No. 17-702

In the Supreme Court of the United States

LEWIS TEIN, P.L., GUY LEWIS AND MICHAEL TEIN,
Petitioners,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Third District Court of Appeal, State of Florida

BRIEF IN OPPOSITION

ROBERT O. SAUNOOKE
Counsel of Record
SAUNOOKE LAW FIRM, P.A.
18620 S.W. 39th Court
Miramar, Florida 33029
(561) 302-5297
ndnlawyer@hotmail.com

GEORGE B. ABNEY
DANIEL F. DIFFLEY
ANDREW J. TUCK
ERIC C. SCHNAPP
MICHAEL J. BARRY
ALSTON & BIRD LLP
1201 W. Peachtree St.
Atlanta, Georgia 30309
(404) 881-7000

Attorneys for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether this Court should depart from over a century of recently-reaffirmed precedent on tribal sovereign immunity and abrogate that immunity for tort claims arising out of an attorney-client relationship, brought by highly-sophisticated attorney-plaintiffs, who voluntarily chose to do business with an Indian tribe, who received millions in compensation for their services, who were well versed in the doctrine of tribal sovereign immunity, who did not seek a waiver of that immunity, and who received compensation for the alleged wrongs through alternative means.

PARTIES TO THE PROCEEDINGS

Petitioners are Lewis Tein, P.L., Guy Lewis, and Michael Tein, plaintiffs and appellees below.

Respondent is the Miccosukee Tribe of Indians of Florida, defendant and appellant below.

CORPORATE DISCLOSURE STATEMENT

The Miccosukee Tribe of Indians of Florida is federally-recognized sovereign Indian tribe. As a result, it has no parent company and no public company owns any interest in it.

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INTRODUCTION

Petitioners Guy Lewis, Michael Tein and their law firm, Lewis Tein, P.L., ask this Court to abrogate the tribal sovereign immunity of their former client, the Miccosukee Tribe, for alleged "bad conduct" that occurred off-reservation. The issue below was different, however, as in the trial court and at the Florida appellate court, the Petitioners argued that the Miccosukee Tribe had ***waived*** tribal sovereign immunity: (1) in a prior proceeding that extended to their new case, and (2) by engaging in alleged egregious litigation conduct in separate cases. The Florida Third District Court of Appeal found that the Miccosukee Tribe had not waived tribal sovereign immunity for Petitioners' claims.

Now Petitioners have abandoned their waiver argument, and assert a new argument—that this Court's prior jurisprudence has "expressly left open" whether tribal sovereign immunity applies to off-reservation bad conduct. (Petition at 1.) And Petitioners also argue that this alleged open issue should be resolved by simply abrogating tribal sovereign immunity for off-reservation intentional torts and alleged criminal conduct. (*Id.* at 3.)

Contrary to Petitioners' assertions, this Court has not "left open" whether tribal sovereign immunity applies to off-reservation torts. Rather, this Court, and lower federal and state courts, have applied tribal sovereign immunity broadly. And this Court has explicitly stated that only Congress can abrogate tribal sovereign immunity. There is no disagreement among the federal Circuit Courts of Appeal on this issue. Recent decisions from the Alabama Supreme Court

holding that tribal sovereign immunity should not prevent unwitting tort victims from seeking recovery do not conflict with the decision of the Florida Third District Court of Appeal. Petitioners in this matter, in sharp contrast to the plaintiffs in the Alabama decisions, are highly-sophisticated attorneys, well versed in the doctrine of tribal sovereign immunity, who knowingly chose to do business with an Indian tribe, did not seek a contractual waiver of immunity despite having opportunity to do so, and who sought and received recovery through alternative means. Thus, this case presents no conflict among the lower courts, much less a well-developed conflict ripe for this Court's review. The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

The Miccosukee Tribe of Indians of Florida is a federally-recognized sovereign Indian tribe situated on land located in the Florida Everglades. The Miccosukee Tribe has approximately 600 members, most of whom have little formal education, and whose primary language is their native Miccosukee. The Miccosukee Tribe is governed by its General Council, which consists of all members of the Tribe aged eighteen and older. Not a single member of the Miccosukee Tribe is a lawyer. Thus, the Tribe necessarily relies on outside counsel for advice and assistance on legal matters.

Petitioners Guy Lewis and Michael Tein are highly-educated and experienced attorneys. Mr. Lewis is the former United States Attorney for the Southern District of Florida and the former Director of the Executive Office for United States Attorneys in

Washington, D.C. Mr. Tein, educated at Yale University and the University of Pennsylvania, served as an Assistant United States Attorney and touts himself as a "highly skilled trial lawyer in and out of court."

