No. 17-1175

IN THE

Supreme Court of the United States

POARCH BAND OF CREEK INDIANS AND PCI GAMING AUTHORITY D/B/A/ WIND CREEK CASINO AND HOTEL WETUMPKA,

Petitioners,

v.

CASEY MARIE WILKES AND ALEXANDER JACK RUSSELL,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* UNITED SOUTH AND EASTERN TRIBES, INC., IN SUPPORT OF PETITIONERS

CAROLINE P. MAYHEW
Counsel of Record
GREGORY A. SMITH
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street NW
Suite 700
Washington, D.C. 20037
(202) 822-8282
cmayhew@hobbsstraus.com

Counsel for Amicus Curiae United South and Eastern Tribes, Inc.

March 26, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an Indian tribe is immune from civil liability for tort claims asserted by non-members.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

The United South and Eastern Tribes, Inc. (USET) is a non-profit organization representing 27 federally recognized Tribal Nations in 13 states stretching from Texas to Maine.[2] Established in 1969, USET works at the regional and national level to educate federal, state, and local governments about the unique historic and political status of its member Tribal Nations.

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The Poarch Band of Creek Indians is a member Tribal Nation of *amicus* United South and Eastern Tribes, Inc., but neither the Poarch Band of Creek Indians nor its counsel has provided any financial support or contribution for the preparation or submission of this brief. Counsel of record provided each party's attorney with at least ten days' notice of the intent to file this brief, and all parties have consented in writing to the filing of this brief.

[2] The USET member Tribal Nations include the following: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

USET also operates a number of programs for the benefit of its membership.

Amicus has a strong interest in this case because of its potentially sweeping impact on a foundational doctrine of Federal Indian law, with far-reaching ramifications for Tribal Nations and a host of relationships that they have entered into with both public and private entities. Further, *Amicus* has particular expertise in the doctrines of tribal sovereignty and sovereign immunity. Due to their location in the southern and eastern regions of the United States, the USET member Tribal Nations have the longest continuous direct contact with the United States government, dating back to some of the earliest treaties and other diplomatic relations that first established government-to-government relationships between Tribal Nations and the United States. These early relationships formed the basis for federal recognition of tribal sovereignty and sovereign immunity. See William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1623–24 (2013).

In the modern era, tribal sovereign immunity has taken on new significance. As Tribal Nations' economies have grown they have had an increasingly significant impact on their surrounding communities. While this impact has been overwhelmingly positive, as with any governmental activity there is always the potential for instances of harm to private parties. In response, Tribal Nations have developed advanced court systems, adopted government tort claims acts similar to those of federal and state governments, and entered into countless contracts and agreements where they have agreed to limited waivers of sovereign immunity for a myriad of purposes. All of these developments mirror the developments of other governments over

time and in response to changing circumstances, and are based on established doctrines regarding the nature of sovereign immunity as recognized under federal law. They are, however, put in jeopardy by the Alabama Supreme Court's fundamentally erroneous decision, which wrongly suggests that case law regarding tribal sovereign immunity is anything less than steadfast and clear.

SUMMARY OF ARGUMENT

The Alabama Supreme Court's decision in this case is utterly at odds with this Court's binding precedents, traditional notions of sovereign immunity, and the vast majority of other federal and state court decisions on the matter. But while the decision below may appear to be a mere anomaly, it threatens to destabilize the settled law of tribal sovereign immunity and to sow widespread harm.

State courts around the country have recognized that tribal sovereign immunity, like the immunity of other sovereigns, extends to tort claims to the extent not waived or abrogated. Yet, even as Tribal Nations have waived immunity in tribal court or otherwise provided for redress of such claims in a manner similar to other governments, some state courts have ignored that fact and complained that the lack of a *state court* remedy against tribal governments renders the doctrine of sovereign immunity intolerable and unjust when invoked by Tribal Nations. The extent of this phenomenon suggests that, were this Court to abstain from correcting the Alabama Supreme Court's erroneous ruling, other state courts would view that abstention as permission to draw their own narrow boundaries around tribal sovereign immunity in contravention of this Court's precedents and Congress' policy judgments.

