No. 22-227

IN THE
Supreme Court of the United States

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.,

Petitioners,

v.

BRIAN W. COUGHLIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Separation of Powers Clinic at the Gray Center for the Study of the Administrative State, located within the Antonin Scalia Law School at George Mason University, was established during the 2021–22 academic year for the purpose of studying, researching, and raising awareness of the proper application of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The Clinic provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation.

The Clinic has submitted numerous briefs at this Court and the lower courts in cases implicating separation of powers, including last Term in *Torres v. Texas Department of Public Safety*, which likewise involved questions about the applicability of sovereign immunity.

This case is important to *amicus* because it addresses the proper allocation of power between the judiciary, the federal political branches, and the states in the context of conferring sovereign immunity on Indian tribes.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Court should reconsider its creation of common-law tribal sovereign immunity in federal and state courts for off-reservation commercial conduct. Returning this issue to the federal political branches and states, where it properly belongs, would be an important "exercise of judicial restraint." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 764 (1998) (Stevens, J., dissenting).

The Court has acknowledged that the practice of awarding tribal sovereign immunity in state and federal courts "developed almost by accident" from serious misinterpretations of prior cases. *Kiowa,* 523 U.S. at 756 (noting that the supposedly seminal case "simply does not stand for that proposition"). In *Kiowa*, Justices Stevens, Thomas, and Ginsburg argued that the Court should return this issue to the political branches, especially in the context of off-reservation tribal commercial conduct, *see id.* at 760 (Stevens, J., dissenting), and subsequent opinions joined by additional Justices have maintained that view, *see*, *e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 820 (2014) (Thomas, J., joined by Scalia, Ginsburg, and Alito, JJ., dissenting); *Lewis v. Clarke*, 581 U.S. 155, 168 (2017) (Thomas, J., concurring in the judgment); *id.* at 168–69 (Ginsburg, J., concurring in the judgment).

The Court's creation of common-law tribal sovereign immunity in federal and state courts has significant negative consequences for the separation of powers and federalism. *See* Part I, *infra.* Whether viewed as a matter appropriate for legislation, for

diplomacy, or both, the decision of whether and when to award tribal sovereign immunity in federal and state courts is not one the Constitution vests with the federal judiciary. Petitioners unwittingly make this point when they claim that "[i]n the end, it is Congress—not this Court—that 'is in a position to weigh and accommodate the competing policy concerns and reliance interests' through 'comprehensive legislation.'" Pet.Br.21; *see* Part I.A, *infra*. The logical conclusion is that the political branches and the states should decide whether tribes are presumed to possess immunity in federal and state courts in the first instance.

Stare decisis does not justify retaining court-created tribal sovereign immunity for off-reservation commercial conduct, given the Court's acknowledgment that the doctrine arose by accident and causes increasingly significant harms to state sovereignty and private rights. *See* Part III, *infra*.

Accordingly, the Court should affirm on the basis that Petitioners are not entitled to sovereign immunity for off-reservation commercial conduct, regardless of whether "the Bankruptcy Code expresses unequivocally Congress's intent to abrogate the sovereign immunity of Indian tribes." Pet.Br.i.[2]

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[2] Whether tribal sovereign immunity precludes suit is a question of subject-matter jurisdiction, *see Oneida Indian Nation v. Phillips*, 981 F.3d 157, 175–80 (2d Cir. 2020) (Menashi, J., concurring in part and concurring in the judgment) (collecting sources), and accordingly the Court should consider *amicus*'s antecedent argument that Petitioners do not possess sovereign immunity for off-reservation commercial conduct at all.

ARGUMENT

I. The Court's Creation of Common-Law Tribal Sovereign Immunity Has Profound Implications for the Separation of Powers and Federalism.

The Court's creation of tribal sovereign immunity disrupted the balance of federal powers by arrogating to the judiciary those legislative and diplomatic powers that the Constitution vests exclusively with the political branches. *See* Part I.A, *infra*. Common-law tribal sovereign immunity also directly undercuts federalism by preempting state power and sovereignty. *See* Part I.B, *infra*.

A. Creating Tribal Sovereign Immunity Is a Matter for the Political Branches, not the Judiciary.

In *Kiowa*, all nine Justices agreed that the practice of awarding tribal sovereign immunity outside of a tribe's own courts "developed almost by accident" from a questionable line of precedent that had not addressed the issue at all, let alone in a reasoned manner. *Kiowa,* 523 U.S. at 756; *id.* at 761 (Stevens, J., dissenting); *see* Part III.B, *infra*. The Court's "accidental" creation of this doctrine has serious implications for the Constitution's separation of powers between the three federal branches.

