No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quotation marks omitted). This Court recently reaffirmed the principle that "[a]mong the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* Accordingly, this Court "ha[s] time and again treated the doctrine of tribal immunity [as] settled law and dismissed any suit against a tribe absent congressional authorization (or waiver)." *Id.* at 2030–31 (second brackets in original).

This case involves an automobile accident between respondents and an employee of a casino that is an instrumentality of petitioner Indian tribe. Respondents sued the tribe and casino in state court. Acknowledging that it was creating a split, and disregarding this Court's numerous tribal immunity decisions, the Alabama Supreme Court held that "the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members." The decision below conflicts with holdings of at least four federal circuits and six state supreme courts.

The question presented is:

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

PARTIES TO THE PROCEEDINGS

Petitioners the Poarch Band of Creek Indians and PCI Gaming Authority d/b/a Wind Creek Casino and Hotel Wetumpka were appellees in the Alabama Supreme Court and defendants in the Elmore County Circuit Court.

Respondents Casey Marie Wilkes and Alexander Jack Russell were appellants in the Alabama Supreme Court and plaintiffs in the Elmore County Circuit Court.

RULE 29.6 DISCLOSURE STATEMENT

The Poarch Band of Creek Indians is a federally recognized Indian tribe. PCI Gaming Authority is an instrumentality of the tribe.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the Alabama Supreme Court.

OPINIONS BELOW

The September 29, 2017, decision of the Alabama Supreme Court is unpublished and unreported. The October 3, 2017, decision of the Alabama Supreme Court, as modified on rehearing *ex mero motu*, is not yet published but is reprinted in the Appendix to the Petition ("App.") at App. 1a–14a and is reported at 2017 WL 4385738. The order of the Elmore County Circuit Court, Alabama, granting petitioners' summary judgment, is unpublished and unreported and is reprinted at App. 19a–34a. The amended summary judgment order is unpublished and unreported and is reprinted at App. 15a–16a. The order of final judgment is unpublished and unreported and is reprinted at App. 17a–18a.

JURISDICTION

The Alabama Supreme Court issued its decision on September 29, 2017, and then issued a modified opinion on rehearing *ex mero motu* on October 3, 2017. App. 1a. On December 12, 2017, Justice Thomas granted petitioners' application for an extension of time to file this petition until February 1, 2018. On January 26, 2018, Justice Thomas granted petitioners a further extension until March 2, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

INTRODUCTION

In a series of cases dating back to the early 20th century, this Court has held that, as a matter of

federal law, Indian tribes are entitled to sovereign immunity unless Congress has abrogated that immunity or the tribe has waived it. Indeed, as this Court recently emphasized, it has "time and again treated the 'doctrine of tribal immunity [as] settled law.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030–31 (2014) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)) (alteration in original). And this Court has not limited the scope of this immunity to one type of case, but held that immunity is coextensive with the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Such immunity extends to tort actions.

In the decision below, the Alabama Supreme Court contravened that settled law. That court broadly held that "the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members." App. 12a. That novel holding is flatly inconsistent with this Court's tribal immunity jurisprudence and conflicts with numerous decisions by other state supreme courts and several federal courts of appeals. Every state supreme court and federal circuit to address the question has held that tort suits are subject to tribal immunity. Further, tribal immunity for tort claims is an important, frequently litigated doctrine; the principle involves a "core aspect[] of sovereignty" possessed by the nation's Indian tribes, *Bay Mills*, 134 S. Ct. at 2030, and its elimination threatens not only their sovereignty and independence but also their solvency.

For these reasons, as explained below, this case warrants review by this Court.

STATEMENT OF THE CASE

1. Petitioner Poarch Band of Creek Indians is a federally recognized Indian tribe. *See* Indian Entities Recognized, Final Determination for Federal Acknowledgement of the Poarch Band of Creeks, 49 Fed. Reg. 24,083–01 (June 11, 1984). In connection with its federal recognition, the Secretary of the Interior found that the Tribe "is a successor of the Creek Nation of Alabama prior to its removal to Indian Territory," and that "[t]he Creek Nation has a documented history back to 1540." *Id.* at 24,083; Record 598. The Creek Nation occupied large portions of present-day Georgia and Alabama. The Creeks had assisted the federal government during the Creek War and had been assured of federally protected reservations within their original territory.[1]

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[1] *See, e.g.,* Treaty of Peace and Friendship, Creek Nation of Indians-U.S., art. V, Aug. 7, 1790, 7 Stat. 35 ("The United States solemnly guarantee to the Creek Nation, all their lands within the limits of the United States to the westward and southward of the boundary described in the preceding article."); Treaty of Fort Jackson, art. I, Aug. 9, 1814, 7 Stat. 120 ("where any possession of any chief or warrior of the Creek nation, who shall have been friendly to the United States during the war and taken an active part therein, shall be within the territory ceded by these articles to the United States, every such person shall be entitled to a reservation of land within the said territory of one mile square, to include his improvements as near the centre thereof as may be, which shall inure to the said chief or warrior, and his descendants, so long as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States").

