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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Casey Marie Wilkes and Alexander Jack Russell were seriously injured when an intoxicated employee of the Poarch Band of Creek Indians' gaming enterprise struck their vehicle while running an errand for the casino. Wilkes and Russell brought various tort claims in Alabama state court against the employee, the Tribe, and the Tribe's gaming authority over four years ago. At no point after they filed suit did the Tribe indicate its intent to amend its tribal code to allow suit in tribal court. Instead, it asserted that tribal sovereign immunity barred the claims. The Alabama Supreme Court disagreed in a thoughtful analysis of this Court's tribal sovereign immunity cases, including the qualifiers discussed in footnote eight of *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 n.8 (2014).

Now, fifteen months after the Tribe petitioned for review of that decision, respondents are told that the Tribe is contemplating an amendment to its tribal code that would grant a limited waiver of immunity to suit *in tribal court*. Relying on this potential change in tribal law, the Solicitor General asks the Court to grant the Tribe's petition, vacate the Alabama Supreme Court's decision, and remand the case for further proceedings. According to the Solicitor General, taking this rare step would allow the Alabama courts to consider whether the possibility of tribal court jurisdiction—which the Tribe declined to establish before losing in the Alabama Supreme Court—would lead to a different outcome.

Respectfully, a grant, vacate, and remand ("GVR") order is not appropriate in this case. The Court uses its GVR power "sparingly" and not in furtherance "of an unfair or manipulative litigation strategy"—

particularly where that strategy would require the state courts to engage in an analysis the Solicitor General otherwise argues is impermissible. *Lawrence v. Chater*, 516 U.S. 163, 167-68, 173 (1996). A GVR is also inappropriate when there is little reason to believe that the (prospective) "intervening development" will lead the lower courts to reach a different conclusion. *Id*. at 173. The Court should decline the recommendation to issue a GVR order.

Respondents do agree with the Solicitor General on one point. This case does not warrant the Court's plenary review. *See* Gov't Br. 14, 17-19. Respondents are entitled to consideration of their claims on the merits without further delay. If the Tribe wishes to seek this Court's review after those proceedings are complete, it has the right to do so. The Court should deny the petition.

I. Seeking GVR is an unfair litigation strategy that is unlikely to lead the court below to alter its decision

The Solicitor General bases his recommendation for a GVR order on the Tribe's proposed amendment to its tribal code, which would enact a limited waiver of immunity for claims in tribal court.[1] Gov't Br. 14. Apart from being hypothetical at this time, the proposed amendment does not meet the basic requirements for a GVR order.

In *Lawrence*, the Court explained that a GVR order is "potentially appropriate" when an intervening development "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower

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[1] http://www.pci-nsn.gov/pdf/051719_revisions_to_title_29.pdf (hereinafter, "Proposed Title") at 29-2-1.

court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." 516 U.S. at 167. "Whether a GVR order is ultimately appropriate," however, "depends further on the equities of the case." *Id.* at 167-68. If the intervening development appears to be "part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168.

The proposed amendment fails to meet these requirements.

A. The equities do not support issuing a GVR order

Respondents' claims have been pending for over four years. Pet. App. 3a. After filing their claims, respondents engaged in time-consuming and costly discovery and mediation. Pet. 8. Only after that investment did the Tribe move for summary judgment, asserting, *inter alia*, that it was immune from suit. *Id.* The Tribe prevailed in the circuit court, but the Alabama Supreme Court reversed. The Tribe petitioned for review fifteen months ago, after obtaining two extensions. Pet. 1.

At no time during the proceedings below did the Tribe propose amending its tribal code to waive immunity to claims in tribal court or a tribal administrative process. Instead, it maintained that tribal sovereign immunity barred respondents' claims, and it petitioned the Court for review on that basis.