Congress, as well as this Court, has always recognized that sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance" and one of the "core aspects of sovereignty that tribes possess[.]" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). While Congress has chosen to abrogate such immunity in limited circumstances, it has not done so with respect to tort claims by non-Indians—choosing instead to support tribal sovereignty and economic development and the concomitant implementation of tribal tort remedies that have developed and are continuing to develop in response to changing conditions. As such, the decision below threatens to strip Tribal Nations of the benefits and protections of sovereign immunity that have long been understood as necessary in light of the many competing priorities and prerogatives of sovereign governments, and to which they are entitled as a matter of federal law. The loss of these benefits would constitute irreparable harm to tribal governments and the decision below should not be allowed to stand.

The decisions of this Court could not be any clearer in establishing that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). The Alabama Supreme Court in this case has utterly ignored that injunction and the will of Congress, and in so doing has overstepped the bounds of its authority. This Court should not permit such overreach by it or any other state court and should grant the Petition in order to overrule the decision below.

ARGUMENT

I. Additional State Courts Are Likely to Adopt the Alabama Supreme Court's Deeply Flawed Holding if This Court Does Not Intervene

USET agrees with Petitioners that the Alabama Supreme Court's decision is utterly at odds with this Court's binding precedents and with the rulings of several federal circuit courts, as well as other state courts. The reason for that is simple: the holding is wrong as a matter of federal law.[3] However, that does not mean that the impact of the Alabama Supreme Court's decision will be limited to Alabama or that this error is likely to self-correct. Rather, it is likely that if this Court does not grant review, other state courts will follow Alabama in defying established precedents in this area.

Despite this Court's clear and repeated rulings broadly upholding the doctrine of tribal sovereign immunity, state courts often apply that precedent only reluctantly—even with disdain. Reflecting historic patterns of disregard for Tribal Nations and their sovereign status, state courts have expressed this disdain even where Tribal Nations have provided effective alternative remedies to state court suit, including, among other things, waivers of sovereign immunity in tribal court. Indeed, the tenor of many of these state court rulings suggests that, were this Court to refuse review of the Alabama Supreme Court's erroneous ruling, other state courts would view that decision as permission to undermine tribal sovereign

[3] As explained in the Petition, Pet. 24-27, the Alabama Supreme Court's holding is irreconcilable with this Court's precedents on tribal sovereign immunity and with traditional understandings of sovereign immunity more generally.

immunity or to carve out exceptions for fact patterns that deviate even slightly from those that this Court has expressly considered before.

USET member Tribal Nations can readily cite several examples of this trend from their own experiences. In one, a New York court lamented that it was "compelled" to uphold tribal sovereign immunity in *Doe v. Oneida Indian Nation*, No. 99-1172, slip op. at 7 (N.Y. Sup. Ct. 1999), stating:

> Despite concerns that such blanket immunity may progressively serve to detrimentally impact fair and reasonable compensation to victims of tortious acts on Indian-sponsored commercial enterprises, this Court is not empowered to circumvent and diminish the clear intention of well-established federal law as plaintiff proposes and, as such, declines to so modify the existing scope of tribal immunity in this manner.

But the court's "concerns" in that case were obviated by the admitted fact that the plaintiff initially sought compensation in the Oneida Indian Nation's Peacemaker Court; received and rejected a settlement offer from the Oneida Indian Nation; and still had his case pending in the tribal court system when he commenced his state court action. *Id*. at 2; see also *Doe v. Oneida Indian Nation of N.Y.*, 278 A.D. 2d 564, 564 (2000).

Another example is *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 658 (Fla. Dist. Ct. App. 2017), cert. denied, *Lewis Tein, P.L. v. Miccosukee Tribe of Indians of Fla.*, 138 S. Ct. 741 (2018). While the Florida District Court of Appeal in that case correctly upheld the sovereign immunity of the Miccosukee Tribe in the face of state law tort claims, the court

made clear its displeasure in doing so, dramatically opening its opinion by highlighting *dicta* from this Court's ruling in *Kiowa*:

> "There are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. It "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." No one knows this more than Guy Lewis and Michael Tein.

