No. 24-5135

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MODOC NATION, AKA MODOC TRIBE OF OKLAHOMA; RED CEDAR ENTERPRISES, INC.; EAGLE TG, LLC; BUFFALO MTE, LLC; TALON MTE, LLC; MODOC MTE, LLC; WALGA MTE, LLC,
Plaintiff Counterclaim Defendants,

v.

RAJESH SHAH; SHARAD DADBHAWALA; SOFTEK MANAGEMENT SERVICES, LLC; SOFTEK FEDERAL SERVICES, LLC; SOFTEK SOLUTIONS, INC.,
Defendant Counterclaimant-Appellees,

v.

RUSTY BOHL,
Defendant,

v.

BLAKE FOLLIS,
Counterclaim Defendant-Appellant,

v.

TROY LITTLEAXE; LEGAL ADVOCATES FOR INDIAN COUNTRY LLP,
Counterclaim Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
D.C. Case No. 4:19-CV-00588-JDR-JFJ (Hon. John D. Russell)

BRIEF FOR APPELLEES

Oral Argument Not Requested

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CITIZENSHIP STATEMENT

Pursuant to 10th Cir. R. 28.2(C)(6), Defendant-Counterclaimant Appellees identify their Limited Liability Companies' ("LLC") members and their states of citizenship as follows:

Appellee LLC	**LLC members**	**State of Citizenship**
Softek Management Services, LLC	Softek Federal Services, LLC (sole member)	California
Softek Federal Services, LLC	Softek Solutions, Inc. (sole member)	California

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GLOSSARY

LAIC	Legal Advocates for Indian Country, LLP
MTE	Modoc Tribal Enterprise

STATEMENT OF RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(C)(3), there are no prior or related appeals.

I. JURISDICTIONAL STATEMENT

Plaintiff-Counterclaim Defendants Modoc Nation, a federally recognized Tribe, and several of its wholly owned enterprises, Red Cedar Enterprises, Inc.; Eagle TG, LLC; Buffalo MTE, LLC; Talon, LLC; Modoc MTE, LLC; and Walga MTE, LLC (collectively, "Plaintiffs") are citizens of Oklahoma. App. Vol. 1 at 60–61. Defendant Countercomplainant-Appellees Rajesh Shah; Sharad Dadbhawala; Softek Management Services, LLC; Softek Federal Services, LLC; and Softek Solutions, Inc. (collectively, "Softek Defendants") are citizens of California; and Defendant Rusty Bohl (collectively, "Defendants") is a citizen of Texas. *Id.* at 62. Counterclaim Defendant-Appellant Blake Follis ("Follis") is a citizen of Oklahoma; and Counterclaim Defendants Troy Littleaxe ("Littleaxe") and Legal Advocates for Indian Country, LLP ("LAIC") are citizens of Oklahoma. App. Vol. 2 at 6.

After Plaintiffs brought federal and state law claims against Defendants, the district court initially had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1332 (diversity jurisdiction), and 28 U.S.C. § 1367 (supplemental jurisdiction). App. Vol. 1 at 64. Today, the district court continues to exercise jurisdiction under 28 U.S.C. § 1332 and § 1367 over Plaintiffs' remaining state law claims against Defendants and Softek Defendants' remaining state law counterclaims and crossclaims against Plaintiffs and Counterclaim Defendants Follis, Littleaxe, and LAIC. *Id.*; App. Vol. 2 at 7.

As discussed in Softek Defendants' motion to dismiss and Section V(B) below, this Court lacks jurisdiction over this appeal under 28 U.S.C. § 1291 because the district court's interlocutory order, denying Follis's converted motion for summary judgment and assertions of tribal sovereign immunity and official immunity, is not a final decision of the district court—as several of Plaintiffs' claims and Softek Defendants' counterclaims and crossclaims are pending below. *See* App. Vol. 2 at 12–19, 185–86; App. Vol. 1 at 98–105. Follis has failed to demonstrate that the Court otherwise has jurisdiction over this appeal.

II. STATEMENT OF THE ISSUES

1. Does this Court have jurisdiction over this appeal from the district court's order denying Follis's converted summary judgment motion?

2. Does Follis have standing to challenge the district court's denial of Plaintiffs' converted motion for summary judgment?

3. Did the district court err in denying Follis's converted summary judgment motion on tribal sovereign immunity and official immunity grounds?

4. Did the district court err in denying Plaintiffs' converted summary judgment motion on tribal sovereign immunity grounds?

III. STATEMENT OF CASE

Plaintiffs are a federally recognized Indian tribe, the Modoc Nation based in Oklahoma, and several of its wholly owned enterprises, including Red Cedar

Enterprises and the MTEs. App. Vol. 1 at 60–62. Softek Defendants are a group of individuals and enterprises doing business in California. App. Vol. 2 at 5.

In August 2010, Softek Defendants executed a letter of intent with the Modoc Nation wherein Softek Defendants agreed to supply startup and operational costs and/or working capital loans to create and operate four Modoc Tribal Enterprises ("MTE") (i.e., Plaintiffs Eagle MTE, Buffalo MTE, Modoc MTE, and Walga MTE) under the U.S. Small Business Administration's 8(a) Business Development program. App. Vol. 2 at 7; Supp. App. Vol. 1 at 13–15. In exchange, Softek Defendants would receive a portion of the net income generated by each of the four MTEs. *Id.* The parties ultimately entered into an agreement formalizing their business relationship; and Softek Defendants proceeded to create and operate the MTEs on behalf of the Modoc Nation. Supp. App. Vol. 1 at 16–28.