From 2005 to 2010, Petitioners represented the Tribe in various legal matters. (Petition at 3; App. 39.) During that same time period, Petitioners also represented individual members of the Miccosukee Tribe on various civil and criminal matters. (*Id.*)

At all times relevant to this matter, the Petitioners were well aware of the doctrine of tribal sovereign immunity. Indeed, as legal counsel, Petitioners argued in favor of the Miccosukee Tribe's sovereign immunity. *E.g.*, Tribal Court's Response to Kraus-Anderson's Emergency Motion to Compel Depositions of Tribal Judges, *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, No. 04-22774-CIV, 2007 WL 2254931 (S.D. Fla. Aug. 2, 2007), ECF No. 163. Although familiar with the doctrine, Petitioners never sought a contractual waiver of immunity from the Tribe.

In late 2009, the Miccosukee Tribe terminated its relationship with Petitioners. (Petition at 3; App. 39, 45.) In 2012, the Miccosukee Tribe filed the first of three significant lawsuits against Lewis Tein and others, asserting various claims of misconduct stemming from the Petitioners' prior representation of the Tribe. (App. 61.) These lawsuits against Petitioners were recommended and prosecuted by the Tribe's now former attorney, Bernardo Roman.

All three lawsuits were ultimately dismissed on various grounds. (App. 66, 72, 77.) After dismissal, Petitioners sought and received recovery of attorneys' fees and sanctions against the Miccosukee Tribe and Mr. Roman totaling approximately $4 million. (App. 67-69, 72-75.) The Miccosukee Tribe has since fired Mr. Roman and he currently faces possible disbarment.[1] After receiving dismissals of the Tribe's lawsuits, along with sanctions and fees, Petitioners filed this case.

II. Procedural History

Petitioners asserted claims for malicious prosecution and other related tort claims against the Tribe arising from the Miccosukee Tribe's lawsuits against them. (App. 87-94.) They sought hundreds of millions of dollars in damages for the alleged destruction of their two-partner law firm (which still exists today.) (*Id.* at 85-87.) The Miccosukee Tribe moved to dismiss the case for lack of subject-matter jurisdiction under the doctrine of tribal sovereign immunity. Petitioners opposed the motion *by arguing only that the Miccosukee Tribe waived its sovereign immunity*; Petitioners did not argue, and no court below addressed, whether the Miccosukee Tribe had sovereign immunity in the first place. The trial court correctly assumed tribal sovereign immunity existed, but held that the Miccosukee Tribe had waived that immunity. (*Id*. at 28-29, 33-34.)

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[1] Referee Says Fla. Tribe's Ex-GC Broke 14 Bar Rules, *Law360*, https://www.law360.com/articles/940245/referee-says-fla-tribe-s-ex-gc-broke-14-bar-rules

The Miccosukee Tribe immediately appealed, and again Petitioners argued only waiver of sovereign immunity. (App. 6-7.) On August 9, 2017, the Florida Third District Court of Appeal unanimously reversed the trial court's order and recognized: "**This is a waiver case (there is no allegation that Congress abrogated the Tribe's sovereign immunity)**, and for us to find the Tribe waived its immunity, the party claiming the waiver must 'show a clear, express and unmistakable waiver of sovereign immunity by the Tribe.'" (App. 9.) (emphasis added.) The Florida Third District Court of Appeal remanded the case with instruction to grant the Miccosukee Tribe's motion to dismiss and to dismiss the case with prejudice. (*Id.* at 25.)

Only after losing their "waiver" arguments in the trial court and Florida Third District Court of Appeal did Petitioners raise the question presented—which has nothing to do with waiver, but rather only with whether the Miccosukee Tribe had any sovereign immunity to waive in these circumstances.[2]

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[2] The Florida Third District Court of Appeal denied Petitioners' motion seeking certification in a one-line order (App. 35-36), so the Florida Third District Court of Appeal opinion is the ruling Petitioners seek to have this Court review.

REASONS FOR DENYING THE PETITION

I. Petitioners Did Not Raise the Question Presented in the Courts Below.

In both the trial court and the Florida Court of Appeal, all parties and the court assumed that the Miccosukee Tribe has tribal sovereign immunity. The only argument Petitioners raised to circumvent that immunity is that the Tribe somehow waived that immunity. (App. 6-7, 29.) As the Florida Court of Appeal noted: "**This is a waiver case (there is no allegation that Congress abrogated the Tribe's sovereign immunity)**, and for us to find the Tribe waived its immunity, the party claiming the waiver must 'show a clear, express and unmistakable waiver of sovereign immunity by the Tribe.'" (App. 9.) (quoting *Cupo v. Seminole Tribe of Fla.*, 860 So. 2d 1078, 1079 (Fla. 1st DCA 2003)) (emphasis added.)