Miccosukee Tribe, 227 So. 3d at 658 (quoting *Kiowa*, 523 U.S. at 758) (citation omitted). In decrying the unfairness of tribal sovereign immunity for tort victims "who have no choice in the matter," however, the Florida court conveniently downplayed the fact that the non-Indian parties in that case were sophisticated attorneys well versed in federal Indian law, who fully understood the doctrine of tribal sovereign immunity, and who had every opportunity in their contracts with the Miccosukee Tribe to address that issue.

Of course, the Florida court's commentary was superfluous to its ruling, which ultimately recognized that "tribal immunity endures, and Indian tribes are not subject to the civil jurisdiction of our courts absent a clear, explicit, and unmistakable waiver of tribal sovereign immunity or a congressional abrogation of that immunity." *Id*. However, it typifies state court attitudes towards Tribal Nations that even where a sophisticated party had a full and fair opportunity to negotiate waivers of sovereign immunity or other relief, the state court nonetheless casts aspersions on the doctrine, characterizing its application as "deeply troubling to the courts" and resulting in "unfairness

and inequity to the non-tribe party." *Id*. at 666; see also *id*. at 667, 668.

In another recent case involving a vehicle accident on an interstate highway in Connecticut, a Connecticut Superior Court went out of its way to express sympathy to the plaintiffs, stating: "The court completely understands the plaintiffs' frustrations with the application of sovereign immunity to a case such as this[,]" and quoting extensively from the *dicta* in *Kiowa*. *Durante v. Mohegan Tribal Gaming Auth.*, No. X04HHDCV116022130S, 2012 WL 1292655, at *5 (Conn. Super. Ct. Mar. 30, 2012). Ultimately, the Connecticut Superior Court upheld tribal sovereign immunity, but only because it felt constrained to do so: "This court, though, has no authority to abrogate MTGA's sovereign immunity, no matter how sound the reasons to do so might be." *Id*. at *6. The Connecticut court failed to note that the plaintiffs in that case had—and exercised—a right to bring their claims in the Mohegan Gaming Disputes Court. See *Durante v. Lyons*, No. GDTC-T-10-104-FOE, 2011 WL 7446443 (Mohegan Gaming Trial Ct. Apr. 25, 2011).

What these state courts are really complaining about is that federal recognition of the doctrine of tribal sovereign immunity prohibits them from exercising jurisdiction over tribal governments.[4] As a

[4] It is not difficult to find similar commentary from state courts across the country. See, *e.g.*, *Seneca Tel. Co. v. Miami Tribe of Okla.*, 253 P.3d 53, 55–56 (Okla. 2011) (recognizing a tribal court remedy but nevertheless lamenting the "harsh reality" of tribal sovereign immunity, stating that "This result leaves Seneca without a remedy against the Tribe for their damages ***under our law***, even when the assertions of negligence by the tribal enterprise are correct[,]" (emphasis added), and opining that "It would be desirable if Congress were to pass legislation limiting the sovereign immunity of tribal entities or their employees in

general matter, the States are and always have been eager to curtail tribal sovereignty and to extend their own jurisdiction. It has become a truism for Tribal Nations that, as articulated by this Court as early as 1886, "the people of the States where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Unfortunately, this remains true today in all too many circumstances, as this kind of state court commentary reflects a persistent and pervasive disrespect for Tribal Nations and their unique relationship with the United States.