Upon achieving statehood in 1819, however, Alabama disregarded the federal protections afforded Indian lands in an effort to destroy the Creek Nation's sovereignty and property rights and gain access to the tribe's natural resources. Beginning in 1824, the Alabama legislature asserted civil and criminal jurisdiction over portions of the Creek Nation, and by 1829 had illegally expanded its authority throughout the Creek Nation within Alabama's borders. In 1832 Alabama banned the Creek government.[2] In that same year, the Alabama Supreme Court, in *Caldwell v. State,* 1 Stew. & P. 327 (Ala. 1832), justified these actions, insisting that the Creek Nation had no protected interest in its lands and the federal government had no constitutional authority to enter into treaties with tribal nations. *Id.* at 340 (Lipscomb, C.J.); *id.* at 373–74 (Saffold, J.). In so holding, the court ignored this Court's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), just one year earlier, which held that tribes have "an unquestionable . . . right to the lands they occupy" and that in entering into treaties with tribes "our government plainly recognize[s tribal nations] as states, and the courts are bound by those acts."[3] *Id.* at 16–17.

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[2] Theda Perdue & Michael Green, *The Columbia Guide to American Indians of the Southeast* 109 (2001); Michael D. Green, *The Politics of Indian Removal: Creek Government and Society in Crisis* 145–47 (1982). According to debates in the Alabama House of Representatives, the prospect of state legislation was intended to "induce them speedily to remove." *Id.* at 147.

[3] *Caldwell* was decided immediately prior to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which held unequivocally that a tribe was "a distinct community occupying its own

Although the Alabama Supreme Court insisted that state law would serve as a "shield of protection . . . against the lawless encroachments of the white man," *Caldwell,* 1 Stew. & P. at 329, Alabama law did the opposite. Lands protected by treaty were wrongfully taken by the state, despite the President ordering federal troops to protect the Creeks from Alabamians. And in 1837, 15,000 Creek Indians were forcibly removed to the present state of Oklahoma, many of them dying along the way.[4]

It was, in part, because of the disregard of federal law exhibited by Alabama and other states toward Indian nations that federal plenary power over tribes was found necessary—to protect tribal nations from actions by the states, their "deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). It is solely Congress, not the states, that has the plenary authority to limit, modify, or eliminate a tribe's sovereign powers. *Santa Clara Pueblo*, 436 U.S. at 56.

In recent years petitioner Poarch Band of Creek Indians ("Tribe"), the sole federally recognized tribe in the state, has experienced a reemergence of the animus directed toward tribes by the Alabama state government. In 2013, the Alabama attorney general filed a complaint in the Elmore County Circuit Court, alleging that the Tribe's gaming activity should be enjoined under state nuisance laws, despite the fact that state law was preempted by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq*. After removal to federal court, the state claimed that the

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territory, with boundaries accurately described, in which the laws of [the state] can have no force." *Id.* at 520.

[4] *See* Perdue & Green, *supra*, at 115–17.

Tribe's lands were subject to state jurisdiction, arguing it could collaterally attack the decision of the Department of Interior to take the Tribe's lands into trust over 30 years earlier. The Eleventh Circuit affirmed the district court's dismissal of the action. *Alabama v. PCI Gaming Auth.*, 15 F. Supp. 3d 1161 (M.D. Ala. 2014), *aff'd*, 801 F.3d 1278 (11th Cir. 2015). While that case was pending, a county tax assessor, who was also an agent for the state, began the process of assessing the Tribe's federal trust lands for state tax purposes, ignoring that such taxation is precluded by federal statute, 25 U.S.C. § 5108. The Tribe obtained an injunction from federal court to stop the unlawful state taxation. *Poarch Band of Creek Indians v. Hildreth*, No. 1:15–0277–CG–C, 2015 WL 4469479 (S.D. Ala. July 22, 2015), *aff'd*, 656 F. App'x 934 (11th Cir. 2016).

2. Following federal recognition of the Tribe in 1984, on three occasions the Tribe conveyed land—virtually all in Alabama—to the Secretary to be held in trust by the United States for the Tribe. *See Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 936–37 (11th Cir. 2016). Petitioner PCI Gaming Authority, which is an unincorporated instrumentality of the Tribe,[5] runs the Wind Creek Casino and Hotel Wetumpka ("Wind Creek"). App. 2a

[5] The Eleventh Circuit previously concluded that PCI Gaming Authority "shares in the Tribe's immunity because it operates as an arm of the Tribe." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287–88 (11th Cir. 2015); *see also*, *e.g.*, *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046–47 (9th Cir. 2006) (finding a casino to be "an arm of the tribe" cloaked with its sovereign immunity). In asserting their immunity arguments in the Alabama Supreme Court, respondents did not dispute that PCI Gaming Authority was immune to the same extent as the Tribe.

n.1; Record 338; Tribal Code of the Poarch Band of Creek Indians title 50 (2016), *available at* https://goo.gl/aVEcfL. Wind Creek is located on tribal trust land in Wetumpka, Alabama. *Alabama v. PCI Gaming Auth.*, 801 F.3d at 1285 n.12.