In approximately late 2016 or early 2017, Follis, a member of the Modoc Nation and grandson of longtime Modoc Chief Bill Follis, decided to insert himself into Softek Defendants' work with the Modoc Nation; he attempted to curtail Softek's management and oversight role of the MTEs. Supp. App. Vol. 1 at 9. Follis inserted himself into Softek Defendants' relationship with the Modoc Nation to promote his now-failed idea of an online sports gambling platform. *Id.* at 9–11, 29–30. Follis, over the objections of Softek Defendants, sought to leverage the finances, resources, and personnel of the MTEs to develop his personal project and started

using personnel from an MTE to develop an electronic platform for his sports gambling enterprise. *Id.* at 9. Follis also hired additional personnel and spent significant amounts of MTE funds on marketing his now-failed gambling endeavor—funds and resources that were never contemplated as part of Softek Defendants' agreement with the Modoc Nation. *Id.* at 10. At one point, Follis's reckless business decision to pursue his now-failed fantasy gambling business resulted in a need to significantly draw down on Softek Defendants' and the Modoc Nation's $5 million joint line of credit. *Id*.

In January 2018, Follis was appointed as the Modoc Nation's Attorney General. App. Vol. 1 at 217, 225–26. Follis was responsible for, in relevant part, "investigat[ing] and prosecut[ing] all actions, civil or criminal, related to civil actions or crimes against or within the jurisdiction of the Modoc Tribe," "furnish[ing] legal advice" to the Modoc Nation, and "supervis[ing] and direct[ing] the legal business of every executive department, board, commission, entit[y], and officer." App. Vol. 1 at 225–26.

In July 2019, Follis apparently became unsatisfied with the online gambling platform software he had (improperly) conscripted certain MTE personnel to develop. App. Vol. 1 at 11. Follis demanded that a manager for the MTEs, Defendant Bohl, travel several hours to the military base where these MTE personnel were working to personally terminate them all. *Id*. Bohl refused, enraging Follis. *Id.*

Shortly thereafter, Follis was allegedly conscripted by his grandfather, the Modoc Nation's Chief, to commence an official "investigation" into Softek Defendants' management and financing activities related to the MTEs. App. Vol. 1 at 217; App. Vol. 2 at 43. Follis conducted interviews of certain MTE employees, including Defendant Bohl on July 16, 2019. App. Vol. 1 at 217–18. On July 17, 2019, Follis's grandfather, the Modoc Nation Chief, terminated Softek Defendants' agreement with the Modoc Nation and directed the termination of certain MTE employees. *Id.* at 218; App. Vol. 2 at 43. As of July 2019, Softek Defendants were owed at least $3,153,761 in loan proceeds and fees from Plaintiffs, but damages continue to accumulate given the profit-sharing nature of the parties' contract. Supp. App. Vol. 1 at 11.

Until at least August 2019, Follis continued to investigate possible claims against Softek Defendants. App. Vol. 1 at 218. After October 3, 2019, however, Follis abruptly ceased serving as the Modoc Nation's Attorney General for unknown reasons. *See id.* at 216. To date, Softek Defendants have not been notified of the results of Follis's alleged "investigation" beginning in July 2019 and thus have been unable to address Follis's and others' false allegations against Softek Defendants. Supp. App. Vol. 1 at 37.

On November 1, 2019, Plaintiffs filed a complaint in the U.S. District Court for the Northern District of Oklahoma against Defendants, asserting claims for

conspiracy to defraud, fraud and misrepresentation, deceit, breach of contract, breach of fiduciary duty, and accounting brought under Oklahoma common law. App. Vol. I at 50–56. Plaintiffs later amended their complaint, asserting three additional claims against Defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). App. Vol. I at 83–98.

Softek Defendants brought counterclaims against Plaintiffs, asserting several claims under Oklahoma common law, including a breach of contract claim, to recover the millions in unpaid loans and proceeds owed to them. *See* App. Vol. 2 at 10–12. Softek Defendants also brought crossclaims against Follis for (1) civil conspiracy, (2) intentional interference with a contractual relationship, (3) conversion, (4) negligence, (5) unjust enrichment, and (6) tortious interference with a prospective economic advantage. App. Vol. 2 at 13–15. Softek Defendants further brought crossclaims against Softek Defendants' former attorney, Littleaxe and his law firm, LAIC. App. Vol. 2 at 15–19.

On October 30, 2024, the district court issued a series of orders, including the order denying Plaintiffs' and Follis's separate motions to dismiss, both of which were converted to motions for summary judgment, seeking to dismiss Softek Defendants' counterclaims against Plaintiffs and crossclaims against Follis. *See*

App. Vol. 2 at 178, 185–86.[1] Thus, Softek Defendants' counterclaims against Plaintiffs and crossclaims against Follis (and Littleaxe and LAIC) remain pending before the district court. *Id.* at 185–86.

On November 13, 2024, Follis filed a notice of appeal, challenging the district court's non-final summary judgment order rejecting Follis's assertion of sovereign immunity and official immunity. App. Vol. 1 at 30. Now, Follis apparently also seeks to challenge the district court's non-final summary judgment order rejecting the assertion of sovereign immunity by Plaintiff Modoc Nation's enterprises.

IV. SUMMARY OF ARGUMENT

Follis has failed to meet his burden to show that the district court's non-final summary judgment order, rejecting his assertion of tribal sovereign immunity and official immunity, is a final, appealable decision under 28 U.S.C. § 1291 or appealable under the collateral order doctrine. The appeal must be dismissed.

Likewise, Follis has no standing on appeal to seek review of the district court's non-final summary judgment order denying the assertion of tribal sovereign immunity by Plaintiff Modoc Nation's enterprises.