First, the Court's approach to tribal sovereign immunity "is at odds with our Constitution's requirements for enacting law." *Bay Mills*, 572 U.S. at 827 (Thomas, J., dissenting). "[T]o the extent an

Indian tribe may claim immunity in federal … court, it is because federal … law provides it," *id.* at 816–17 (Thomas, J., dissenting), and the Constitution vests Congress with the power to develop substantive law, with a check by the President, leaving no such role for the judiciary, *see Gamble v. United States*, 139 S. Ct. 1960, 1982 (2019) (Thomas, J., concurring) ("The Constitution tasks the political branches—not the Judiciary—with systematically developing the laws that govern our society.").

But "it was this Court, not Congress, that adopted the doctrine of tribal sovereign immunity in the first instance," *Bay Mills*, 572 U.S. at 821 (Thomas, J., dissenting), and thus the Court itself "creat[ed] law" and "perform[ed]" a "legislative function," *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting). By doing so, the Court inverted the normal legislative process. Thus, *Kiowa* had it backwards when it held that continued recognition of tribal sovereign immunity was an act of "defer[ence] to the role Congress may wish to exercise in this important judgment." *Kiowa*, 523 U.S. at 758. Indeed, as noted above, Petitioners themselves unwittingly acknowledge that "it is Congress—not this Court—that 'is in a position to weigh and accommodate the competing policy concerns and reliance interests' through 'comprehensive legislation.'" Pet.Br.21. It stands to reason, then, that Congress should determine in the first instance whether tribes are entitled to a presumption of immunity.

The Court has also indicated that Congress's silence in the face of the Court's creation of tribal sovereign immunity is evidence of Congress's

acquiescence in the Court's error. *See Bay Mills*, 572 U.S. at 803. But "[w]hy should Congress … have to take on a problem this Court created?" *Id.* at 821 (Thomas, J., dissenting). "Allowing legislative inaction to guide common-law decisionmaking is not deference, but abdication." *Id.* at 827–28. And notably, "Congress has never granted tribal sovereign immunity in *any* shape or form," *id.* at 826 (emphasis in original), making it unclear exactly what congressional judgment the Court is deferring to by presuming immunity.

In any event, the Court has compounded this error by presuming tribal sovereign immunity unless Congress abrogates it using *clear* statutory text. *See id.* at 790 (majority op.). Requiring Congress to use clear language to overcome *the Court's* own erroneous arrogation of legislative powers only further entrenches the Court's mistake. Thus, one *amicus* brief in support of Petitioners has it backwards when it claims the clear statement requirement "reflects the separation of powers between Congress and the federal courts." Amicus Br. of Profs. of Fed. Indian Law 3. Those same *amici* simultaneously acknowledge "the Constitution's assignment of authority to the political branches in the field of Indian affairs," *id.*, but (like Petitioners themselves, *see* Pet.Br.21) they do not take that view to its logical conclusion that those same political branches—not the Court—should be the ones to decide whether tribes are presumed to possess sovereign immunity *in the first place*.

Accordingly, as Justice Thomas explains, "[t]his asserted 'deference' to Congress" is a "fiction and …

an enigma" because it does "not actually leave to Congress the decision whether to extend tribal immunity." *Bay Mills*, 572 U.S. at 820 (Thomas, J., dissenting).

Second, to the extent awarding tribal sovereign immunity is viewed as a matter of diplomacy between the federal government and tribes,[3] it is likewise vested with the political branches. For example, Article II authorizes the President to make treaties with the concurrence of the Senate. U.S. CONST., art. II, § 2, cl. 2; *see United States v. Lara*, 541 U.S. 193, 225 (2004) (Thomas, J., concurring in the judgment) (acknowledging that the terms of a "specific treaty" could possibly provide immunity for that particular tribe). The Court has also held that the power of recognizing foreign nations belongs to the President, and that such recognition may confer "sovereign immunity [on the recognized nations] when they are sued." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 11, 30 (2015); *see also Lara*, 541 U.S. at 225–26 (Thomas, J., concurring in the judgment) (raising possibility that tribal sovereign immunity may be a matter for "the President").[4] Article III, however,

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[3] *See, e.g.*, Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1095–97 (2004) (noting the treaty power could give Congress power over certain tribes); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. L. REV. 201, 254–56 (2007) (noting early statutes like the Indian Intercourse Act were passed pursuant to the treaty power).