3. Barbie Spraggins was employed by Wind Creek beginning in 2013 as a facilities-management administrator. App. 2a. On January 1, 2015, she arrived for work at 8 a.m., allegedly after a night of drinking. *Id.* She then took a casino-owned pickup truck and drove about 10 miles south to a warehouse to retrieve lamp shades needed for hotel rooms. For unknown reasons she did not return directly to the casino. At approximately 10 a.m., on an off-reservation highway about 15 minutes north of the casino, the truck hit a guardrail while driving on a bridge, crossed into on-coming traffic, and collided head-on with an approaching car. *Id.* at 2a–3a; Record 349. Respondent Casey Marie Wilkes was the driver of the car that Spraggins struck, and respondent Alexander Jack Russell was a passenger in that car.

4. Respondents sued Spraggins and petitioners in the Elmore County Circuit Court, Alabama.[6] As amended, their complaint alleged negligence and wantonness claims against all defendants based on Spraggins' operation of the truck at the time of the accident, when Respondents alleged that Spraggins was drunk. They also alleged negligence and wantonness claims against petitioners for their hiring, retention, and supervision of Spraggins. App. 3a–4a.

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[6] Plaintiffs also sued several other defendants. Claims against those defendants were dismissed and are not relevant on appeal.

After discovery, the parties were unable to settle during mediation, and petitioners then moved for summary judgment based on, *inter alia*, tribal sovereign immunity. The circuit court granted the motion. The court held that "it lacks subject matter jurisdiction to hear and adjudicate claims against the Poarch Band of Creek Indians where they have not consented to civil suits and where Congress has not acted to limit their immunity." App. 21a. Further, the court explained that "the federal courts have settled the question of whether tribal sovereignty extends to commercial activities occurring beyond trust lands in the affirmative."[7] *Id.* After the circuit court certified its judgment as final, App. 18a; *see* Ala. R. Civ. P. 54(b), respondents noticed an appeal to the Alabama Supreme Court.

The Alabama Supreme Court reversed.[8] After discussing this Court's decisions in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), the court focused on the supposed "limitation" in those holdings. Specifically, ignoring the broad holdings in both of those cases, the Alabama court opined that this Court

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[7] In opposing summary judgment, respondents contended that the Tribe was not entitled to immunity because it was not properly recognized by the United States in 1984. App. 21a–22a. The circuit court rejected this argument, *id.* at 22a, as has the Eleventh Circuit on several occasions. *See Poarch Band*, 656 F. App'x at 940; *PCI Gaming Auth.*, 801 F.3d at 1290–93. The Alabama Supreme Court did not address this argument.

[8] The Alabama Supreme Court initially issued its decision on September 29, 2017, and then issued a "modified" opinion "on rehearing ex mero motu" on October 3, 2017. App. 1a.

in *Kiowa* limited "its holding . . . to 'suits on contract'" (App. 10a) (quoting *Kiowa*, 523 U.S. at 758–60), and it emphasized the footnote in *Bay Mills* "explaining . . . that [this Court] had never 'specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct.'" App. 10a (quoting *Bay Mills*, 134 S. Ct. at 2036 n.8). The court—relying extensively on Justice Stevens' dissent in *Kiowa* and Justice Thomas' dissent in *Bay Mills*—therefore "decline[d] to extend the doctrine beyond the circumstances to which that Court itself has applied it," particularly because application of immunity "would be contrary to the interests of justice." *Id.* at 10a–11a. Accordingly, the court "h[e]ld that the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members." *Id.* at 12a. The court acknowledged that "our holding is contrary to the holdings of several of the United States Courts of Appeals that have considered this issue." *Id.* at 13a.

5. The same day as the initial decision in this case, the Alabama Supreme Court issued two additional decisions demonstrating its disagreement with this Court's tribal immunity jurisprudence.

In *Harrison v. PCI Gaming Auth.*, ___ So. 3d ___, 2017 WL 4324716 (Ala. Sept. 29, 2017) (per curiam), the court denied tribal immunity in a suit brought by the administrator of the estate of a passenger killed in an automobile accident off tribal property; the driver of the car allegedly had consumed alcohol at the Wind Creek casino and then led the police on a high-

speed chase. The Alabama Supreme Court's opinion includes a lengthy critique of this Court's tribal-immunity jurisprudence, including several pages-long block quotations from the dissents in *Kiowa* and *Bay Mills*. *Id.* at *2–*8. Moreover, relying on a prior concurring opinion by former Alabama Chief Justice Roy Moore and two decisions from the Oklahoma appellate courts that had been overruled, *see Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 367 (Okla. 2013), the court instructed the trial court to examine whether state law preempted the tribe's adjudicatory authority with respect to sales of alcohol at its casino. *Harrison*, 2017 WL 4324716, at *9. Every court considering such a preemption argument has rejected it, including the Eleventh Circuit. *See Furry v. Miccosukee Tribe of Indians of Fla.,* 685 F.3d 1224, 1226 (11th Cir. 2012). *Harrison* settled shortly after the decision was issued.