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[1] The district court issued two additional orders that day: one granted Softek Defendants' motion to dismiss Plaintiffs' RICO claims against Softek Defendants, meaning only Plaintiffs' remaining state law claims against Softek Defendants remain pending below; the other order largely denied Littleaxe's and LAIC's motion to dismiss Softek Defendants' crossclaims (which was later converted to a summary judgment motion), meaning nearly all of Softek Defendants' crossclaims against Littleaxe and LAIC remain pending below. *See* App. Vol. 2 at 178 n.1; Vol. 1 at 30.

Even if the Court reaches the merits of Follis's arguments on appeal, the district court properly concluded that Softek Defendants' crossclaims against Follis are not barred by tribal sovereign immunity or official immunity. These crossclaims were brought against Follis based on tortious acts he committed in his personal capacity, most of which *predated* his employment with the Modoc Nation.

Finally, the district court properly concluded that Plaintiff Modoc Nation's enterprises waived their tribal sovereign immunity defense. Follis's belated attempt to challenge the district court's conclusion on appeal (assuming he has standing to do so) must be rejected under the invited error doctrine.

V. ARGUMENT

A. Standard of Review

"Ordinarily, '[the Court] review[s] de novo a district court's denial of a motion to dismiss based on tribal sovereign immunity.'" *Breakthrough Mgmt. Grp. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182 (10th Cir. 2010) (quoting *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007)). "But '[w]here, as here, subject-matter jurisdiction turns on a question of fact, we review the district court's factual findings for clear error and review its legal conclusions de novo." *Id.* (quoting *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008)).

B. The Court Lacks Jurisdiction over the District Court's Non-Final Order Denying Follis's Motion.

1. This Court lacks jurisdiction under 28 U.S.C. § 1291.

This Court lacks jurisdiction over this appeal under 28 U.S.C. § 1291 because the district court's interlocutory order denying Follis's converted summary judgment motion did not terminate the action and is not a final decision for purposes of appeal.

Whether the Court has appellate jurisdiction is "antecedent to all other questions." *Grosvenor v. Qwest Corp.*, 733 F.3d 990, 994 (10th Cir. 2013). The Court's jurisdiction is limited to "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. "A final decision is typically one by which a district court disassociates itself from a case." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (cleaned up). The appellant bears the burden to establish appellate jurisdiction. *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 542 n.7 (10th Cir. 2016).

It is undisputed that the district court's denial of Follis's motion failed to terminate the action below, as several of Plaintiffs' claims against Defendants and Softek Defendants' counterclaims and crossclaims against Plaintiffs, Follis, Littleaxe, and LAIC remain pending before the district court. *See* App. Vol. 2 at 185–86; App. Vol. 1 at 98–105; App. Vol. 2 at 12–19.[2]

[2] Follis never asked the district court to certify an appeal of its summary judgment order under Federal Rule of Civil Procedure 54(b) or to make a determination that

Thus, unless a narrow exception to 28 U.S.C. § 1291 applies, the Court lacks jurisdiction over this appeal.

2. This Court lacks jurisdiction under the collateral order doctrine.

The district court's summary judgment order, denying Follis's assertions of tribal sovereign and official immunity, does not fall within the "small class of orders that are final for purposes of § 1291 under the collateral order doctrine." *Decker v. IHC Hosp., Inc.*, 982 F.2d 433, 435 (10th Cir. 1992).

The U.S. Supreme Court has cautioned "courts of appeals to view claims of a right not to be tried with skepticism, if not a jaundiced eye," for "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 43 (1995) (internal quotation marks and citation omitted); *see Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1033 (10th Cir. 2022) (appeals under the collateral order doctrine must be the "exception, not the rule").

A non-final or collateral order "practical[ly]" qualifies as a final decision if it falls within a category of cases that satisfy *all three* of the criteria articulated in

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there is no "just reason" for delaying this appeal. *See* Fed. R. Civ. P. 54(b); *see also Atiya v. Salt Lake County*, 988 F.2d 1013, 1016 (10th Cir. 1993) (an order adjudicating "fewer than all of the claims or liabilities of all the parties" is not a "final appealable order" absent the district court's Rule 54(b) determination).

Cohen v. Ben. Indus. Loan Corp., 337 U.S. 541, 546 (1949), including: (1) the decision "conclusively determine[s] the disputed question," (2) it "resolve[s] an important issue completely separate from the merits of the action," and (3) it "[is] effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006). Under the second criterion, the issue on appeal must be "significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits" and is more likely to be satisfied "where purely legal matters are at issue." *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 665 (10th Cir. 2018). In considering the *Cohen* criteria, the Court's "focus is not on whether an immediate appeal should be available in a particular case, but instead on whether an immediate appeal should be available for the *category* of orders at issue." *Tucker*, 36 F.4th at 1035 (emphasis in original).

This Court has previously concluded that it lacks appellate jurisdiction when a tribal member challenges a non-final order rejecting his claim of "Indian sovereign immunity," at least where claims are brought against a tribal member "individually," because such claims "do not implicate tribal sovereign immunity." *Gardner v. Long*, No. 20-4128, 2021 WL 2327814, at *1 (10th Cir. Feb. 2, 2021) (citing, *inter alia*, *Lewis v. Clarke*, 581 U.S. 155 (2017)). Relatedly, the Court has determined that it lacks appellate jurisdiction over a state official's appeal of an interlocutory order denying qualified immunity, where the state official challenged the district court's

factual determinations, as the Court "may only consider purely legal questions on appeal from a denial of qualified immunity." *Henderson v. Glanz*, 813 F.3d 938, 950 (10th Cir. 2015).[3]

Here, the undisputed record demonstrates that Follis, an individual tribal member, is not entitled to tribal sovereign immunity because he was sued in his individual capacity for monetary damages based on the wrongful acts that he took beginning in late 2016 or early 2017, *before* he was employed by the Modoc Nation. *See* App. Vol. 2 at 13–15, 19–20, 180–81; Supp. App. Vol. 1 at 9–11. Consistent with this Court's prior holding that non-final orders denying an individual tribal member's assertion of tribal sovereign immunity are not appealable, this Court lacks appellate jurisdiction over the district court's summary judgment order rejecting Follis's sovereign immunity claim. *See Gardner*, 2021 WL 2327814, at *1 (dismissing the appeal based on an individual tribal member's claim of tribal sovereign immunity where suit was brought against him in his personal capacity).

