No. 17-1175

In the Supreme Court of the United States

POARCH BAND OF CREEK INDIANS, ET AL.,

Petitioners,

v.

CASEY MARIE WILKES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF INDIAN LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are 22 leading scholars and clinical practitioners of Indian law.[1] They are:

- Robert T. Anderson, Charles I. Stone Professor of Law and Director of the Native American Law Center at the University of Washington School of Law and Oneida Indian Nation Visiting Professor of Law at Harvard Law School.
- Michael C. Blumm, Jeffrey Bain Faculty Scholar and Professor of Law at Lewis and Clark Law School.
- Kirsten Matoy Carlson, Associate Professor of Law and Adjunct Associate Professor of Political Science at Wayne State University.
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- Allison M. Dussias, Professor of Law at New England Law | Boston.
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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief. All parties have consented to the filing of this brief.

- Kathryn E. Fort, Director of the Indian Law Clinic and Adjunct Professor at Michigan State University College of Law.
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The scholarship and clinical practice of *amici* focus on the subject-matter areas—including tribal powers and federal- and state-court jurisdiction—that are implicated by the decision of the Supreme Court of Alabama in this case. *Amici* have an interest in ensuring that cases in these fields are decided in a uniform and coherent manner, consistent with foundational principles of law. *Amici* submit this brief to highlight the extent to which the lower court exceeded its authority over petitioners, a federally recognized Indian tribe and one of its instrumentalities. The brief describes the proper role of state courts in issuing decisions involving Indian law, an

area over which Congress and the Executive Branch exercise plenary control.

The affiliations of *amici* are listed above, but *amici* submit this brief in their personal capacities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court of Alabama held that Indian tribes do not enjoy immunity from tort claims brought in state court by non-tribal plaintiffs. That decision runs afoul of nearly a century of settled precedent of this Court and elevates the lower court's policy preferences above those confirmed over many years by Congress and this Court.

Review is warranted for two reasons. First, the Alabama Supreme Court disregarded this Court's precedents, which hold that Indian tribes are immune from all suits absent congressional or tribal consent or waiver. Instead, the lower court incorrectly held that the issue of tribal immunity from tort claims is an open question. Second, the court below substituted its own policy preferences in the area of tribal immunity—an area this Court has reserved exclusively to Congress to define—to allow non-tribal plaintiffs to sue tribes in state courts. In effect, the lower court has chosen to exercise its policymaking powers as a common-law court in an area where even this Court will not tread. If its decision is allowed to stand, the world of Indian affairs will be turned upside down and the Supremacy Clause in this context effectively nullified.

The decision of the Alabama Supreme Court would allow any non-tribal plaintiff to sue any tribal entity in state court on any tort claim, even one arising on reservation lands. The decision below is thus

as broad as it is troubling, and this Court should grant certiorari to review it.

ARGUMENT

A. Tribal Immunity From Tort Claims, Absent Tribal Or Congressional Waiver Or Consent, Is The Settled Law Of This Court

This Court has repeatedly recognized that federally recognized Indian tribes are immune from tort claims absent waiver or consent by Congress or the tribal defendant. See *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g,* 476 U.S. 877, 890-891 (1986); *Kiowa Tribe of Okla.* v. *Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998); *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2038-2039 (2014). The decision below is irreconcilable with these cases.

1. In *Turner*, Muscogee (Creek) Nation members allegedly destroyed a fence erected on Indian lands by a nonmember ranching company authorized to do so by tribal law. 248 U.S. at 355-356. After the company failed to secure compensation from the Creek Nation, the United States (for unrelated reasons) temporarily assumed control over the tribe and its assets. *Id.* at 357. The lower courts had determined that the immunity of the Creek Nation survived federal control over tribal assets. See, *e.g.*, *Adams* v. *Murphy*, 165 F. 304, 308 (8th Cir. 1908) ("the Creek Nation is exempt from civil suit to compel performance of its contracts or to recover damages for their violation"). The nonmember company thus was forced to seek authorization from Congress to bring suit against the Creek Nation. After Congress granted that authorization (Act of May 29, 1908, § 26, 35

Stat. 444, 457), the company sued the Creek Nation and the United States, which was named as trustee of the tribe's assets. 248 U.S. at 357.

This Court made clear that the tribe could not be sued without congressional authorization: "Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent." *Turner*, 248 U.S. at 358; see also *id.* at 355 (noting that the tribe "exercised * * * the powers of a sovereign people; having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial"). In *Kiowa*, 523 U.S. at 756-757, this Court correctly observed that the *Turner* decision did not address tribal immunity from tort claims. But the case could not have proceeded as it did without recognition of such immunity. The baseline rule confirmed in *Turner* is that Indian tribes are immune from all claims arising in tort unless Congress or the tribe consents to the suit or waives immunity.