In *Rape v. Poarch Band of Creek Indians*, ___ So. 3d ___, 2017 WL 4325017 (Ala. Sept. 29, 2017), the court dismissed a claim by a Wind Creek casino patron alleging that the casino refused to pay him for substantial electronic bingo winnings. The court, however, refused to rely on tribal immunity. Indeed, during the course of lengthy and emphatic *dicta* discussing sovereign immunity, *id.* at *3–*5, the court expressly rejected the very premise of this Court's tribal immunity jurisprudence: the court opined that "sovereign immunity naturally exists only in the courts that themselves derive from and serve that same sovereignty," *id.* at *4. Indeed, the court expressly noted that its reasoning was the same as

Justice Stevens' dissent in *Kiowa* and Justice Thomas' dissent in *Bay Mills*.[9] *Id.* at *5 n.4.

REASONS FOR GRANTING THE PETITION

The Alabama Supreme Court's broad holding—which deprives Indian tribes of sovereign immunity for tort claims asserted by non-members—conflicts with this Court's cases, creates a split with many state supreme courts and federal courts of appeals, and undermines a principal component of tribal sovereignty. The nature and extent of tribal immunity is not only important, but it is also frequently litigated. This case presents an ideal vehicle to address the question presented. This Court should therefore grant this petition.

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[9] The court questioned whether the United States properly took land into trust on behalf of the Tribe—an argument that the Eleventh Circuit has twice rejected, *see* note 7, *supra.* The court also held that the Tribe had no right to "regulate or adjudicate contract and tort disputes" it may have with a non-member, *Rape*, 2017 WL 4325017, at *13, ignoring this Court's decisions that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana v. United States*, 450 U.S. 544, 565 (1981). Ultimately, the court ruled for the tribe. The court held that if the casino was located on land properly taken into trust, and if the dispute fell within the exclusive jurisdiction of the tribal courts as a result, then the state courts lacked jurisdiction; on the other hand, if the state courts had jurisdiction, the gambling contract that the plaintiff sought to enforce was illegal, and hence unenforceable, under state law. *Rape*, 2017 WL 4325017, at *15.

I. THE ALABAMA SUPREME COURT'S DECISION CREATES A CLEAR SPLIT ON AN IMPORTANT, RECURRING ISSUE.

A. This Court Repeatedly Has Held That Indian Tribes Are Entitled To Immunity.

1. This Court recently reaffirmed that it has "time and again treated the 'doctrine of tribal immunity [as] settled law.'"[10] *Bay Mills*, 134 S. Ct. at 2030–31 (quoting *Kiowa*, 523 U.S. at 756) (alteration in original). Since *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Court has recognized that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Bay Mills*, 134 U.S. at 2029 (internal quotation marks omitted). Tribes "remain separate sovereigns pre-existing the Constitution," and "unless and until Congress acts, the tribes retain their historic sovereign authority." *Id.* (internal quotation marks and citations omitted).

Critically, the Court recognized that "[a]mong the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally

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[10] *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165 (1977); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354 (1919). The tribal immunity doctrine was established law well before this Court first addressed the issue. By 1895, the Ninth Circuit characterized tribal immunity as "settled doctrine" based on "well-established principle[s] of jurisprudence." *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 375 (9th Cir. 1895).

employed by sovereign powers." *Id.* (internal quotation marks omitted). Indeed, this Court noted that immunity "is a necessary corollary to Indian sovereignty and self-governance." *Id.* (internal quotation marks omitted). And "the common-law immunity from suit traditionally employed by sovereign powers" includes immunity from tort actions. *See*, *e.g.*, *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924); *Gibbons v. United States*, 75 U.S. 269, 275 (1868).

Moreover, the Court has applied tribal sovereign immunity to a tribe's business dealings. As explained in *Bay Mills*, "we declined in *Kiowa* to make any exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands." 134 S. Ct. at 2031. The reason is instructive here: this Court's precedents "had established a broad principle, from which we thought it improper suddenly to start carving out exceptions." *Id.*

2. In this Court's two most recent tribal immunity cases, *Kiowa* and *Bay Mills*, the Court emphatically refused to narrow or eliminate tribal immunity and deferred to Congress on the scope of tribal immunity.

In *Kiowa*, the tribe defaulted on a promissory note, and the holder sued in Oklahoma state court. The state courts held that tribes were subject to jurisdiction in state court for breaches of contract that involve off-reservation commercial conduct. This Court reversed, "choos[ing] to defer to Congress" and reaffirming that—in the absence of congressional abrogation—"[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." 523 U.S. at

760. Unlike this Court, it explained, "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" involved.[11] *Id.* at 759.