Likewise, the Court lacks appellate jurisdiction to review the denial of Follis's claim of official immunity because Follis simply ignores the district court's factual determinations that Follis was the "real party in interest" subject to Softek

[3] Although the appellant in *Henderson* was a state official, the U.S. Supreme Court has clarified that "[t]he protection offered by tribal sovereign immunity . . . is no broader than the protection offered by state or federal sovereign immunity." *Lewis*, 581 U.S. at 164.

Defendants' crossclaims and that Follis tortious acts were committed "independent from his role as a tribal official." App. Vol. 2 at 180–81; *see Henderson*, 813 F.3d at 950 (concluding the Court lacks jurisdiction over the interlocutory appeal of an order denying qualified immunity because it "would require second-guessing the district court's determinations of evidence sufficiency").

Even if the Court applies the *Cohen* criteria to this particular case, Follis cannot satisfy the second *Cohen* criterion because the district court's summary judgment order did not "resolve an important issue *completely separate* from the merits of the action." *Will*, 546 U.S. at 349 (emphasis added). Whether Follis is entitled to sovereign or official immunity necessarily turns on factual determinations made by the district court, namely (1) whether Follis or the Modoc Nation is the "real party in interest" subject to Softek Defendants' crossclaims and (2) whether Follis's tortious acts were committed "independent from his role as a tribal official" or within the scope of his power as Attorney General. *See* App. Vol. 2 at 180–81; *see Lewis*, 581 U.S. at 161–62 ("[C]ourts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit"; *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010) ("[T]he immunity question hinges on the breadth of the official power the official enjoys"). These factual questions are not only at the heart of the inquiry into Follis's claim of sovereign immunity, but they are also at the heart of the inquiry into the merits of Softek

Defendants' crossclaims—i.e., the lawfulness of Follis's challenged actions, most of which commenced long before Follis was employed by the Modoc Nation. Supp. App. Vol. 1 at 9–11.

Challenging that position, Follis asserts that this Court has jurisdiction over the district court's order denying his motion because the district court rejected his assertion of "tribal" sovereign immunity. Opening Br. at 8. Follis exclusively relies on two cases decided by this Court: *Osage Tribe of Indians v. U.S. Department of Labor*, 187 F.3d 1174 (10th Cir. 1999) and *Breakthrough Management Group*, 629 F.3d 1173. Those cases stand for the unremarkable proposition that the Court has appellate jurisdiction to review "[a] district court's order denying a motion to dismiss involving a claim of *tribal* sovereign immunity." *Breakthrough Mgmt. Grp.*, 629 F.3d at 1177 n.1 (emphasis added). But, of course, Follis is not a tribal government, nor is he "a body corporate[]," a "politic[]," "an instrumentality of the Tribal Government," or "an authorized agency of the Tribe." *Id.* at 1192 (explaining that a Tribal agency and an enterprise wholly owned by the Tribe, created under the Tribe's constitution, demonstrated these subordinate tribal *entities* shared in the Tribe's sovereign immunity); *see also Osage Tribe*, 187 F.3d at 1179–80 (involving denial of sovereign immunity asserted by the Osage Tribal Council).

Follis is an individual tribal member who was sued in his personal capacity for tortious acts, most of which occurred *before* he was appointed as Attorney

General. *See* App. Vol. I at 217; App. Vol. 2 at 13–15, 19–20, 180–81; Supp. App. Vol. 1 at 9–11. Nothing in *Osage Tribe of Indians* or *Breakthrough Management Group* can be read to permit Follis, a tribal member who was sued for monetary damages in his personal capacity for torts committed outside the scope of his employment with the Modoc Nation, to immediately appeal the denial of a non-final order adjudicating fewer than all claims brought by the parties. *See Breakthrough Mgmt. Grp.*, 629 F.3d at 1177 n.1, 1192; *see also Osage Tribe*, 187 F.3d at 1179–80; *but see Gardner*, 2021 WL 2327814, at *1 (dismissing appeal of order denying tribal sovereign immunity asserted by individual tribal member).

Notably, Follis fails to cite any authority that this Court has jurisdiction to review the district court's denial of his assertion of official immunity. *But see Henderson*, 813 F.3d at 950 (dismissing appeal of order denying qualified immunity where the Court would be required to "second-guess[]" the district court's factual determinations).[4] Because Follis has failed to meet his burden to establish that the

[4] Previously, Follis exclusively relied on *Mitchell v. Forsyth*, 472 U.S. 511 (1985) to support jurisdiction over the district court's denial of his official immunity claim. Even assuming it is appropriate to extend *Mitchell*'s holding, involving a claim of qualified immunity, to the official immunity context, "the Supreme Court has held that there is still a class of qualified immunity rulings not immediately appealable." *McFarland v. Childers*, 212 F.3d 1178, 1183 (10th Cir. 2000) (citing *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995)). Relevant here, a party "may not appeal a district court's summary judgment order insofar as the order determines whether the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 320. In denying Follis's motion, the district court clearly found genuine disputes of fact existed for trial. App. Vol. 2 at 180–86.

Court has jurisdiction to review the district court's non-final order under the collateral order doctrine, the Court should dismiss the appeal.

C. Follis Lacks Standing to Challenge the District Court's Denial of *Plaintiff's* Assertion of Tribal Sovereign Immunity.