II. The Apparent Validation of the Decision Below Would Have Severe Consequences for Tribal Nations, in Contravention of Congressional Policy

The Alabama Supreme Court has purported to adopt a broad abrogation of tribal sovereign immunity

---

such situations."); *Filer v. Tohono O'odham Nation Gaming Enter.*, 129 P.3d 78, 84–85 (Ariz. Ct. App. 2006) (upholding tribal sovereign immunity in dram shop action but adding, "This conclusion, we hasten to add, may be unsatisfactory to some" and quoting from *Kiowa*; ultimately concluding that "This court, of course, has no greater or different authority" to abrogate tribal sovereign immunity than the United States Supreme Court.). See also Wood, *supra*, at 1606–07 ("Although most courts follow the Supreme Court's seemingly clear directive that Indian tribes are subject to suit 'only where Congress has authorized the suit or the tribe has waived its immunity,' many courts have asked the Supreme Court to change the doctrine, and some have created their own exceptions to it. Perhaps the boldest rebuke of tribal sovereign immunity came from a small claims court judge in Iowa who concluded that the tribe was 'not a "sovereign" as that word is commonly defined' and invoked Dred Scott to evade Supreme Court precedent on tribal immunity, stare decisis notwithstanding.") (footnotes omitted).

"with regard to tort claims asserted against [Tribal Nations] by non-tribe members." Pet. App. 12a. There is no basis for such a sweeping rule in the common law of sovereign immunity, this Court's precedents, or any act of Congress. Yet, if that rule is seemingly validated by a denial of the Petition for a Writ of Certiorari in this case, additional state courts across the country are more likely than not to adopt similar rules of their own. The result would be a cascade of harmful and likely irreparable consequences for Tribal Nations, in contravention of Congressional Indian policy recognizing tribal sovereignty and supporting tribal self-government.

Some of the threatened harms are self-evident. This Court has repeatedly recognized tribal sovereign immunity as "a necessary corollary to Indian sovereignty and self-governance" and one of the "core aspects of sovereignty that tribes possess[.]" *Bay Mills*, 134 S. Ct. at 2030. When a sovereign is stripped of its immunity and forced to defend itself in a foreign court without its consent, there is irreparable harm to the dignity of the sovereign. See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (permitting appeal of a district court order denying a State's claim to Eleventh Amendment immunity under the collateral order doctrine and noting: "[w]hile application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated.").[5] This

[5] The Court in *Puerto Rico Aqueduct & Sewer Authority* also acknowledged that "the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Id*. at 145.

principle applies to Tribal Nations to the same extent as other sovereigns. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) ("As with absolute, qualified, and Eleventh Amendment immunity, tribal sovereign immunity 'is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.'").

Beyond sovereign dignity, a second core justification for sovereign immunity is to protect governmental resources,[6] as well as the ability of the sovereign to make decisions regarding the allocation of those resources for the benefit of its citizens. In *Alden v. Maine*, 527 U.S. 706, 751 (1999), this Court proclaimed:

> Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor

---

[6] See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 750 (1999) ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens[.]"). See also Wood, *supra*, at 1659 ("[The early tribal sovereign immunity cases] upheld tribal immunity for two basic reasons: primarily, because the courts equated the tribes with states and foreign nations that enjoyed immunity as part of their inherent sovereignty; and secondarily, because subjecting the tribes to suit would have threatened the tribal governments' treasuries. These are the same reasons set forth in the Court's contemporaneous cases involving other sovereigns' (and particularly states') immunity.") (footnote omitted).

> of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made.[7]

This includes decisions relating to the balance between rights and remedies for tort victims, on the one hand, and the need to fund governmental operations and provide government services—such as health care, job training, housing assistance, and more—on the other.

Thus, as is true for all sovereigns, an important aspect of tribal self-government is the power to define the forum, procedure, and limits with respect to lawsuits against the sovereign. See Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 161-66 (2004) (surveying the availability of remedies against non-tribal governments in the United States and concluding that "With respect to both the federal and state governments, there continue to exist significant limits on governmental liability."). As Tribal Nations increase their contact with non-Indians and their participation in the larger national economy, they are concomitantly making these kinds of sovereign decisions in ways that reflect that increased contact and participation, just as States and the federal government have evolved their remedies over

---

[7] The Court continued: "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id*.