[4] *See* Prakash, *supra* note 3, at 1106 (noting the President's recognition power may be relevant to tribal sovereignty).

vests the judiciary with no such diplomatic powers, and the Court's creation of tribal sovereign immunity thus injects the judiciary into matters where it has no authority or competency.

B. The Court's Creation of Tribal Sovereign Immunity Directly Undercuts Federalism.

The Court's creation of tribal sovereign immunity for off-reservation conduct has significant detrimental effects on federalism. "When an Indian tribe engages in commercial activity outside its own territory, it necessarily acts within the territory of a sovereign State." *Bay Mills*, 572 U.S. at 818 (Thomas, J., dissenting). Typically, "each State is 'entitled to the sovereignty and jurisdiction over all the territory within her limits.'" *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1662 (2018) (Thomas, J., dissenting). But tribal sovereign immunity "bar[s] all suits against a tribe arising out of a tribe's conduct within state territory," thereby "foreclosing key mechanisms upon which States depend to enforce their laws against tribes." *Bay Mills*, 572 U.S. at 818 (Thomas, J., dissenting).

The Court's creation of tribal sovereign immunity therefore is "not merely … a rule of comity for federal judges to observe" but instead "a rule that pre-empts state power" in many circumstances. *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting). This stands in stark contrast to the Court's "strong" presumption elsewhere that federal law does not preempt state law, *see Cipollone v. Ligget Grp., Inc.,* 505 U.S. 504, 523 (1992)—a presumption that should "apply with

added force to judge-made rules," *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting).

Moreover, because tribal sovereign immunity "applies in state courts," too, "it strips the States of their prerogative 'to decide for themselves whether to accord such immunity to Indian tribes'" in the states' own courts. *Bay Mills*, 572 U.S. at 818 (Thomas, J., dissenting); *see also Kiowa,* 523 U.S. at 760 (Stevens, J., dissenting). Ironically, court-created tribal sovereign immunity infringes on the sovereign powers expressly "secured by the Constitution" to the states. *Bay Mills*, 572 U.S. at 816 n.1 (Thomas, J., dissenting).

II. The Court Should Hold that Tribes Do Not Possess Sovereign Immunity for Off-Reservation Commercial Conduct.

The Court can take a significant step towards remedying these separation of powers and federalism concerns by holding that tribes do not possess sovereign immunity in federal and state courts, at least for off-reservation commercial conduct, which is the most "commonplace" scenario where the issue arises. *Bay Mills*, 572 U.S. at 824 (Thomas, J., dissenting). This would return the authority over tribal sovereign immunity to the federal political branches and states while also hewing more closely to the original understanding of the Constitution.

A. The Constitution Does Not Guarantee Tribal Sovereign Immunity.

"Sovereign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another," but rather "the sovereign's claim to immunity in the courts of a second sovereign normally depends on the second sovereign's law." *Bay Mills*, 572 U.S. at 816 (Thomas, J., dissenting) (alterations omitted) (collecting authorities).

But there is no United States law that confers immunity on tribes in federal court. "Congress has never granted tribal sovereign immunity in *any* shape or form," *id.* at 826 (emphasis in original), and the Constitution itself "allocates sovereignty" *only* "between the State and Federal Governments," *Lara*, 541 U.S. at 218 (Thomas, J., concurring in the judgment). The Constitution created the United States as a sovereign and is replete with provisions that also recognize states' sovereignty. *See, e.g.*, U.S. CONST. amend. X; U.S. CONST. amend. XI; U.S. CONST. art. IV, §§ 2–4. But tribes "are not part of this constitutional order," and thus their "sovereignty is not guaranteed by it." *Lara*, 541 U.S. at 219 (Thomas, J., concurring in the judgment). Tribes "were not at the Constitutional convention," *Kiowa*, 523 U.S. at 756, nor did they subsequently "accept[] that plan" as did later-admitted states, *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).

