 U.S. at 56. “In 1968, however, Congress passed the ICRA to provide certain protections for Indians as against their tribal governments.” Las Vegas Tribe of Paiute Indians v. Phebus, 5 F.Supp.3d 1221, 1228 (D. Nev. 2014). “Congress enacted the ICRA in 1968 in response to a ‘long line’ of federal court decisions exempting Indian tribes from constitutional restraints.” Tavares v. Whitehouse, 851 F.3d 863, 865 (9th Cir. 2017). Congress did this “to transmit federal constitutional protections to those individuals subject to tribal jurisdiction.”

Randall v. Yakima Nation Tribal Ct., 841 F.2d 897, 899 (9th Cir. 1988) (internal quotes omitted).

In relevant part, the ICRA provides that “[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.” 25 U.S.C. § 1302(a)(8). “These protections roughly parallel the protections afforded by the Bill of Rights, but the only remedy available is habeas corpus, not injunctive or declaratory relief.” Las Vegas Tribe of Paiute Indians, 5 F.Supp.3d at 1228.

When enacting ICRA, Congress limited the remedy available solely to habeas corpus relief. Santa Clara Pueblo, 436 U.S. at 66. “The only avenue available to a party who seeks relief in the federal courts for an alleged violation of the ICRA is through an application for habeas corpus relief[.]” Boe v. Fort Belknap Indian Cmty. of Ft. Belknap Rsrv., 642 F.2d 276, 278 (9th Cir. 1981). “Thus, although a Tribe is bound by the ICRA, a federal court has no jurisdiction to enjoin violations or to award damages for violations of that Act.” Williams v. Pyramid Lake Paiute Tribe of Pyramid Lake Rsrv., 625 F. Supp. 1457, 1458 (D. Nev. 1986). “The only recognized exception to a sovereign immunity defense under the ICRA is a habeas corpus action.” Johnson v. Gila River Indian Cmty., 174 F.3d 1032, 1035 (9th Cir. 1999).

Here, Villasenor has not filed a habeas corpus claim to test the legality of a detention by order of an Indian tribe. Instead, he has sued for money damages claiming civil rights violations. That requested relief is precluded by the Tribe's sovereign immunity. Congress did not abrogate the Tribe's sovereign immunity through the Indian Civil Rights Act to allow Villasenor to sue for money damages. See Demontiney, 255 F.3d at 814 (holding that ICRA did not waive the tribe's sovereign immunity to allow suit for money damages).

Villasenor argues that upholding sovereign immunity “would allow for injustice of every type to be committed by any tribe, such that tribal sovereign immunity power is unchecked, unimpeachable, and unprecedented.” (See Opening Brf. at 6-7). This is not true. Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation. Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989). Courts have “time and again treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver).” Michigan, 572 U.S. at 789 (internal quotes omitted).

“[C]ourts are not in a position to modify well-settled doctrines of tribal sovereign immunity.” Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005). Even if sovereign immunity may leave a party with no forum for its claims, that lack of a

forum does not prevent dismissal of the lawsuit. Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990).

An intention to abrogate tribal sovereign immunity must be unmistakably clear and come from Congress. Deschutes River All., 1 F.4th at 1162. Courts will defer to Congress on the need to abrogate tribal immunity as an overarching rule. Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998).

Congress has not acted to limit tribal sovereign immunity in the ICRA or otherwise as applicable to the Tribe. Because Villasenor has not met his burden to show jurisdiction, this Court should affirm the district court's dismissal based on tribal sovereign immunity.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as untimely. In the alternative, this Court should AFFIRM the order of dismissal by the district court.

Date: September 23, 2022

THE LAW OFFICES OF THOMAS
EAGLE WEATHERS, P.C.

/s/ Thomas Weathers
Thomas Weathers

*Attorneys for Appellee Torres Martinez
Desert Cahuilla Indians*

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

I, the undersigned attorney, state that I am unaware of any related cases currently pending in this Court.

Signature: /s/ Thomas Weathers

Date: September 23, 2022

Form 8. Certificate of Compliance for Briefs

I am the attorney. **This brief contains 3,687 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature: /s/ Thomas Weathers

Date: September 23, 2022

Form 15. Certificate of Service for Electronic Filing

9th Cir. Case Number 22-55637

I hereby certify that I electronically filed the foregoing (1) APPELLEE'S ANSWERING BRIEF and (2) EXCERPTS OF RECORD on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

I also certify that I served the foregoing (1) APPELLEE'S ANSWERING BRIEF and (2) EXCERPTS OF RECORD on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participant:

Appellant Stephen Villasenor
6264 Topaz St.
Rancho Cucamonga, CA 91701
Email: villarancho@gmail.com

Signature: /s/ Thomas Weathers

Date: September 23, 2022