The Court reaffirmed the doctrine just four Terms ago in *Bay Mills*. In that case, Michigan sued the tribe to enjoin its operation of a casino on property that the state alleged was not Indian land. The Court rejected Michigan's argument to overrule *Kiowa* as applied to commercial conduct outside of Indian territory, *see* 134 S. Ct. at 2036–37, refusing to "create a freestanding exception to tribal immunity for all off-reservation commercial conduct," *id.* at 2039. The Court explained that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Id.* at 2037. "Sovereignty," this Court emphatically emphasized, "implies immunity from lawsuits." *Id.* at 2039. And adopting a "freestanding exception to tribal immunity," the Court further explained, "would entail both overthrowing

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[11] The Court in *Kiowa* suggested that the tribal immunity doctrine "developed almost by accident" and was supported by "little analysis" in this Court's cases. 523 U.S. at 756–57. But tribal immunity in this respect differs not at all from federal, state, and foreign sovereign immunity. As one scholar explained, the tribal immunity cases "used the same reasoning and language as other immunity cases of their time, which themselves offer little analysis or reasoning. Any criticism of the tribal immunity doctrine for being light on analysis applies equally for state, federal, and foreign immunity." William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am. U.L. Rev. 1587, 1658 (2013) (footnotes omitted).

our precedent and usurping Congress's current policy judgment."[12] *Id.*

B. The Alabama Supreme Court's Decision Creates a Split With Many Other Courts

The Alabama Supreme Court flatly held that Indian tribes have no immunity "with regard to tort claims asserted against them by non-tribe members." App. 12a. It is true, as the Alabama Supreme Court noted, that none of this Court's previous cases involved a tort claim "in a situation such as this." *Id.* at 10a. As explained below, that fact does not excuse the Alabama Supreme Court's holding, because that decision conflicts with the broad immunity principle adopted in this Court's cases. *See infra*, at 24–27. But one thing is clear: *numerous* decisions by other state supreme courts and federal courts of appeals have addressed the applicability of tribal immunity to tort claims filed by non-tribal members—and they *each* conflict with the Alabama Supreme Court's decision below.[13]

In a series of cases, the Ninth Circuit has "held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law." *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563

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[12] Most recently, last Term in *Lewis v. Clarke*, 137 S. Ct. 1285, 1290–91 (2017), the Court applied to tribal employees the same rules applicable when state or federal employees are sued for torts committed within the scope of their employment. This Court held that, because the tribal employee in *Lewis* was sued in his personal capacity, tribal "immunity is simply not in play" because the employee, and not the tribe, was "the real party in interest." *Id.* at 1291.

[13] In none of the cases discussed below is there any indication that the tort plaintiff is a member of the defendant tribe.

n.8 (9th Cir. 2016). In *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), the plaintiff alleged that employees of a tribal casino gave an intoxicated fellow employee free drinks at a party and then drove her to her car; she hit the plaintiff's motorcycle moments later. The injured motorcyclist sued the casino, alleging negligence and dram shop liability. The Ninth Circuit found the casino to be protected by tribal sovereign immunity. *Id.* at 724–26. The court rejected the plaintiff's plea to deny immunity to "tribal corporations competing in the economic mainstream" as inconsistent with *Kiowa*. *Id.*

The Ninth Circuit again found tribal immunity for tort claims in *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). In that case, an ambulance from the Viejas Band of Kumeyaay Indians Tribal Fire Department assisted a victim of a shooting off the reservation pursuant to an agreement with a local, non-Indian fire department. After a delayed departure, the victim died as the ambulance drove to meet an emergency helicopter. The victim's family then filed tort claims against, among others, the tribal fire department. *Id.* at 1080–81. The Ninth Circuit held that the tribe's fire department was protected by sovereign immunity.[14] *Id.* at 1086–87.

The Eleventh Circuit has held similarly. In *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224 (11th Cir. 2012), the plaintiff alleged that the tribe's casino served his daughter excessive amounts of alcohol, resulting in a fatal car accident. *Id.* at 1226–

[14] The Ninth Circuit, anticipating *Lewis v. Clarke*, denied tribal immunity to the paramedics sued in their individual capacities. *See Maxwell*, 708 F.3d at 1087–90.

27. The Eleventh Circuit held that the tribe was immune from the dram-shop claims,[15] concluding that this Court in *Kiowa* "could not have been clearer about placing the ball in Congress' court going forward." *Id.* at 1229. Indeed, the court noted that "[c]obbling together a new exception to tribal immunity would directly conflict with the Supreme Court's straightforward doctrinal statement . . . that an Indian tribe is subject to suit in state or federal court '*only where* Congress has authorized the suit or the tribe has waived its immunity.'" *Id.* at 1236 (quoting *Kiowa*, 523 U.S. at 754) (emphasis in the original).