In *Three Affiliated Tribes*, this Court reaffirmed that Indian tribes are immune from tort claims, this time in state courts. In that case, the tribe brought tort and contract claims against a nonmember in state court. 476 U.S. at 878. The North Dakota Supreme Court held that the tribe was not authorized to invoke the state court's jurisdiction until it consented to a waiver of its sovereign immunity pursuant to a state law that authorized broad state-court jurisdiction under Pub. L. No. 280, 67 Stat. 588, as amended (codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360), which opened state courthouse doors to suits arising in Indian country. 476 U.S. at 878. This Court reversed, holding that the state law's requirement that the tribe

consent to state-court jurisdiction would improperly force the tribe to abrogate its immunity from suit in state court, including potential counterclaims sounding in tort.

"It is clear," the Court said, "that the extent of the waiver presently required by [the state statute] is unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws." *Three Affiliated Tribes*, 476 U.S. at 891. Public Law 280 did not authorize the state to impose such a requirement on the tribe. "By requiring that the Tribe open itself up to the coercive jurisdiction of state courts for *all* matters occurring on the reservation," the Court explained, "the statute invites a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Id.* As any potential counterclaims involved in that matter would have sounded in tort, the decision in *Three Affiliated* depended on this Court's recognition that Indian tribes are immune from tort claims in state court absent tribal or congressional waiver or consent.

This Court's more recent decisions confirm that claims against Indian tribes are subject to tribal immunity whether they arise on or off reservation, in a governmental or a commercial context, in contract or in tort. In *Kiowa*, while questioning this principle and inviting Congress to weigh in, the Court reaffirmed that tribes are immune from tort claims—even though, "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." 523 U.S. at 758. In *Bay Mills*, before surveying cases that enforce tribal immunity from

suit in all the situations described above, as well as the one where a state is the plaintiff (134 S. Ct. at 2031-2032), the Court stated that "we 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)" (*id.* at 2030-2031 (quoting *Kiowa*, 523 U.S. at 756; emphasis added)).

After the Court in *Kiowa* invited Congress to review the wisdom of tribal immunity in the commercial context, Congress did so, as this Court observed in *Bay Mills*, 134 S. Ct. at 2038. The Court explained there that Congress considered bills to abrogate tribal immunity from "most torts," but "chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior's approval." *Id.* (citing Indian Tribal Economic Development and Contract Encouragement Act of 2000, § 2, 114 Stat. 46 (codified at 25 U.S.C. § 81(d)(2)). As discussed in more detail in Point B.2 below, tribal immunity from tort claims thus has been part of the ongoing discussion between this Court and Congress since at least *Kiowa*, with both this Court and Congress confirming that Indian tribes are immune from tort claims now, just as they were in *Turner* in 1919 and in *Three Affiliated Tribes* in 1986.

2. Cobbling together a legal theory derived from dicta in *Kiowa* and dissenting opinions in *Kiowa* and *Bay Mills*, the Alabama Supreme Court disregarded *Turner* and *Three Affiliated Tribes*, as well as this Court's reasoning in *Kiowa* and *Bay Mills* that confirmed tribal immunity from tort claims absent congressional or tribal consent or waiver. See Pet. App. 7a-12a. The lower court did not address *Turner* or

Three Affiliated Tribes. Instead, it hung its hat on footnote 8 of *Bay Mills*, where this Court stated in dicta that it had not decided a case where a tort victim had "no alternative way to obtain relief for off-reservation commercial conduct." 134 S. Ct. at 2038 n.8, cited in Pet. App. 10a.

Even if the footnote 8 dicta could be construed to bypass *Turner* and *Three Affiliated Tribes*, this is not a case in which the plaintiffs have "no alternative way to obtain relief for off-reservation commercial conduct." *Bay Mills*, 134 S. Ct. at 2038 n.8. First, respondents' claims involve not only off-reservation conduct, but also *on-reservation* conduct by tribal employees. Second, petitioners have provided a way for respondents to seek relief through the tribe's tort-claims ordinance. See Poarch Band of Creek Indians Tribal Code § 29-2-2 (providing a cause of action in tribal court for persons "seeking an Award for Compensable Injuries which may result from injuries to person or property resulting from activities undertaken by the Gaming Authority or its employees that occur in a Gaming Facility"). Respondents had this remedy available but chose to seek relief in state court. Respondents also could—and did—assert a claim against the tribal employee in her individual capacity. Pet. App. 3a; see *Lewis* v. *Clarke*, 137 S. Ct. 1285 (2017).