It is not a coincidence that the Tribe is only now considering whether it should amend its tribal code—

an amendment that "may occur as early as June 6, 2019." Gov't Br. 14. But an amendment that "may occur as early as June 6, 2019" is years too late. Had the Tribe wanted the Alabama courts to consider the availability of tribal court or a tribal administrative process in this litigation, it could have amended its code long ago. Its newly discovered interest in considering either is "an unfair or manipulative litigation strategy" designed to have an unfavorable decision vacated. *Lawrence*, 516 U.S. at 168. These circumstances render a GVR order inappropriate.

1. The Solicitor General cites (at 17) *Madison County, et al. v. Oneida Indian Nation*, 562 U.S. 42 (2011) (per curiam) in support of its recommendation, but that case is inapposite. The tribe was not the petitioner; it *prevailed* in its claim that tribal sovereign immunity barred foreclosure of certain fee-title properties. *See Oneida Indian Nation v. Madison County, et al.*, 605 F.3d 149, 160 (2d Cir. 2010). This Court had already granted the counties' petition, after which the tribe adopted an ordinance waiving its immunity to suits for foreclosure and tax sale. *Madison County*, 562 U.S. at 42. The Court's vacatur and remand allowed the counties' suit, previously foreclosed by the Second Circuit decision, to proceed. *Id.* Although the counties objected to the tribe's belated waiver, the Second Circuit observed on remand that it did not "have any reason to think that the [tribe] is using its waiver *as a tactic to overturn an existing unfavorable decision*," because the vacated decision "was in its favor." *Oneida Indian Nation v. Madison County, et al.*, 665 F.3d 408, 425 (2d Cir. 2011) (emphasis added); *cf. Stutson v. United States*, 516 U.S. 193, 195 (1996) (explaining that GVR was appropriate where, *inter alia*, "the prevailing

party below . . . repudiated the legal position that it advanced below").

This case presents the opposite scenario. The Tribe *lost* in the Alabama Supreme Court. It is attempting to eliminate that loss by taking a unilateral action it could have taken at any time during the litigation. This is precisely the type of litigation tactic Justice Scalia warned against in *Dep't of Interior v. South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting). This is an example of a litigant, "having *lost* below, wish[ing] to try out a new legal position." *Id.* (emphasis in original). And "[t]he unfairness of such a practice to the litigant who prevailed . . . is obvious." *Id.*

2. The incongruity between the Solicitor General's recommendation and his legal position on the merits also counsels against a GVR order. The Solicitor General maintains (at 13) that the Alabama Supreme Court erred because the court was "bound to hold tribes immune from all claims against them." In his view, "[f]ootnote eight [in *Bay Mills*] was not an invitation for lower courts to cut back on the established scope of Indian tribes' sovereign immunity." *Id.* at 12. He goes on to argue that to the extent there may be reasons to limit the scope of tribal immunity, those reasons "potentially provide a basis for *this* Court to revisit its past decisions," not the Alabama Supreme Court. *Id.* at 13 (emphasis in original).

But the Solicitor General's view of the law undermines his professed reason for recommending a GVR order. If lower courts are "bound to hold tribes immune from all claims against them," *id.* at 12, there is no purpose in having them "consider, in the first instance, the effect of the amendment to the tribal Tort Claims Act, including whether it provides respondents with

an opportunity to seek relief from the Tribe," *id.* at 17. A GVR order would require the Alabama courts to engage in the very analysis the Solicitor General argues they are prohibited from undertaking.

B. The availability of tribal court jurisdiction will not alter the Alabama Supreme Court's decision

The Solicitor General's argument for GVR has three parts: (1) the Alabama Supreme Court based its decision "on the premise that respondents 'have no way to obtain relief if the doctrine of tribal sovereign immunity is applied to bar their lawsuit,'" Gov't Br. 15 (quoting Pet. App. 10a); (2) "[t]he Tribe has proposed to amend its Tribal Code to waive its sovereign immunity for claims like those asserted by respondents," *id.* at 14; and (3) the amendment "would substantially affect the basis for the Alabama Supreme Court's decision," *id.* Even assuming the Tribe follows through with its proposed waiver of immunity, the Solicitor General's argument crumbles upon closer examination.