In fact, tribes are barely mentioned at all in the Constitution. James Madison had originally proposed

giving Congress the power "[t]o regulate affairs with the Indians," 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324 (M. Farrand ed. 1937), but this was quickly narrowed to the power "[t]o regulate commerce … with Indians," *id.* at 367. Tribes are not the subject of express constitutional preservations of authority as are the states. Thus, "States retain sovereignty despite the fact that Congress can regulate States *qua* States in certain limited circumstances," *Lara*, 541 U.S. at 218 (Thomas, J., concurring in the judgment), but that fact "does not even arguably present a legitimate basis for concluding that Indian tribes retained—or, indeed, ever had—any sovereign immunity," *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting).

Further, as demonstrated above, whether tribes receive immunity in *state* courts is a matter for the state itself, *see* Part I.B, *supra*, and accordingly there is no justification for the federal judiciary to impose such a requirement by common law.

B. Tribes Should Not Receive Common-Law Sovereign Immunity for Off-Reservation Commercial Conduct.

Although it is "doubtful" that tribes retained any sovereignty after adoption of the Constitution, *Lara*, 541 U.S. at 215 (Thomas, J., concurring in the judgment), the Court need not resolve that question in this case. Even assuming tribes enjoy sovereignty of a "modest scope" extending "to what is 'necessary to protect tribal self-government or to control internal relations,'" *Bay Mills*, 572 U.S. at 819 (Thomas, J.,

dissenting) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)), "there is scant substantive justification for extending tribal immunity to off-reservation commercial acts" like those at issue here, *id.* at 820.[5]

First, the Court has held that those tribal sovereign powers that are truly necessary for tribal self-governance are limited to the "power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (alteration omitted) (quoting *Montana*, 450 U.S. at 564). None of these powers applies to conducting off-reservation commercial activity. *See Bay Mills*, 572 U.S. at 819 (Thomas, J., dissenting) ("Nor is immunity for off-reservation commercial actions necessary to protect tribal self-governance.").

If it were otherwise, then almost all tribal activity would be classified as necessary for tribal self-governance, but the Court has repeatedly rejected a broad construction of tribal sovereign power, even over activities technically on a reservation. In *Montana*, for example, the Court held that a tribe could not regulate hunting and fishing by nonmembers on lands within the reservation but that

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[5] Nor would the Court need to resolve its "schizophrenic" Indian law precedents at this time because even setting aside Congress's power over tribes (*vel non*), there still would be no constitutional basis for the broad common-law tribal sovereign immunity this Court has conferred. *Lara*, 541 U.S. at 219 (Thomas, J., concurring in the judgment).

were no longer owned by the tribe because such activity "bears no clear relationship to tribal self-governance or internal relations." *Montana*, 450 U.S. at 564; *see also Strate*, 520 U.S. at 459 ("Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"). The argument is even stronger for activity occurring off the reservation altogether. And *Kiowa* acknowledged that "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities" likewise do not implicate core tribal self-government. *Kiowa*, 523 U.S. at 757–58.

Second, although immunity is sometimes couched in terms of comity, *see Verlinden B.V. v. Ctr. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 418 (1964), such concerns have long been regarded as insufficient to grant immunity for foreign nations' *commercial* activity, *see, e.g.*, *Alfred Dunhill of London, Inc v. Cuba*, 425 U.S. 682, 703–04 (1976) (plurality opinion) ("Subjecting foreign governments to the rule of law in their commercial dealings" does not violate comity because "[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns."); *see Bay Mills*, 572 U.S. at 817 (Thomas, J., dissenting) (same). Congress has accordingly refused to provide immunity to foreign nations for their commercial activities. 28 U.S.C. § 1605(a)(2). It would make little sense for courts to judicially confer on tribes a broader immunity than Congress has conferred on foreign nations.

In fact, comity *supports* the withholding of tribal sovereign immunity in this context. As noted above, there are significant federalism concerns with awarding tribal sovereign immunity for activities that take place off-reservation. *See* Part I.B, *supra*; *Bay Mills*, 572 U.S. at 817–19 (Thomas, J., dissenting). By depriving states of the right to apply their own rules to such conduct, tribal sovereign immunity aggravates the relationship between tribes and states—the very evil comity seeks to avoid. *Bay Mills*, 572 U.S. at 818 (Thomas, J., dissenting). These concerns are heightened by the recent proliferation of off-reservation commercial activities by tribes, including in "areas that are often heavily regulated by States," such as high-interest lending, gambling, and campaign financing. *See id.* at 822–25 (Thomas, J., dissenting).