Follis simply assumes, without citation to legal authority, that he has standing on appeal to challenge the district court's order denying *Plaintiffs*' converted motion for summary judgment, or at least the court's denial of the Modoc Nation's enterprises' assertion of tribal sovereign immunity. *See* Opening Br. at 27–31; *see also id.* at 27 n.4 (acknowledging that the district court did not deny the Modoc Nation's claim of tribal sovereign immunity).

"Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (citing U.S. Const., art. III, § 2). "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Id.* "To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way'" and have "a direct stake in the outcome." *Id.* at 705 (citations omitted). "Standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* (concluding petitioners had no "direct stake" in the outcome of their appeal, given their only interest was "to vindicate the constitutional validity of a generally applicable California law").

In challenging the district court's denial of *Plaintiffs'* converted motion for summary judgment, or any claim that the Modoc Nation's enterprises are entitled to tribal sovereign immunity, Follis does not seek relief for an injury that affects him in a "personal and individual way" because he has no "direct stake" in the outcome of this challenge. *Hollingsworth*, 570 U.S. at 705. To be sure, the district court noted that Follis's claim of sovereign immunity would be "derivative of the [Modoc Nation's] sovereign immunity" but ultimately concluded that tribal sovereign immunity was unavailable to Follis because Softek Defendants sought to hold him "liable for actions independent from his role as a tribal official and seek relief directly from . . . Follis, not the Tribe's treasury." App. Vol. 2 at 180–81. The district court therefore declined to address whether the Modoc Nation was entitled to sovereign immunity because Softek Defendants' counterclaims were not brought against the Modoc Nation—as Follis concedes. *Id.* at 179; *see* Opening Br. at 12. Confusingly, Follis also previously conceded that the Modoc Nation *waived* its sovereign immunity as to counterclaims brought by Softek Defendants. *Id.* at 179; Opp. to Mot. to Dismiss at 8 n.3 (citing *Berrey v. Asarco Inc.*, 439 F.3d 636, 643 (10th Cir. 2006) ("[W]hen a tribe files suit it waives its immunity as to counterclaims of the defendant that sound in recoupment.")); *see also* Supp. App. Vol. 1 at 25 (Modoc Nation agreeing to a limited waiver of sovereign immunity).

Notably, Plaintiffs have not appealed, on their own behalf, the district court's determination that a tribal sovereign immunity defense is unavailable to the Modoc Nation's enterprises—presumably because Plaintiffs' state law claims are still pending below. Regardless, Follis lacks standing to seek appellate review of the denial of *Plaintiffs'* motion or their assertion of sovereign immunity as to the Modoc Nation's enterprises. *See Hollingsworth*, 570 U.S. at 705.

D. The District Court Did Not Err in Denying Follis's Motion.

1. The district court properly concluded Follis is not entitled to sovereign immunity.

To the extent the Court reaches the merits of Follis's assertion of tribal sovereign immunity or official immunity, the Court did not err in concluding that the sovereign immunity defense was unavailable to Follis, where his tortious acts were committed either *before* Follis held any position with the Modoc Nation or outside the scope of his official authority.

As the U.S. Supreme Court has long held, tribal sovereign immunity is not available when a claim is made against a tribal member, a tribal officer, or a tribal employee "in their individual capacities." *Lewis*, 581 U.S. at 168; *Puyallup Tribe, Inc. v. Wash. Dep't of Game*, 433 U.S. 165, 171–72 (1977) (concluding the "doctrine of sovereign immunity . . . does not immunize the individual members of the Tribe" from a suit to enjoin violations of state law); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) ("As an officer of the [tribe], [he] is not protected by the tribe's

immunity from suit."); *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014) (noting that "Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction").

"[A] tribe's sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Burrell*, 603 F.3d at 832 (internal quotation marks and citation omitted). Tribal sovereign immunity extends to tribal employees only when they are "acting within the scope of their official authority," *id.* at 832, or "*because of* their official capacities," i.e., "because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." *Native Am. Distrib.*, 546 F.3d at 1296 (emphasis in original).

Thus, "to determine whether sovereign immunity bars the suit, [the Court] ask[s] whether the sovereign 'is the real, substantial party in interest,'" which generally "turns on the relief sought by the plaintiffs." *Native Am. Distrib.*, 546 F.3d at 1296 (quoting *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)). Still, the Court must determine "in the first instance whether the remedy sought is truly against the sovereign." *Lewis*, 581 U.S. at 162.

If a plaintiff seeks, for example, "a decree [that] would operate against the [tribe]," the tribe, not the tribal employee, is likely the real party in interest. *Native Am. Distrib.*, 546 F.3d at 1296–97; *cf. Santa Clara Pueblo*, 436 U.S. at 72

(concluding claims for declaratory and injunctive relief against a tribal officer were subject to the tribe's sovereign immunity). Generally, "[i]n an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis*, 581 U.S. at 162.

On the other hand, if a plaintiff seeks *monetary* damages from the officer "in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself," *sovereign immunity does not bar the suit* "so long as the relief is sought not from the sovereign's treasury but from the officer personally." *Native Am. Distrib.*, 546 F.3d at 1296 (quoting *Alden v. Maine*, 527 U.S. 706, 757 (1999)) (emphases added). "Personal-capacity suits . . . seek to impose *individual* liability upon a government officer for actions taken under color of . . . law"; "[o]fficers sued in their personal capacity come to court as individuals . . . and the real party in interest is the individual, not the sovereign." *Lewis*, 581 U.S. at 163.