The Eighth Circuit also has recognized that tribal immunity applies to tort claims. In *Rosebud Sioux Tribe v. Val-U Constr. Co. of S. Dakota, Inc.*, 50 F.3d 560 (8th Cir. 1995), a construction company contracted with the tribe to build housing, and eventually the tribe terminated the contract and sued the company, alleging breach of contract and RICO claims. The construction company asserted counterclaims sounding in both contract and tort. *Id.* at 561. The Eighth Circuit found that the tribe had waived its immunity for the contract claims, but not the tort claims, and it affirmed dismissal of the tort claims on immunity grounds. *Id.* at 562–63.

Earlier, in *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957), the plaintiff sued for injuries suffered when a "swinging bridge over the Oconaluftee River on the Cherokee Indian Reservation" collapsed. *Id.* at 294. The Fourth Circuit found the tribe immune,

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[15] The Eleventh Circuit viewed dram-shop claims as a species of tort claims. *See Furry*, 685 F.3d at 1233 (referring to "private tort suits based on state dram shop acts or other tort law").

concluding that "[t]he rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument." *Id.* at 297.

Even more state supreme courts have applied tribal immunity to tort claims. In *Seneca Telephone Co. v. Miami Tribe of Oklahoma*, 253 P.3d 53 (Okla. 2011), the Miami Tribe of Oklahoma was hired to perform excavation work outside of its reservation. During the course of the excavation, the Miami Tribe cut Seneca Telephone Company's underground telephone lines on four occasions. Seneca sued the Miami Tribe in tort for negligence. The Oklahoma Supreme Court held that the tribe was immune from the tort claims. The court concluded that "[t]he instant case is exactly the type of suit envisioned" by *Kiowa*, even though "Seneca did not have the opportunity to negotiate a waiver of the sovereign immunity with the negligent party, but was an innocent third party to the negligence of a tribal enterprise." *Id.* at 55–56.

The Oklahoma Supreme Court adhered to *Seneca* in *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359 (Okla. 2013). In that case, the plaintiffs were injured in an automobile accident off the reservation by a truck driver who had been drinking alcohol at the defendant tribe's casino. *Id.* at 361. The plaintiffs asserted dram-shop claims against the casino and the tribe. The Oklahoma Supreme Court held that the tribe and casino were immune from suit. *Id.* at 371.

The Utah Supreme Court held likewise in *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*, ___ P.3d ___, 2017 WL 5166885 (Utah Nov. 7, 2017). In that case, the plaintiff alleged that

tribal officials barred his businesses from operating on the reservation after he rebuffed requests for payment of a bribe. The plaintiff sued, among others, the tribe, asserting various tort and related claims. The Utah Supreme Court affirmed the dismissal of the claims against the tribe on grounds of tribal immunity. *Id.* at *4–*6. Relying on *Kiowa*, the court explained that a tribe can be sued only when Congress authorized the suit or it has waived immunity, and such immunity "extends to on- or off-reservation activities." *Id.* at *4.

In *Beecher v. Mohegan Tribe of Indians of Connecticut*, 918 A.2d 880 (Conn. 2007), the tribe sued two former employees, alleging that they attempted to extort the tribe. After that case ended, the employees sued the tribe, alleging that the previous litigation represented a vexatious attempt to silence them. The Connecticut Supreme Court concluded that the tribe was protected by immunity, rejecting the argument that it waived immunity by filing the initial lawsuit. *Id.* at 884–87.

The New Mexico Supreme Court held similarly in *Gallegos v. Pueblo of Tesuque*, 46 P.3d 668 (N.M. 2002). When the plaintiff visited the tribe's casino, wind blew a garbage can into her, knocking her over and injuring her. She filed a personal-injury action against the tribe, and the New Mexico Supreme Court held that the tribe was immune. *Id.* at 672–73. "Without an unequivocal and express waiver of sovereign immunity or congressional authorization," the court explained, "state courts lack the power to entertain lawsuits against tribal entitles." *Id.* at 673.

Likewise, *Gross v. Omaha Tribe of Nebraska*, 604 N.W.2d 82 (Iowa 1999), involved a personal injury

action filed by a tribal casino patron for injuries sustained at the casino. Rejecting arguments that the tribe's sovereign immunity had been abrogated by federal law or the gaming compact with the state, the Iowa Supreme Court held that the tribe was immune. *Id.* at 82–83.

And in *Morgan v. Colorado River Indian Tribes*, 443 P.2d 421 (Ariz. 1968), a tribe owned and operated a water park on the Arizona side of the Colorado River. The plaintiff's decedent was killed while swimming in the river near the tribe's facility when she was struck by a boat. Her estate's administrator sued the tribe, alleging that it negligently contributed to her death by failing to rope off and properly mark the area for swimming. *Id.* at 422. The Arizona Supreme Court, after concluding that the accident did not occur on tribal lands, *id.* at 423, held that the tribe, "being a dependent sovereign immune from suit, cannot be subjected to the jurisdiction of our courts without its consent or the consent of Congress."[16] *Id.* at 424.