time and in response to changing circumstances. *Id*. Tribal Nations are undertaking this important governmental work through the implementation of tort claims acts and other statutory and administrative remedies; stronger tribal court systems as well as administrative systems and procedures that are fair and accessible to non-Indians; and through the negotiation of provisions in private contracts as well as inter-governmental agreements that address tort remedies and immunity waivers.[8] The ruling below at

---

[8] See, *e.g.*, Tribal-State Compact between the Mohegan Tribe and the State of Connecticut, § 3(g), *available at* http://www.portal.ct.gov/-/media/DCP/pdf/gaming/TribalStateCompactMohegan1pdf.pdf?la=en (negotiated compact provision requiring the Mohegan Tribe to establish tort remedies for patrons of gaming facilities); MOHEGAN TRIBE OF INDIANS CODE, Ch. 3, Art. II §§ 3-21, *et seq.* (2017) *available at*: https://library.municode.com/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws (establishing Gaming Disputes Court); *id*. at Ch. 3, Art. IV §§ 3-241, *et seq.* (tribal torts code); Gaming Compact between the Seminole Tribe of Florida and the State of Florida, Part VI.D.5 (2010), *available at* https://www.bia.gov/sites/bia.gov/files/assets/asia/oig/oig/pdf/idc1-026001.pdf (limited waiver of sovereign immunity for state court tort claims with tribal administrative exhaustion requirement); EASTERN BAND OF CHEROKEE INDIANS CODE, Part II, Ch. 1, Art. 1, § 1-2(g)(3) (2017), https://www.municode.com/library/nc/cherokee_indians_eastern_band/codes/code_of_ordinances (establishing tribal court jurisdiction to hear tort claims brought against the Tribe, limited to claims for which the Tribe maintains insurance coverage). See *Welch v. Eastern Band of Cherokee Indians*, 6 Cher. Rep. 20, 2007 WL 7079613, at *5 (E. Cher. Ct. App. 2007) (denying motion to dismiss tort claims against Tribe). See also Struve, *supra*, at 158–61 (discussing tribal remedies for tort and contract claims); *Bay Mills*, 134 S. Ct. at 2036 ("[T]ribes across the country, as well as entities and individuals doing business with them, have for many years relied on *Kiowa* (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal immunity. As in other cases involving contract and property rights, concerns of *stare decisis* are thus 'at their acme.'").

best seriously undermines, and at worst destroys, these sovereign actions and decisions, negotiated agreements, and settled expectations.

At the same time, Tribal Nations face unique barriers to raising governmental revenue that other governments do not face. See, *e.g.*, *Bay Mills*, 134 S. Ct. at 2042-45 (Sotomayor, J., concurring) (discussing barriers faced by Tribal Nations to raising governmental revenue in traditional ways, including unique barriers to taxation as a means of funding governmental operations). Arguably, then, the rationale that sovereign immunity is necessary for the protection of governmental resources applies with even greater force to Tribal Nations, and the ability of tribal governments to make individual decisions regarding the appropriate balance between redress and immunity is even more important. See Struve, *supra*, at 166-71. Likewise, because Tribal Nations generally lack their own tax base, it is even more important that they retain the ability to engage in economic development with outside entities, and often in other jurisdictions, in order to raise governmental revenue. See *Bay Mills*, 134 S. Ct. at 2042-45 (Sotomayor, J., concurring). In short, for Tribal Nations, economic development is a critical sovereign exercise, and one that may necessarily bring them into greater contact with non-Indians.

A rule that abrogates tribal sovereign immunity for tort claims by non-Indians would have a major impact on the ability of Tribal Nations to raise governmental revenues, because those Tribal Nations would be forced to give up fundamental aspects of sovereign authority in order to do so. Congress has not seen fit to impose this Hobson's choice on Tribal Nations. Instead, Congress has recognized the need for Tribal

Nations to engage in economic development as a governmental activity and has adopted a policy in support of such activity while at the same time protecting and advancing tribal sovereignty. See *id.* at 2042-45 (citing the Indian Gaming Regulatory Act, 25 U.S.C. § 2702(1); F. Cohen, Handbook of Federal Indian Law, §§ 21.03[4]–21.04[6] at 1357–73 (Nell Jessup Newton, ed., 2012)).