In *Lewis*, the U.S. Supreme Court denied a tribal employee's sovereign immunity defense where the suit was brought after the employee negligently operated a vehicle on state lands but within the scope of his employment with the Tribe. *Id*. The Court in *Lewis* held that tribal sovereign "immunity is simply not in play," explaining that any "judgment will not operate against the Tribe," as the suit merely sought to recover against the tribal official "for his personal actions, which 'w[ould] not require action by the sovereign or disturb the sovereign's property.'"

Id. (quoting *Larson v. Domestic and Foreign Comm. Corp.*, 337 U.S. 682, 687 (1949)).

Here, the district court properly concluded that Softek Defendants brought state law tort claims against Follis in his personal capacity arising from Follis's individual tortious actions. *See* App. Vol. 2 at 180–81. In opposing Follis's motion, Softek Defendants presented evidence, including the declarations of Softek Defendant Rajesh Shah and supporting exhibits, averring that Follis engaged in tortious conduct for his own benefit even *before* Follis became Attorney General in January 2018:

- "[I]n approximately *late 2016 or early 2017*, . . . Follis inserted himself into Softek's work with Modoc, and curtailed Softek's management and oversight role of several of the [MTEs]";
- "Follis inserted himself into the relationship between the Modoc and Softek in order to promote his idea of an online sports gambling platform";
- "Follis, over the objections of Softek, sought to leverage the finances, resources, and personnel of the MTEs to develop his now-failed fantasy sports gambling platform, which he did in fact do" by "us[ing] personnel from Eagle [MTE] to help develop an electronic platform for his gambling enterprise";
- Follis "hired additional personnel and spent significant amounts of MTE funds on marketing his gambling endeavor," funds and resources that were never contemplated as part of Softek Defendants' business model;
- "Follis's reckless business decision pursuing his now-failed fantasy gambling business interests resulted in a need to draw

down on [Softek and Modoc's $5 million] line of credit significantly";

- Leading up to July 2019, Follis "previously demanded to use the resources of the MTEs," including the use of contracted personnel on military bases, "to benefit his fantasy sports gambling operation"; and

- "When . . . Follis was unsatisfied with the online gambling platform software he had (improperly) conscripted certain [MTE] personnel to develop, he demanded [Defendant Bohl, then an MTE manager] travel several hours to the military base where these personnel were working and terminate them all personally."

Supp. App. Vol. 1 at 9–11, 29–30; *see also* App. Vol. 2 at 9–10, 13–14, 180–81.[5] Softek Defendants now seek to recover monetary damages for Follis's individual wrongful actions, which will not require action by the Modoc Nation or disturb its property, particularly as Follis has not been an employee of the Modoc Nation since October 2019. App. Vol. 2 at 13–14, 19–20; *see Lewis*, 581 U.S. at 163.

And although the district court did not expressly reach this issue, *see Native Am. Distrib.*, 546 F.3d at 1297, there is nothing in the record demonstrating that Follis enjoyed broad "official power" to carry out any of these tortious actions, again most of which were carried out in his personal capacity *before* he was appointed as

[5] Although the district court did not expressly cite these averred statements in its summary judgment order, this Court is "free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even on grounds not relied upon by the district court." *Native Am. Dist.*, 546 F.3d at 1297.

Attorney General. Supp. App. Vol. 1 at 9–11, 29–30. Follis concedes that during his short stint as Attorney General (from to January 2018 to October 2019) he was authorized only to "*investigate* . . . actions, civil or criminal, related to civil actions or crimes," "furnish *legal* advice" to the Modoc Nation, and "supervise and direct the *legal* business of" the MTEs. App. Vol. 1 at 217, 225–26 (emphasis added). Follis was never authorized, as Attorney General, to convert MTE's funds or resources to support his now-failed online sports gambling platform or tortiously interfere with Softek Defendants' contract with the Modoc Nation leading up to the "investigation" of Softek Defendants, which Follis commenced in July 2019. Supp. App. Vol. 1 at 9–11, 29–30; *see* App. Vol. 2 at 180–81.

Follis nevertheless responds that the district court's findings were in clear error because they were based on allegations based on "information and belief" contained in Softek Defendants' amended pleadings. Opening Br. at 21. But Follis misunderstands his burden on summary judgment. Follis "always [bore] the initial responsibility of informing the district court of the basis of [his] motion[] and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970) (concluding because the court must view the underlying facts

alleged in the moving party's materials in the light most favorable to the party opposing the motion, a moving party's initial failure to address a fact material to the case required reversal of summary judgment in the moving party's favor).

In moving for dismissal of Softek Defendants' crossclaims asserted against him, Follis failed to identify, let alone rebut, the relevant portions of the pleadings or the supporting declarations and exhibits showing that Follis's tortious acts were taken "to benefit his personal, failed fantasy sports operation" or that most of them occurred *before* he became Attorney General—as the district court correctly found. App. Vol. 2 at 180–81. Indeed, Follis's motion entirely failed to address Softek Defendants' specific allegations of personal wrongdoing, which were clearly outside the scope of his authority as Attorney General to conduct the Tribe's or the MTEs' *legal* business. *See* App. Vol. 1 at 195, 203–05 (Follis asserting, in a conclusory fashion, that "at all times relevant hereto [Follis] was acting in the scope of his authority as the Attorney General of Plaintiffs Modoc Nation"); App. Vol. 1 at 217–18 (Follis incorrectly averring that Softek Defendants' allegations all "relate to purported actions during an official investigation [Follis] commenced in July 2019"); *but see* App. Vol. 2 at 9–10 (indicating that much of Follis's tortious conduct commenced *before* July 2019). Follis's motion and supporting documentation simply "failed to fulfill [his] initial burden of demonstrating what is a critical element" of the case—that Follis committed tortious acts outside the scope of his

short tenure as Attorney General, which only show that Follis was the "real party in interest" subject to Softek Defendants' crossclaims. *See Lewis*, 581 U.S. at 163. The district court properly concluded that Follis failed to meet his burden to address these underlying factual allegations (which Follis never rebutted), particularly given the court's duty to construe all facts in a light most favorable to Softek Defendants. *See Adickes*, 398 U.S. at 159; App. Vol. 2 at 180–81.