These cases vary in their facts and in the nature of the tort claims as to which the tribe claimed sovereign immunity. But they all share one thing in common: they recognize that a tribe is entitled to immunity for tort claims alleged against them by a non-tribal plaintiff. They thus starkly conflict with the Alabama Supreme Court's decision below. The decision below

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[16] The Arizona courts continue to adhere to *Morgan*. *See*, *e.g.*, *Val/Del, Inc. v. Superior Court in & for Pima Cty.*, 703 P.2d 502, 504 (Ariz. 1985); *Brown v. Robertson*, No. 1 CA-CV 14-0812, 2016 WL 229431, at *1 (Ariz. Ct. App. Jan. 19, 2016); *Carter v. Indus. Comm'n of Ariz.*, No. 1 CA-IC 12-0001, 2012 WL 5269487, at *2 (Ariz. Ct. App. Oct. 25, 2012).

stands alone—against at least four federal circuit decisions and six state supreme court decisions.[17]

C. The Issue of Tribal Immunity for Tort Suits Is Important and Recurring, and this Case Presents a Good Vehicle for Resolving It.

In addition to the significant split created by the decision below, this case warrants this Court's review because tribal immunity is a critically important doctrine that arises often in litigation.

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[17] Numerous intermediate state appellate courts have similarly applied tribal immunity to tort claims alleged by non-tribal members. *See*, *e.g.*, *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 661 (Fla. Dist. Ct. App. 2017), *cert. denied*, No. 17-702 (Jan. 16, 2018); *Koscielak v. Stockbridge-Munsee Cmty.*, 811 N.W.2d 451, 457 (Wis. Ct. App. 2012); *Reed v. Gutierrez*, No. 28,249, 2010 WL 4924989, at *2 (N.M. Ct. App. 2010); *Foxworthy v. Puyallup Tribe of Indians Ass'n*, 169 P.3d 53, 55 (Wash. Ct. App. 2007); *Filer v. Tohono O'odham Nation Gaming Enter.*, 129 P.3d 78, 80–81 (Ariz. Ct. App. 2006); *Sevastian v. Sevastian*, 808 A.2d 1180, 1182 (Conn. App. Ct. 2002); *Doe v. Oneida Indian Nation of N.Y.*, 717 N.Y.S.2d 417, 418 (App. Div. 2000); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 854 (Tex. Ct. App. 1997).

So have a federal court of appeals in an unpublished decision, *see Santana v. Muscogee (Creek) Nation ex rel. River Spirit Casino*, 508 F. App'x 821, 822–24 (10th Cir. 2013), and federal district courts, *see Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians*, No. 16-CV-13643, 2018 WL 508471 (E.D. Mich. Jan. 23, 2018); *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 171–18 (W.D. Mich. 2017); *Sun v. Mashantucket Pequot Gaming Enter.*, 309 F.R.D. 157, 162–64 (D. Conn. 2015); *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568, at *10 (W.D. Okla. Oct. 27, 2010).

Sovereign immunity from lawsuits is one of "the core aspects of sovereignty." *Bay Mills*, 134 S. Ct. at 2030. Indeed, "[t]hat immunity . . . is 'a necessary corollary to Indian sovereignty and self-governance.'" *Id.* (quoting *Three Affiliated Tribes*, 476 U.S. at 890). Tribal immunity, to be sure, is qualified by Congress' ability to limit its scope. But "Congress has exercised this power only sparingly." Wood, *supra*, at 1662; *see Kiowa*, 523 U.S. at 758–59; Cohen's Handbook of Federal Indian Law § 7.05[1][b], at 639–43 (Nell Jessup Newton ed., 2012 ed.). Any limitation on a tribe's immunity, including the dramatic and unprecedented limitation invented by the Alabama Supreme Court below, is therefore an affront to the tribal sovereignty that this Court has acknowledged for centuries.

Further, exposing tribes to tort suits could "impose serious financial burdens on already 'financially disadvantaged' tribes." *Santa Clara Pueblo*, 436 U.S. at 64. "Despite the well-publicized successes of a handful of tribes, most tribes are still struggling economically." Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 168 (2004). "[N]ot all Tribes are engaged in highly lucrative commercial activity. Nearly half of federally recognized Tribes in the United States do not operate gaming facilities at all." *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring).

Just as with lawsuits against states, damages actions against tribes may "threaten the[ir] financial integrity." *Alden v. Maine*, 527 U.S. 706, 750 (1999); *see Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) ("Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one

of the historic purposes of sovereign immunity in general."); *Thebo*, 66 F. at 376 ("As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it."). Indeed, Indian tribes are *more* dependent on sovereign immunity than are states; unlike states, tribes as a practical matter cannot raise revenue through taxation. *See Bay Mills*, 134 S. Ct. at 2043–44 (Sotomayor, J., concurring) (discussing "the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means"); Struve, *supra*, at 169 & n.185.