Third, even setting aside the commercial-activity aspect, declining to recognize tribal sovereign immunity for off-reservation conduct would align with the traditional rule that immunity did not extend to courts beyond the sovereign's borders. *See Franchise Tax Bd. of Calif. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019) ("[W]hether the host nation respects that sovereign immunity … is for the host nation to decide."); *Schooner* Exchange *v. McFaddon*, 7 Cranch 116, 136 (1812) ("Any restriction upon [the jurisdiction of a nation], deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.").

* * *

Rejecting tribal sovereign immunity for off-reservation commercial activity would return that issue to the political branches and states, where it belongs.

III. Judicial Restraint Favors Narrowing Common-Law Tribal Sovereign Immunity.

When it comes to federal common law, "it is up to us to correct our errors." *Bay Mills*, 572 U.S. at 821 (Thomas, J., dissenting). As Justice Stevens argued in his *Kiowa* dissent, there are "compelling reasons" for refusing to award tribal sovereign immunity to off-reservation commercial conduct, and doing so would represent an "exercise of judicial restraint" because the Court would be disclaiming its own wrongfully asserted power. *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting).

To be sure, *stare decisis* is "the preferred course," but it is "not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). And it especially does not "compel unending adherence to … abuse of judicial authority." *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2243 (2022). When determining whether to narrow a prior decision, the Court looks to: (1) the nature of the Court's prior error; (2) the quality of the Court's prior reasoning; (3) the workability of the precedent; (4) the effect the precedent has had on other areas of the law; and (5) reliance interests. *Id.* at 2265. Each of these factors weighs in favor of "exercis[ing] … judicial restraint" and returning the question of tribal sovereign immunity to the political branches. *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting).

A. The Court's Error Is Significant.

As explained above, *see* Part I, *supra*, creating tribal sovereign immunity violated core tenants of separation of powers and federalism. The Court interfered with the federal political branches by "perform[ing] … a legislative" or executive "function." *Kiowa,* 523 U.S. at 764 (Stevens, J., dissenting). "The fact that Congress may nullify or modify the Court's grant of virtually unlimited tribal immunity does not justify the Court's" actions. *Id.* In fact, the Court's self-created requirement that Congress use clear statutory language to overcome this Court's presumption of immunity inverts the normal legislative process even further, making it all the more likely that tribes will receive immunity undeservedly.[6]

The Court's creation of tribal sovereign immunity also "extinguish[ed] … the States' ability to protect their citizens and enforce the law against tribal businesses." *Bay Mills*, 572 U.S. at 823 (Thomas, J., dissenting). The magnitude of that error has only increased over time as tribal commercial activity has proliferated beyond its borders and into the states. Tribal gambling has exploded to a multi-billion-dollar industry, and tribes have expanded to off-reservation "manufacturing, retail, banking, construction, energy, telecommunications, and more." *Id.* Thus, tribes "across the country have emerged as substantial and successful competitors in interstate and international

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[6] Any contention that Congress has somehow ratified the Court's tribal sovereign immunity doctrine is also unsupported. *See Bay Mills*, 572 U.S. at 826–30 (Thomas, J., dissenting).

commerce," but as "long as tribal immunity remains out of sync with this reality, it will continue to invite problems, including *de facto* deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike." *Id.* at 825. And this "problem repeats itself every time a tribe fails to pay state taxes, harms a tort victim, breaches a contract, or otherwise violates state laws." *Id.* at 824.

Tribal sovereign immunity also inflicts harms on parties who do *not* sue tribes. For example, courts routinely dismiss cases altogether where a tribe is deemed to be a necessary party that cannot be added because of its immunity. *See, e.g.*, *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) ("'Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity.'").

These "growing harms" "fully justify overruling" the grant of immunity for off-reservation tribal conduct. *Bay Mills*, 572 U.S. at 825; *see Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting) ("[T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity….").

B. The Court Has Acknowledged Its Reasoning Was Poor.

The Court has already recognized that the adoption of tribal sovereign immunity was not just poorly reasoned but was not reasoned at all—it was "almost by accident." *Kiowa*, 523 U.S. at 756. The Court's 1919 decision that supposedly created tribal

sovereign immunity "simply does not stand for that proposition." *Id.* (citing *Turner v. United States*, 248 U.S. 354 (1919)). The opinion in *Turner* did not even "assume[] th[at] congressional enactment was needed to overcome tribal immunity," *id.* at 757, and if anything *Turner* actually *declined* to apply immunity by saying that the "fundamental obstacle to recovery is not the immunity of a sovereign to suit," 248 U.S. at 358. In 1940, the Court nonetheless cited that proposition as somehow establishing tribal sovereign immunity, *see United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940), and then "[l]ater cases, albeit with little analysis, reiterated the doctrine," *Kiowa*, 523 U.S. at 757. Such admittedly unreasoned decisions are not entitled to weight under *stare decisis*.