Follis also ignores the declarations and other evidence that Softek Defendants filed in support of their opposition to Follis's motion below. *See, e.g.*, Supp. App. Vol. 1 at 4–39. This evidence alone permits the Court to reject Follis's baseless assertion that the district court somehow erred by relying on Softek Defendants' allegations based on "information and belief."[6]

Follis also faults the district court for relying on two federal district court cases involving motions to dismiss: *Phillips v. James*, No. CIV-21-256, 2023 WL 1785774 (E.D. Okla. Jan. 18, 2023) and *Gregory v. United States*, No. CIV-20-308, 2022 WL 4624693 (E.D. Okla. Sep. 30, 2022). Opening Br. at 22. But the district court cited

[6] Follis's reliance on *Tavery v. United States*, 32 F.3d 1423 (10th Cir. 1994) and other unpublished or out-of-circuit authority are inapplicable, given that Softek Defendants submitted declarations and exhibits, based on personal knowledge, supporting their allegations of tortious acts committed by Follis outside the scope of his employment with the Modoc Nation, as most of the tortious acts occurred before he was appointed as Attorney General in January 2018. Supp. App. Vol. 1 at 9–11.

these cases for specific propositions[7] and in no way suggested it was applying the legal standard for a motion to dismiss, rather than the summary judgment standard. App. Vol. 2 at 179–80. The district court's analysis was not in error.

2. The district court properly concluded Follis is not entitled to official immunity.

For the same reasons that Follis's assertion of tribal sovereign immunity fails, Follis's assertion of official immunity fails. As the district court concluded, although Follis argued his acts were performed within the scope of his role as Attorney General, Softek Defendants alleged (and demonstrated) that:

- Follis managed a "daily sports operation," which lost money belonging to an MTE and Follis demanded the resources of that MTE "to benefit his personal, failed fantasy sports operation";
- Follis "interfered with Softek's good faith endeavors to meet its contractual obligations"; and
- Follis "fabricated a false narrative that Softek had defrauded Modoc and the MTEs."

App. Vol. 2 at 181; *see* Supp. App. Vol. 1 at 9–11, 29–30. The district court concluded that Follis failed to address these allegations; and although Follis's

[7] The district court cited these cases for the proposition that sovereign immunity does not bar a suit where, as here, a party brings the suit against a tribal employee in his personal capacity, based on allegations factually distinct from those alleged against the Tribe, and seeks monetary damages against that employee. *See* App. Vol. 2 at 180. These district court cases merely applied binding Circuit and U.S. Supreme Court authority, and it was not erroneous for the district court to rely on them. *See Native Am. Distrib.*, 546 F.3d at 1297; *Lewis*, 518 U.S. at 163.

sweeping declaration statements attempted to do so (e.g., by baselessly averring Softek Defendants' allegations all "related to [Follis's] purported actions during an official investigation"),[8] the district court properly concluded that Softek Defendants' "allegations cover far more ground than that addressed by . . . Follis." App. Vol. 2 at 181; *see also Adickes*, 398 U.S. at 159 (moving party's initial failure to address a fact material to the case required reversal of summary judgment).

Contrary to Follis's assertions, the district court neither "mischaracterized" Follis's declaration nor did it "ignore" the other evidence in the record. *Compare* Opening Br. at 23–26, *with* App. Vol. 2 at 181–82.[9] The only relevant evidence that the district court did not cite in its summary judgment order is an averment by the Modoc Nation's General Counsel that Softek Defendants were "not terminated because of any dispute [an MTE manager] and . . . Follis may have been having about Modoc MTE's Fantasy Sports business." App. Vol. 2 at 43. But even the

[8] Follis's declaration, which lacks any supporting facts, *see* App. Vol. 1 at 217, is precisely the type of "conclusory and self-serving affidavit" that this Court has held to be insufficient to show an absence of any genuine dispute of material fact at the summary judgment stage. *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991).

[9] Follis also re-raises his assertion that the district court relied on "threadbare allegations based upon[] 'information and belief'" in rejecting his official immunity defense. Opening Br. 27. Follis again ignores Softek Defendants' declarations and exhibits showing that Follis's tortious acts predated or were outside the scope of his role as Attorney General. *See* Supp. App. Vol. 1 at 9–11, 29–30; *see also Native Am. Dist.*, 546 F.3d at 1297 (the Court may affirm on any ground supported by the record).

General Counsel's averment fails to address the long list of tortious actions that Follis took *before* July 2019, including without limitation Follis's wrongful use of the MTE's funds and resources and his tortious interference with Softek Defendants' contract with the Modoc Nation beginning in late 2016 or early 2017 (before Follis was appointed as Attorney General). *See* Supp. App. Vol. 1 at 9–11, 29–30.

Follis's wrongful acts, again which predated or were outside the scope of his employment as Attorney General, simply were not "done within scope of his authority" and are not "quasi-judicial in character"—meaning the doctrine of official immunity cannot apply to this case. *Cf. Powell v. Seay*, 553 P.2d 161, 163–64 (Okla. 1976); *see also Taylor v. Meacham*, 82 F.3d 1556, 1560–61 (10th Cir. 1996) (recognizing a malicious prosecution claim is available where the injury is of a constitutional magnitude and meets the elements of the state tort of malicious prosecution). The district court did not err in rejecting Follis's assertion of official immunity under Oklahoma common law.