1. The Solicitor General describes the Tribe's proposed amendment as "waiv[ing] its sovereign immunity for claims *like those asserted by respondents*." *Id.* (emphasis added). But this use of "like" brushes over a critical distinction. The proposed amendment would effect only a limited waiver of immunity in tribal court for "compensable injuries." Proposed Title §§ 29-2-4 to 29-2-6. The waiver the Solicitor General cites in *Madison County*, by contrast, waived tribal immunity from suits to enforce property taxes through tax sale or foreclosure in state court. 562 U.S. at 42. The claims available to respondents in tribal court are not "like" those they are pursuing in Alabama state court.

First, the proposed amendment would require claimants to submit to a mandatory administrative process conducted by a tribal "claims administrator," who may request additional information at any time and without apparent limitation. Proposed Title §§ 29-2-4 to 29-2-6. Second, the amendment prohibits any "suit in state or federal Court, or any other state or federal forum, for any purpose." *Id.* § 29-2-4(b). Proceedings would also be governed by "Tribal and federal law," even where the injury occurs outside the reservation and the victims never chose to engage with the Tribe. *Id.* § 29-2-8. Recovery, if any, is subject to numerous conditions and restrictions, including that claimants waive relief elsewhere and submit to "exclusive Tribal jurisdiction." *Id.* §§ 29-2-3(b), 29-2-5(c)(3), 29-2-9. The amendment says nothing regarding the applicable standard of review of the claims administrators' decisions, rights of appeal, or tribal tort law. For all respondents know, tribal tort law may not allow them any recovery against the Tribe.

The Alabama Supreme Court is virtually certain to reject the proposed amendment as an adequate alternative remedy. This Court has repeatedly emphasized that a nonmember is not subject to tribal court jurisdiction unless "the nonmember has consented, either expressly or by his actions." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (citations omitted); *see also Nevada v. Hicks*, 533 U.S. 353, 384-85 (2001) (Souter, J., concurring). The Court has further observed that tribal courts differ from traditional American courts "in their structure, in the substantive law they apply, and in the independence of their judges." *Hicks*, 533 U.S. at 384. The Bill of Rights and the Fourteenth Amendment do not apply, and the safeguards that are enforceable in tribal court under the Indian Civil

Rights Act of 1968, 25 U.S.C. § 1302, are not equivalent. *Hicks*, 533 U.S. at 383-84. Other differences can make tribal court "unusually difficult for an outsider to sort out," including that "tribal law is still frequently unwritten" and is often based "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices." *Id.* at 384-85 (internal citations and quotations omitted). Compare Proposed Title § 29-2-8 (stating that reference to state law permissible if consistent with "customs, traditions, or other sources of tribal law").

The Alabama Supreme Court recognized these concerns in *Rape v. Poarch Band of Creek Indians*, where it declined to resolve a suit alleging breach of contract and various tort claims arising out of the Tribe's refusal to pay disputed winnings from an electric bingo gaming machine. 250 So. 3d 547, 551 (Ala. 2017). In discussing the limits of tribal court jurisdiction, the court quoted this Court's discussion in *Hicks* extensively, emphasizing the "presumption against tribal-court civil jurisdiction," which reflects its "*overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty*.'" *Id.* at 556-57 n.5 (quoting *Hicks*, 33 U.S. at 383–85) (internal citation omitted; emphasis added by Alabama Supreme Court).

The Alabama Supreme Court has twice concluded that tribal sovereign immunity does not bar tort claims in state court. *See Harrison v. PCI Gaming Authority*, 251 So. 3d 24 (Ala. 2017) (holding tribal sovereign immunity does not bar claims of negligent or wanton serving of alcohol resulting in fatal injuries). It is unlikely to retreat from that position based on the potential availability of tribal court.