Moreover, tribal immunity arises frequently in litigation. This Court's docket, for example, has included more than a half-dozen cases in the last four decades. *See supra*, pp. 12–15 and n.10. Indeed, just last Term this Court decided *Lewis v. Clarke*, *see* note 12, *supra,* and it has granted certiorari this Term in *Upper Skagit Indian Tribe v. Lundgren*, No. 17-387, to determine whether tribal immunity applies to *in rem* actions. Just as important, cases raising immunity questions have proliferated in the lower courts. "The number of cases applying or challenging tribal immunity has increased immensely in the last few years. . . ." William C. Canby, Jr., *American Indian Law* 102 (2015). This growth occurred in part because of "the increased economic activity of the tribes," *id.*—a trend that will only accelerate in the future.

Finally, this case is an ideal vehicle for addressing the question presented. The tribal immunity question was squarely raised, fully briefed, and resolved in

opinions by the circuit court and the Alabama Supreme Court, and the resolution of that question was dispositive in both courts. No other legal issues are present that could prevent the Court from addressing the question presented. And the facts relevant to the immunity question are undisputed.

II. THE ALABAMA SUPREME COURT ERRED IN DENYING PETITIONERS IMMUNITY.

Under this Court's precedents, the Alabama Supreme Court's decision is simply wrong. This Court's precedents—through its recent decision in *Bay Mills*—are consistent, unyielding, and unqualified: "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754. Here, neither respondents nor the Alabama Supreme Court pointed to any congressional authorization of this lawsuit or any waiver by petitioners. Petitioners are therefore immune from the action, and the trial court properly dismissed it.

The Alabama Supreme Court, in rejecting immunity, expressly limited all of this Court's precedents to their facts. Because none of this Court's cases involved "a situation such as this," the Alabama Supreme Court explained, it "decline[d] to extend the doctrine beyond the circumstances to which that Court itself has applied it." App. 10a–11a. This reasoning defies this Court's authority. Lower courts "are not 'free to limit Supreme Court opinions precisely to the facts of each case.'" *Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007) (quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991)). "[I]t is a general rule that unless the Supreme Court expressly limits its opinion to the facts before it, it is

the principle which controls and not the specific facts upon which the principle was decided." *United States v. Stephens*, 764 F.3d 327, 338 (4th Cir. 2014) (quoting *United States v. LaBinia*, 614 F.2d 1207, 1210 (9th Cir. 1980)).

Nor is the Alabama Supreme Court's decision justified by footnote 8 of *Bay Mills*. The Alabama court noted (App. 10a) that, in that footnote, this Court indicated that it has "never specifically addressed . . . whether immunity should apply in the ordinary way if a tort victim . . . has no alternative way to obtain relief for off-reservation commercial conduct." *Bay Mills*, 134 S. Ct. at 2036 n.8. To begin with, respondents here have "an alternative way to obtain relief," and in fact have pursued it: Spraggins, the driver of the truck, is a defendant in the action that respondents filed, App. 3a, and, in light of *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), she is not protected by the Tribe's immunity.[18]

Moreover, this Court has broadly stated, in a series of cases dating back decades, that Indian tribes are entitled to immunity absent congressional authorization or waiver—and not a single case has excluded tort actions filed by non-members from that holding. The *rationale* of those cases remains binding on the Alabama Supreme Court, notwithstanding footnote 8 of *Bay Mills*. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 66–67 (1996) ("When an opinion issues for the Court, it is not only the result but also

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[18] The circuit court issued an order, pursuant to Ala. R. Civ. P. 54(b), entering final judgment as to the claims against petitioners. App. 18a. Subsequently, the circuit court stayed the claims against Spraggins pending the decision in *Lewis v. Clarke*. Record 898.

those portions of the opinion necessary to that result by which we are bound," including the "rationale upon which the Court based the results of its earlier decisions"); *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."). And as this Court has often said and recently reaffirmed, "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (quoting *Hohn v. United States*, 524 U.S. 236, 252–53 (1998)).

Finally, the Alabama Supreme Court articulated no principled basis to exempt from the otherwise broad scope of tribal immunity tort actions by plaintiffs who are not members of the tribe—and there is none. Such an exemption finds no basis in the traditional immunities enjoyed by sovereigns, as federal, state, and foreign sovereigns all traditionally enjoyed immunity from tort suits (by citizens of the polity and strangers alike). *See* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 Wake Forest L. Rev. 765, 782–83 (2008) ("tribal sovereign immunity maps state sovereign immunity in nearly every particular, with the sole (although significant) exception" that tribal immunity "can be abrogated by Congress"). Nor is such an exemption consistent with the rationales for tribal immunity: preserving the dignity and independence of the Indian tribes, safeguarding the

tribal treasury from potentially ruinous liability judgments, and reinforcing Congress' exclusive role in regulating Indian tribes. *See* Wood, *supra*, at 1621–22.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted.

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