E. The District Court Did Not Err In Denying Plaintiffs' Motion.

Finally, assuming Follis has standing to challenge the district court's denial of *Plaintiffs*' converted motion for summary judgment and the rejection of the Modoc Nation's enterprises' sovereign immunity defense, the district court did not commit any error. Follis exclusively challenges the district court's reliance on Plaintiffs' concessions that the Modoc Nation's enterprises, Red Cedar Enterprises

and the MTEs, waived their sovereign immunity under *Somerlott v. Cherokee Nation Distributions, Inc.*, 686 F.3d 1144 (10th Cir. 2012). Opening Br. at 27–30.

In their supplemental briefing, Plaintiffs conceded that if the Modoc Nation's enterprises, and not the Modoc Nation, were the real parties in interest subject to Softek Defendants' counterclaims, "*Somerlett* [sic—*Somerlott*] would apply because Oklahoma's incorporation statute expressly provides that an Oklahoma corporation can sue or be sued." App. Vol. 2 at 27. Plaintiffs then conceded that "*Somerlett* [sic—*Somerlott*] does apply to the MTE's [sic—MTEs] and their incorporation, or in the case of Red Cedar's qualification to do business," and "the laws of Oklahoma, Texas, Utah, and Kansas effected a waiver of their sovereign immunity." *Id.* at 28 (citing 12 O.S. §§ 1002, 2002–03; Tex. Bus. Code Ann. §§ 1.002, 2.101; Utah Code Ann. § 38-32a-105; Kan. Stat. Ann. § 17-7668). Finally, Plaintiffs noted that the Modoc Nation's enterprises' "waiver under *Somerlett* [sic—*Somerlott*] dispenses with the need to resolve wither the SBA 8(a) limited waiver by the MTE's [sic—MTEs] permits Softek to assert the counterclaims against them." *Id.* at 28–29 n.3. Rather than argue these MTEs shared in the Modoc Nation's sovereign immunity, Plaintiffs instead argued that dismissal of Softek Defendants' counterclaims was proper because "they fail to state a claim for relief." *Id.* at 29.

The district court appropriately read Plaintiff's repeated concessions that *all* "the MTE[s] . . . waiv[ed] . . . their sovereign immunity" under *Somerlott* by

incorporating the MTEs under the incorporation statutes of Oklahoma, Texas, Utah, and Kansas. *See* App. Vol. 1 at 27–29, 179. At no point did Plaintiffs state below that the MTEs waived sovereign immunity *except for* "Modoc MTE or Talon," which Follis now attempts to exclude from Plaintiffs' prior concessions. *See* Opening Br. at 28.

Follis's belated attempts are unavailing under the invited error doctrine. "[T]he invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt." *United States v. McBride*, 94 F.4th 1036, 1042 (10th Cir. 2024) (citation omitted). "Having induced the court to rely on a particular erroneous proposition of law or fact, a party may not at a later stage use the error to set aside the immediate consequences of the error." *United States v. Morrison*, 771 F.3d 687, 694 (10th Cir. 2014) (citation omitted); *see also Parker v. United Airlines, Inc.*, 49 F.4th 1331, 1338 (10th Cir. 2022) (applying the doctrine in the civil context).

If Plaintiffs were part of this appeal, they would be precluded from attempting to set aside the district court's alleged "error" based on Plaintiffs' clear and repeated concessions that the MTEs waived their sovereign immunity (and without expressly carving out either the Modoc MTE or Talon). *See* App. Vol. 2 at 27–29. Follis cannot now stand in Plaintiffs' shoes to circumvent the invited error doctrine.

The Court can likewise reject Follis's argument that the district court's "erroneous" conclusion that Modoc MTE and Talon did not enjoy sovereign immunity "deprived [Follis] to assert sovereign immunity in his capacity as Attorney General." *See* Opening Br. at 30. To the contrary, as discussed extensively above, the district court refused to dismiss Softek Defendants' crossclaims against Follis on sovereign immunity grounds, after finding that such crossclaims did not rest on any tortious actions taken within the scope of Follis's employment as Attorney General for Modoc MTE or Talon. *See* App. Vol. 2 at 180–81. The court instead found that Softek Defendants' crossclaims were based on the tortious actions that Follis took *outside* the scope of his authority as Attorney General, e.g., Follis's wrongful use of the MTE's funds and resources "to benefit his personal, failed fantasy sports operation" (beginning in late 2016 or early 2017, at least a year before he was appointed as Attorney General). *Id.* at 180; Supp. App. Vol. 1 at 9–11, 29–30. Thus, even if Modoc MTE and Talon were entitled to share in the Modoc Nation's sovereign immunity (assuming it was not waived), Follis would not be immune from liability for his individual tortious acts committed before he served or outside his authority as those MTE's Attorney General.

The district court did not err in denying Plaintiffs' converted summary judgment motion or rejecting the Modoc Nation's enterprises' sovereign immunity

defense—based on Plaintiffs' clear and repeated concessions that such immunity was waived.

VI. CONCLUSION

For the foregoing reasons, Softek Defendants respectfully urge the Court to dismiss this appeal for lack of jurisdiction under 28 U.S.C. § 1291. Even assuming the Court has jurisdiction, it should affirm the district court's summary judgment order denying Follis's assertion of tribal sovereign immunity and official immunity. It should also affirm the district court's denial of Plaintiffs' assertion of tribal sovereign immunity as to the Modoc Nation's enterprises, assuming Follis has standing to challenge that determination.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 10th Cir. R. 28.2(a)(10), this brief complies with the page limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,859 words, excluding the cover page, citizenship statement, disclosure statement, tables of contents and authorities, glossary, statement of related appeals, attorneys' signature block, and certificates of compliance and service. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) and 10th Cir. R. 32(A) because it was prepared in Times New Roman 14-point font, a proportionally spaced typeface.

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