Further, as demonstrated above, *see* Part II, *supra*, there is no *post hoc* rationale that would support the creation of broad tribal sovereign immunity. It has no underpinnings in the Constitution, and there is no support from the Court's cases recognizing tribal sovereignty over narrow aspects of core tribal government functions. And the Court's justification of tribal sovereign immunity in part on comity concerns is inconsistent with both Congress's and this Court's own view that comity does not warrant immunity for foreign nations' commercial activities.

C. Tribal Sovereign Immunity Has Workability Problems.

One notable Indian law treatise explains that the "application" of this Court's tribal sovereign immunity cases "has proven uneven," with "a welter of

sometimes difficult to reconcile cases." AMERICAN INDIAN LAW DESKBOOK § 7:11 (2022). The case *sub judice* provides just one example where judges have disagreed about how to apply this Court's decisions in this area. There have also been significant disputes in the lower courts about whether particular defendants are entitled to immunity as "arms of the tribe" or "tribal employees [or] officials acting within the scope of their employment." *Bay Mills*, 572 U.S. at 824 n.4 (collecting cases).

D. The Court's Decisions Have Adversely Affected Other Areas of Law.

The decisions extending tribal sovereign immunity have adversely affected other areas of the law, most notably state laws that protect the interests of their citizens, as demonstrated above. *See* Part II.B, *supra*. Despite their extensive off-reservation commercial enterprises, tribes are "largely litigation-proof" even against suits brought by states themselves. *Bay Mills*, 572 U.S. at 823 (Thomas, J., dissenting). This drastically distorts not just state regulatory law but also tort law.

E. Reliance Interests Are Minimal.

Reliance interests do not justify retaining tribal sovereign immunity for off-reservation commercial activities. "[E]ven when *Kiowa* extended the scope of tribal immunity, it was readily apparent that the Court had strong misgivings about it," as all nine Justices agreed the doctrine had arisen by accident, and "[n]ot one Member of the *Kiowa* Court identified a substantive justification for its extension of

immunity." *Bay Mills*, 572 U.S. at 830 (Thomas, J., dissenting). "Against that backdrop, it would hardly be reasonable for a tribe to rely on *Kiowa* as a permanent grant of immunity for off-reservation commercial activities." *Id.* at 830–31. And it would be even more unreasonable to expect immunity for commercial actions in "new areas that are often heavily regulated by States." *Id.* at 825.

To be sure, *Bay Mills* later conferred tribal sovereign immunity for off-reservation commercial activity, but that decision was even more closely divided than *Kiowa*, with four Justices arguing persuasively that "the utter absence of a reasoned justification for *Kiowa*'s rule and its growing adverse effects easily outweigh" any "generalized assertion of reliance." *Id.* at 831. And as one Indian law treatise expressly warns, "Given the close division in *Bay Mills* … the Court may eventually revisit that decision and its predecessors with regard to tribal immunity for off-reservation commercial activity." AMERICAN INDIAN LAW DESKBOOK § 7:11.

Moreover, as the Court has noted, "[t]raditional reliance interests arise where advance planning of great precision is most obviously a necessity." *Dobbs*, 142. S. Ct. at 2276. But tribal sovereign immunity frequently arises in contexts where reliance interests and advance planning do not exist at all, i.e., torts, which are hardly "voluntary contractual relationships." *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting).

* * *

Court-conferred tribal sovereign immunity over off-reservation commercial conduct is "unsupported by any rationale," "inconsistent with the limits on tribal sovereignty," and "an affront to State sovereignty." *Bay Mills*, 572 U.S. at 814 (Thomas, J., dissenting). As explained in the *Bay Mills* dissent by Justice Scalia, who had previously joined the majority in *Kiowa*: "Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa*." Bay Mills, 572 U.S. at 814 (Scalia, J., dissenting). The Court should heed his words and take this opportunity to restore the proper allocation of federal and state power in this important area by affirming the decision below on the ground that Petitioners lack immunity for off-reservation commercial actions.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to affirm.

Respectfully submitted,

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