No. 12-372

IN THE

Supreme Court of the United States

CONTOUR SPA AT THE HARD ROCK, INC.,

Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA, a federally recognized Indian Tribe, MITCHELL CYPRESS, Chairman of the Seminole Tribe of Florida, JOHN DOE, unknown member(s) of the Seminole Tribe and RICHARD ROE, unknown non-member(s) of the Seminole Tribe of Florida,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW P.A.
500 East Broward Blvd.,
Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909
brogow@rogowlaw.com

245037

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The Seminole Tribe opposes certiorari primarily by arguing the merits of the questions presented, not whether the questions pose important and unanswered questions, or whether the acknowledged conflicts call for certiorari.

Is the *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, (2002) removal/sovereign immunity principle applicable to an Indian Tribe? That is clearly an unanswered question. The Seminole Tribe's Brief in Opposition does not deny the question is an important one; indeed it opines that applying *Lapides* "would relegate Tribes to an untenable and undesirable choice" of litigating sovereign immunity in state courts. Brief in Opp. at 11. That sounds important to the Seminoles, and to all Indian tribes and to the reach of federal court authority. Opposing certiorari by saying the court of appeals was correct addresses the ultimate question, not the question for certiorari.

As to conflict, it is true that the conflicting opinions *vis a vis* the application of *Lapides* to Indian tribes is at the district court level, not the circuit court level (Brief in Opp. at 12-13). But the important point is that there is conflict among courts presented with this question. The circuit court below, while not persuaded that *Lapides* is applicable, recognized the seriousness of the matter: "The first and most substantial argument is that the Supreme Court's Eleventh Amendment holding in *Lapides* should be extended in order to

establish that when an Indian tribe voluntarily removes a case to federal court it too waives sovereign immunity from suit." Pet. App. 8a.

The Tribe, again by arguing the merits, begs the question of whether the Court should address the conflict.

The sovereign immunity question is ripe for certiorari review. This Court denied certiorari in *Furry v. Miccosukee Tribe*, No. 12-376 (November 26, 2012), but the sovereign immunity question persists, especially on the admittedly egregious facts here, which are far different from *Furry*.

The Tribe admits that the 2003 lease between the Tribe and Contour Spa "called for the Tribe to expressly waive its tribal sovereign immunity from suit as to certain lawsuits that Contour might bring." Brief in Opp. at 3. The Tribe does not dispute that it was not until June 29, 2007 "when the Tribe first disclosed that it had not obtained secretarial approval" and that it allowed Contour to operate for four years knowing that it (the Tribe) had not corrected and resubmitted the lease. *Id.*

The Tribe does not deny that Contour, after learning that the Tribe had failed to correct the lease, was unable to persuade the Tribe to cure and re-submit the lease. The Tribe then was content to allow Contour to operate for another two and one-half years. *Id.* The Tribe candidly acknowledges all that, and its preemptory pulling the plug "on March 17, 2010, at approximately 10:00 P.M." It

was then that the Tribe e-mailed Contour "that the Tribe had elected to permanently close Contour's business" and "[o]n March 18, 2010, the Tribe locked the premises and used its security personnel to deny Contour further access to the premises." *Id.* at 4.

Whatever one may think about the continued utility of tribal sovereign immunity, the question in this case is whether having actually waived sovereign immunity, can the Tribe assert it when it both concealed the fact that the lease had not been formally approved, and allowed Contour to operate, reaping the benefits of Contour's Spa facilities.

The Tribe recognizes that tribal sovereign immunity is an almost accidental development. *Id.* at 21. It suggests that the accident should continue in light of the history of "unspeakable abuse." *Id.* at 22. We do not deny that history and respect the doctrines that seek to mitigate the harms. But here the former victims have themselves victimized a party. Whether sovereign immunity now shields the Seminoles is an important unanswered question.

Finally the Indian Civil Rights Act question's importance and the extant conflict are subtly conceded here. The Tribe recognizes that *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980) "has been followed sparingly and only in the Tenth Circuit" and "runs contrary to the authority laid down by the Court in *Santa Clara Pueblo [v. Martinez*, 436 U.S. 49 (1978)]." *Id.* at 28. Thus the decision below poses conflict with

Dry Creek Lodge, both in terms of circuit conflict and conflict with this Court.

The district court in this case agreed that Contour met two of the *Dry Creek Lodge* exceptions to sovereign immunity (a non-Indian party and deprivation of property). The other two factors (a tribal forum and a tribal remedy) were obviously unavailable given the Tribe's refusal to take any steps to see to it that the lease it had signed, waiving sovereign immunity, was resubmitted for approval. *Dry Creek Lodge* and the Indian Civil Rights Act present a viable remedy. The Court should grant review to resolve whether *Dry Creek Lodge* is available here, where there was an express waiver of sovereign immunity, and but for the Tribe's perfidy, Contour would have been protected.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
500 East Broward Blvd.,
Suite 1930
Ft.Lauderdale, FL 33394
(954) 767-8909
brogow@rogowlaw.com