The lower court's insistence that recognition of tribal immunity from tort claims will "extend" the immunity doctrine further than this Court's decisions allow (Pet. App. 10a) is simply wrong. The precedents of this Court on a question of federal law cannot be so lightly disregarded by a lower court. This Court has stepped in whenever a defiant state-court decision on Indian affairs conflicts with federal

law. See, *e.g.*, *Washington* v. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1978) (noting concerns over "widespread defiance of the District Court's orders" by state courts). To the extent that the Alabama Supreme Court treats the question of tribal immunity from tort claims as an open question, its decision both "conflicts with relevant decisions of this Court" and "so far depart[s] from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a), (c). While this Court has at times been critical of it, tribal immunity from tort claims, absent congressional or tribal consent or waiver, is the settled law of the United States.

B. Congress, Not The Supreme Court Of Alabama, Exercises Plenary Power Over Tribal Immunity

As this Court held in *Kiowa*, *Bay Mills*, and a host of other cases, the scope of tribal sovereign immunity is a question of federal law, not state law, with Congress as the primary policymaker. And Congress has repeatedly exercised its policymaking authority in this area. The Supreme Court of Alabama's decision abolishing tribal immunity from tort claims arrogates to a state court a power even this Court has refrained from exercising.

1. In general, this Court has held that the scope of the powers of Indian tribes is constitutionally assigned to Congress. See *Bay Mills*, 134 S. Ct. at 2031; see also *United States* v. *Lara*, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on

tribal sovereign authority."); *Antoine* v. *Washington*, 420 U.S. 194, 204 (1975) (sourcing congressional plenary power over Indian affairs in the Constitution). The Court usually defers to Congress on questions involving the powers of Indian tribes. See, *e.g., United States* v. *Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers."). At times, this Court has interpreted federal statutes or policies to address the scope of tribal powers. See, *e.g.*, *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 853-54 (1985) (concluding that the Court's role in defining the scope of tribal powers is deciding whether "federal legislation" has explicitly or implicitly "pre-empted tribal jurisdiction"); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978) (holding that tribes do not possess criminal jurisdiction over non-Indians as a "necessary result of [Congress's] repeated legislative actions").

In determining the scope of tribal sovereign immunity, this Court has confirmed time and again that the question is governed exclusively by federal law. State legislatures and state courts have no role in defining the scope of tribal immunity where Congress or this Court has spoken. As the Court made clear in *Bay Mills*, "tribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756); see also *Three Affiliated Tribes*, 476 U.S. at 891 ("in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States").

In defining the scope of tribal sovereign immunity in particular, as opposed to the powers of Indian tribes more generally, this Court has chosen to defer even more completely to Congress. As noted above, the Court in *Kiowa* affirmed tribal immunity from suit in an off-reservation, commercial context, even though it doubted the wisdom of tribal immunity in that circumstance, especially in relation to tort claims. 523 U.S. at 758. And in *Bay Mills*, the Court emphasized that defining the scope of tribal immunity requires policymaking, not common-law rulemaking: "[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." 134 S. Ct. at 2037.

2. Congress has taken seriously its obligation to review the policies behind tribal sovereign immunity from tort claims. Even before this Court's decision in *Kiowa*, Senator Gorton added a rider to an appropriations bill, H.R. 3662, 104th Cong. (1996), that would have waived immunity in tribal actions threatening to affect the property rights of others. That section (329) was removed before the bill passed, but the Senate Committee on Indian Affairs held a hearing on tribal sovereign immunity to examine the issues raised by it. *Tribal Sovereign Immunity: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. (1996).

After *Kiowa*, Congress considered other bills specifically focused on immunity from tort claims: the American Indian Tort Liability Insurance Act, S. 2302, 105th Cong. (1998), which would have granted jurisdiction over tort actions to federal courts and waived tribal sovereign immunity; and the American Indian Equal Justice Act, S. 1691, 105th Cong. (1998), which would have granted juris-

diction over tort actions to state and federal courts and subjected tribes to the same liability to which private individuals and corporations are subject. The Senate Committee on Indian Affairs held extensive hearings on these bills. *Sovereign Immunity: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong., pts. 1-3 (1998). Neither of the bills passed.

As discussed in *Bay Mills*, 134 S. Ct. at 2038, another statute, the Indian Tribal Economic Development and Contract Encouragement Act, § 2, 114 Stat. 46 (codified at 25 U.S.C. § 81(d)(2)), does not expressly waive tribal sovereign immunity but mandates that contracts with Indian tribes requiring federal approval include provisions either disclosing or waiving immunity. The bill that became that law was introduced in response to this Court's concerns that "immunity can harm those who * * * do not know of tribal immunity." *Kiowa*, 523 U.S. at 758. The hearings on the bill illustrate that Congress contemplated other options, including waiving tribal immunity. The Senate Report noted that, over the course of "extensive hearings," Congress had considered "divergent views about the value, effect, and even the purpose and justification for the [immunity] doctrine." S. Rep. No. 106-150, at 11 (1999). Rather than adopt any of those views, the bill proposed the alternative of requiring disclosure of tribal sovereign immunity in the contracts.