2. Nor is the Alabama Supreme Court likely to be persuaded by the Solicitor General's expansive reading of *Williams v. Lee*, 358 U.S. 217 (1959). The Solicitor General attempts (at 16) to paint the tribal court jurisdiction the amendment would create in a more attractive light by suggesting that at least "part of respondents' suit" may be barred by *Williams*. But that is not correct; *Williams* says nothing about tribal court jurisdiction in cases involving injuries suffered off-reservation by nonmembers having no relationship with a tribe.

The Court held in *Williams* that a licensed Indian trader operating a general store on the Navajo Reservation pursuant to federal law must use tribal courts to collect on debts incurred by tribal customers because "the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223. The consensual relationship between the trader and the tribe and the on-reservation nature of the conduct were key to the *Williams* decision, as the Court later made clear in *Montana v. United States*, 450 U.S. 544 (1981). The Court held in *Montana* that a tribe's jurisdiction over a nonmember is limited to cases where there is a consensual relationship between the tribe and the nonmember over whom the tribe seeks to assert jurisdiction or where jurisdiction is necessary to preserve tribal sovereignty. 450 U.S. at 565–567. *Williams* is simply an example of when "regulation of non-Indian activities on the reservation" is permitted. *Plains Commerce*, 554 U.S. at 332.

Williams cannot be interpreted to preclude suit in state court when a nonmember has no relationship with a tribe, save for being injured off-reservation by

the tribe's tortious conduct. This Court has never "'upheld . . . the extension of tribal civil authority over nonmembers *on non-Indian land*.'" *Id.* at 333 (quoting *Hicks*, 533 U.S. at 360). In fact, the Solicitor General's argument is effectively foreclosed by *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). There, the Court rejected application of the *Williams* test in determining whether there was tribal court jurisdiction over a state highway accident because "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 459 (quoting *Williams*, 358 U.S. at 220). By the same token, application of Alabama laws to regulate use of Alabama roads is critical to the State. In short, the rationale supporting tribal court jurisdiction in *Williams* has no application here and certainly does not independently prohibit respondents' claims.

3. The Solicitor General seeks (at 16) to avoid the geographic limits inherent in *Williams* by claiming that the allegedly improper hiring, retention, and supervision of the Tribe's employee occurred on-reservation. Apart from the fact that the negligent supervision occurred while the Tribe's employee drove intoxicated on Alabama roads, Alabama follows the doctrine of *lex loci delicti*—the law of the place where the injury occurred applies. *See Fitts v. Minnesota Min. & Mfg. Co.*, 581 So. 2d 819, 823 (Ala. 1991).

The Solicitor General cites *Ex parte Jim Burke Auto., Inc.*, 200 So. 3d 1153, 1156 (Ala. 2016) for the proposition that respondents' claims "find their locus on the Reservation." Gov't Br. 16. *Jim Burke Auto.*, however, involves the application of Alabama's venue

statute for bringing a civil action against a corporation. 200 So. 3d at 1155 (discussing § 6–3–7(a), Ala. Code (1975)). It says nothing about where a negligent supervision tort occurred. And in cases involving bodily harm, "'the injury occurs in the county where the bodily harm occurs.'" *Ex parte Haynes Downard Andra & Jones, LLP*, 924 So. 2d 687, 693 (Ala. 2005) (quoting *Ex parte Graham*, 634 So. 2d 994, 997 (Ala. 1993)). Because respondents suffered injury in Alabama, the question of where the tort occurred is a question of Alabama law that can be resolved during the liability phase. *Fitts*, 581 So. 2d at 823; *see also Hicks*, 533 U.S. at 361-62 (observing "an Indian reservation is considered part of the territory of the State") (internal quote and citation omitted).

II. The Court should deny the petition

The Court should deny the Tribe's petition for a writ of certiorari whether or not the Tribe amends its code. As the Solicitor General acknowledges (at 18), this case is interlocutory. Respondents have not had the opportunity to have the merits of their claims heard. If, after those claims are addressed, the Tribe wishes to have the Alabama Supreme Court's decisions reviewed, it may petition at that time. *See* Gov't Br. 18-19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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