In an attempt to avoid this constraint, Petitioners argue that "the foundation of the Florida court's decision is an application of tribal sovereign immunity to off-reservation torts committed against non-Tribe members (otherwise no waiver analysis would be required)." (Petition at 16.) This does not change the analysis as Courts regularly assume facts and legal principles not challenged by the parties, only to decide the case on the issues raised by the parties. It goes without saying that when a court assumes a fact, it does not decide a fact. That the Florida court assumed without deciding that sovereign immunity applies, and then decided the case on waiver grounds, does not create a justiciable issue for this Court to consider. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (holding that "we do not decide in the first

instance issues not decided below.") But Petitioners cannot now, for the first time, argue before this Court that tribal sovereign immunity never existed in the first place. That issue had to be raised and ruled on in the courts below.

Petitioners did not raise the question presented below. For that reason alone, this case is an improper vehicle to resolve the question presented.

II. Even if the Question Presented was Preserved for Review, This Court's Precedents Have Not Left Any Gap in the Law.

There is no "gap" in the law, as the petition claims, as this Court's precedent establishes tribal sovereign immunity and defers to Congress to delineate any particular circumstances in which that immunity should be abrogated. To the contrary, this Court has recently explained, "we have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe *absent congressional authorization* (or a waiver)." *Mich. v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2030-31 (2014).

In the 1998 *Kiowa* decision, this Court reaffirmed that tribal sovereign immunity does not end at the reservation's borders. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751 (1998). There, the Court evaluated if tribal sovereign immunity applied to claims on a promissory note when that note was delivered beyond tribal lands. *See id*. at 754. The Court upheld immunity, concluding that "[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." *Id*. at 760.

Then, three years ago, the Court reiterated the doctrine's validity and rejected an invitation to "create a freestanding exception to tribal immunity for all off-reservation commercial conduct." *Bay Mills*, 134 S. Ct. at 2039. Instead, the Court held that immunity applies "even when a suit arises from off-reservation commercial activity." *Id.* at 2028. When reaching this holding, the Court explicitly "declin[ed] to draw any distinction that would confine immunity to reservations or to noncommercial activities." *Id*. at 2037.

These decisions are consistent with the Court's other holdings on tribal sovereign immunity. For example, in *Oklahoma Tax Commissioner v. Citizen Band Potawatomi Indian Tribe of Oklahoma* the Court found that filing a lawsuit in a federal or state court system waives sovereign immunity only so far as necessary to resolve the specific issue raised, and does not entitle the opposing party to counterclaims. 498 U.S. 505, 509 (1991) ("Possessing…immunity from direct suit, we are of the opinion [that Indian nations] possess immunity from cross-suits.") Additionally, lower courts have concluded that had the Court wanted to limit this holding in the way that Petitioners request here, the Court could have done so. *See, e.g.*, *Beecher v. Mohegan Tribe of Indians of Conn.*, 918 A.2d 880, 885 (Conn. 2007) (barring malicious prosecution claim); *see also Quinault Indian Nation v. Pearson for Estate of Comenout,* 868 F.3d 1093 (9th Cir. 2017) (barring tort counterclaims brought against Indian tribe where waiver argument premised on Tribe's filing of lawsuit.)

Further, the Court's recent opinion in *Lewis v. Clarke* does not upset the Court's settled precedent. In *Lewis* a plaintiff sought to hold an employee of a business entity related to an Indian tribe personally liable in a negligence action. *See Lewis v. Clarke*, -- U.S. --, 137 S. Ct. 1285, 1287 (2017). The suit was brought against the employee in a personal capacity. The Court concluded that "although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capabilities." *Id.* at 1294. This case, however, is against the Miccosukee Tribe, not a business entity related to the Tribe, much less an individual employee of a business entity related to the Tribe. (App. 37-38, 44.)

The petition focuses largely on dissents from these cases and a footnote in the *Bay Mills* opinion (Petition at 10-13): "We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, 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. The argument that such cases would present a 'special justification' for abandoning precedent is not before us." 134 S. Ct. at 2036 n.8. But the dissents and *Bay Mills*'s dictum have not left any gap in the law that remotely relates to the circumstances in this case.

First, notwithstanding the footnote in *Bay Mills*, both that case and *Kiowa* rest on the Court's longstanding deference to Congress on matters of tribal sovereign immunity; it is Congress's role to make thorny, policy-driven decisions about the circumstances in which to abrogate tribal sovereign immunity. Indeed, *Kiowa* noted the potential unfairness of tribal sovereign immunity in certain situations, like in the case of unknowing tort victims, but immediately followed with: "These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, *as we defer to the role Congress may wish to exercise* in this important judgment." 523 U.S. at 758 (emphasis added.) The Court reaffirmed that reasoning three years ago in *Bay Mills*, stating "[a]ll that we said in *Kiowa* applies today, with yet one more thing: Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity." 134 S. Ct. at 2038.