Of course, as with any sovereign, these considerations weigh against the need for adequate redress of harm to private individuals. While, as noted above, Tribal Nations take these concerns seriously and are taking measures similar to other governments to strike an appropriate balance, this Court has also emphasized that Congress can step in if those measures prove to be insufficient. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991). So far, Congress has weighed the policy considerations and chosen not to abrogate tribal sovereign immunity with respect to tort claims in state court. *Id*. ("Congress has consistently reiterated its approval of the immunity doctrine."); *Bay Mills*, 134 S. Ct. at 2038 ("Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity."). It is not for the individual States to overturn that choice, or to subject Tribal Nations to the harms inherent in doing so.

III. The Alabama Supreme Court has Overstepped its Bounds, and This Court Should Not Permit Such Overreach by it or Any Other State Court

The ruling below thus purports to make drastic changes to federal law that would undermine the twin pillars of Congressional Indian affairs policy: tribal self-government and tribal economic development.

The decision ignores the rule of federal supremacy over states in Indian affairs and constitutes a gross overreach by the Alabama Supreme Court in defiance of this Court's repeated warnings that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty[,]" *Bay Mills*, 134 S. Ct. at 2039 (citing *Kiowa*, 523 U.S. at 758-60; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)), and that "Congress . . . has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved in the issue." *Bay Mills*, 134 S. Ct. at 2037–38 (quoting *Kiowa*, 523 U.S. at 759).

Indeed, this Court has specifically held that "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa*, 523 U.S. at 756. Further, "The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 371 (1990). Nor may state courts ignore the will of Congress or the valid exercise of congressional decisionmaking authority:

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the

> State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

Id. at 371 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912)). This Court has acknowledged criticisms of the sovereign immunity doctrine, but affirmed that Congress is the proper body to address its scope. In response, Congress has declined to broadly abrogate tribal sovereign immunity with respect to tort claims, although it has chosen to abrogate tribal immunity in other, discrete circumstances. See *Kiowa*, 523 U.S. at 758 (noting that, acting against the backdrop of this Court's decisions, Congress has "restricted tribal immunity from suit in limited circumstances" and "in other statutes it has declared an intention not to alter it[,]" and citing examples). The Alabama Supreme Court must respect Congress' decision and uphold the federal law of tribal sovereign immunity.

Especially in the area of federal Indian law, where a unique trust responsibility applies to all three branches of the federal government, it has always been the role of this Court to police the boundaries between States' rights, tribal sovereignty, and the clear doctrine of federal preeminence and Congressional authority over Indian affairs. See *Worcester v. Georgia*, 31 U.S. 515 (1832). In this case, the Alabama Supreme Court, in defiance of clear federal precedent, has overstepped its prerogatives in an area where both the law and the primary role of Congress in altering that law are clear. Swift action by this Court is warranted and necessary to correct this clear overreach and egregious misinterpretation of federal law by the Alabama Supreme Court.

CONCLUSION

As this Court opined in *Bay Mills*, "Reversing *Kiowa* in these circumstances would scale the heights of presumption: Beyond upending 'long-established principle[s] of tribal sovereign immunity,' that action would replace Congress's considered judgment with our contrary opinion." 134 S. Ct. at 2039 (quoting *Potawatomi*, 498 U.S. at 510) (brackets in original). That is precisely what the Alabama Supreme Court has done, in utter disregard for the authority of this Court and of the United States Congress. Because the Alabama Supreme Court grossly overstepped its bounds, and because letting the decision stand would invite additional state courts to take similar actions in derogation of tribal sovereignty and federal authority, this Court should grant the Petition and overturn the decision below.

Respectfully submitted,

CAROLINE P. MAYHEW
Counsel of Record
GREGORY A. SMITH
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street NW
Suite 700
Washington, D.C. 20037
(202) 822-8282
cmayhew@hobbsstraus.com

Counsel for Amicus Curiae United South and Eastern Tribes, Inc.

March 26, 2018