Congress has addressed tribal immunity in other statutes as well. As originally enacted, for example, the Indian Self-Determination and Educational Assistance Act of 1975, Pub. L. No. 93-638, § 103(c), 88 Stat. 2203, 2207, required tribes to obtain liability insurance and insurance carriers to waive the defense of tribal sovereign immunity in suits related to

a contract between the tribe and the federal government. Congress amended this provision in the Indian Self-Determination and Educational Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 201(a), 102 Stat. 2285, 2289, which required the Secretary of the Interior to acquire insurance to cover tort claims against "Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this Act."

Congress also has considered bills that would have authorized suits in federal court to enforce the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq*., although none of the bills passed. See Indian Civil Rights Act Amendments of 1988, S. 2474, 100th Cong. (1988); Indian Civil Rights Act Amendments of 1989, S. 517, 101st Cong. (1989); Indian Civil Rights Enforcement Act, S. 2298, 105th Cong. (1998). And in *Bay Mills*, this Court identified yet another instance where Congress chose to abrogate tribal immunity. See 134 S. Ct. at 2035 (25 U.S.C. § 2710(d)(7)(A)(ii), which allows states to sue tribes to enforce gaming-compact terms).

3. Either ignoring or disagreeing with the considered policy choices made by Congress in an area of law that is exclusively federal, the Alabama Supreme Court has impermissibly substituted its policy preferences for those of Congress—something that not even this Court will do. Despite Congress' record of policymaking on tribal immunity, the court below seems to have treated Congress' decision not to abrogate tribal immunity from tort claims as a type of silence that allows a state court to implement its own policy preferences. As this Court's decision in *Bay Mills* makes clear, the lower court does not possess

that authority. See 134 S. Ct. at 2038 ("As in *Kiowa*—except still more so—'we decline to revisit our case law[,] and choose' instead 'to defer to Congress.'" (quoting *Kiowa*, 523 U.S. at 760)). The Alabama Supreme Court stands alone among state courts in refusing to recognize the settled federal law that Indian tribes are immune from tort claims.[2]

This Court has previously recognized the absurdity of allowing suits by states against Indian tribes. See *Bay Mills*, 134 S. Ct. at 2031 ("While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity against state-initiated suits." (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782 (1991)). The lower court's decision here jumps over that absurdity to create an even greater

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[2] See, *e.g.*, *Atkinson* v. *Haldane*, 569 P.2d 151 (Alaska 1977); *Filer* v. *Tohono O'Odham Nation Gaming Enter.*, 129 P.3d 78 (Ariz. Ct. App. 2006); *Redding Rancheria* v. *Superior Court*, 105 Cal. Rptr. 2d 773 (Ct. App. 2001); *Kizis* v. *Morse Diesel Int'l, Inc.*, 794 A.2d 498 (Conn. 2002*); Seminole Tribe of Fla.* v. *Arizona*, 67 So.3d 229 (Fla. Dist. Ct. App. 2010); *ACF Leasing* v. *Oneida Seven Generations Corp.*, 2015 WL 5965249 (Ill. App. Ct. Oct. 13, 2015); *Diepenbrock* v. *Merkel*, 97 P.3d 1063 (Kan. Ct. App. 2004); *Bonnette* v. *Tunica-Biloxi Indians*, 873 So. 2d 1 (La. Ct. App. 2003); *Gavle* v. *Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996); *Colliflower* v. *Fort Belknap Cmty. Council*, 628 P.2d 1091 (Mont. 1981); *Gallegos* v. *Pueblo of Tesuque*, 46 P.3d 668 (N.M. 2002); *Sue/Perior Concrete & Paving, Inc.* v. *Seneca Gaming Corp.*, 952 N.Y.S.2d 353 (App. Div. 2012); *Sheffer* v. *Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359 (Okla. 2013); *Holguin* v. *Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex. App. 1996); *Wright* v. *Colville Tribal Enter. Corp.*, 147 P.3d 1275 (Wash. 2006); *Koscielak* v. *Stockbridge-Munsee Cmty.*, 811 N.W.2d 451 (Wis. Ct. App. 2012).

one: state-court control over Indian affairs. This dramatic assertion of unauthorized state power conflicts with the supremacy of the federal government that has been a staple of Indian affairs since at least *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). The Court should review the decision below and reverse its unlawful assertion of power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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