Second, to the extent the Court were to reverse course from *Kiowa* and *Bay Mills* and step in for Congress to fashion new limitations to tribal sovereign immunity, this case does not present the circumstances where such a limitation may be justified. The Court in *Bay Mills* stated that there may be circumstances where immunity does not function in an "ordinary way" if a plaintiff has "not chosen to deal with a tribe" and "has no alternative way to obtain relief." But in this case the Petitioners were the Miccosukee Tribe's long-time lawyers who knew they were dealing with a tribe,

knew about and even argued for the Tribe's sovereign immunity, and could have chosen to either not deal with the Tribe or negotiate an immunity waiver. (Section III, *infra*, further details these vehicle problems.) So even if the *Bay Mills* footnote left a gap in the law, this case does not present the question for resolution.

The cases that Petitioners claim have filled the gap simply follow the Court's existing law. (Petition at 13-17.) Those cases rest in two categories: cases that do not address the *Bay Mills* footnote and two Alabama Supreme Court cases issued on September 29, 2017, that hold that unwitting tort victims have recourse against an Indian tribe's economic entities notwithstanding tribal sovereign immunity for tortious off-reservation conduct.

A. The handful of cases cited in the Petition do not address the purported "gap" created by the *Bay Mills* footnote.

Again, Petitioners focus on a footnote in *Bay Mills* leaving open the question of whether immunity can apply in the "ordinary way" if a plaintiff has not chosen to deal with a tribe and "has no alternative way to obtain relief." (Petition at 13.) But the first case Petitioners cite is an unpublished district court order issued 12 years prior to *Bay Mills*. *See D'Lil v. Cher-Ae Heights Indian Cmty. of the Trinidad Rancheria*, No. C 01-cv-1638 TEH, 2002 WL 3394761, at *8 (N.D. Cal. Mar. 11, 2002). (Petition at 14.) And as Petitioners concede, that federal district court, like the Florida Court of Appeal in this case, ruled on waiver grounds, not on grounds that immunity did not exist in the first place. Though the *D'Lil* order stated in dicta that "the

question of immunity for non-contractual activity is, in this Court's opinion, left open," *id.* at *7, *Bay Mills* squarely closed that question and "declin[ed] to draw any distinction that would confine immunity to reservations or to noncommercial activities." *Bay Mills*, 134 S. Ct. at 2037.

Petitioners also cite *Beecher*, 918 A.2d 880, decided by the Connecticut Supreme Court seven years prior to *Bay Mills*. (Petition at 17.) Like this case, the *Beecher* court addressed only waiver and never suggested tribal sovereign immunity did not exist. The very first line in the opinion states that "[t]he sole issue in this appeal is whether a federally recognized Indian tribe *has waived tribal sovereign immunity*, against a vexatious litigation claim in state court by having commenced, in state court, the prior action that is the subject of that vexatious litigation claim." *Id.* at 882 (emphasis added.)[3]

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[3] *Bay Mills* itself clearly illustrates the distinction between the question raised both in *Beecher* and before the Florida Court of Appeal (relating to waiver in specific contexts), on the one hand, and the question presented to this Court both here and also in cases like *Kiowa* and *Bay Mills* (relating to blanket removal—essentially judicial abrogation—of tribal immunity), on the other hand,. *See Bay Mills*, 134 S. Ct. at 2032 & n.1-4 (appellant asking that the Court "revisit—and reverse—our decision in *Kiowa*, so that tribal immunity no longer applies to claims arising from commercial activity outside Indian lands"; "Michigan does not argue that Bay Mills waived its immunity from suit.")

B. Recent decisions by the Alabama Supreme Court are aberrations, and address fundamentally different facts and circumstances.

The only court to suggest there is a "gap" in this Court's precedent and make a holding within that alleged gap is the Alabama Supreme Court, and it did so only three months ago. In one day, the Alabama Supreme Court issued three decisions relating to litigation against Indian tribes. *See Harrison v. PCI Gaming Auth.*, No. 1130168, -- So. 3d --, 2017 WL 4324716 (Ala. Sept. 29, 2017); *Rape v. Poarch Band of Creek Indians*, No. 1111250, -- So. 3d -- 2017 WL 4325017 (Ala. Sept. 29, 2017); *Wilkes v. PCI Gaming Auth.,* No. 1151312, -- So. 3d --, 2017 WL 4385738 (Ala. Oct. 3, 2017).[4] Petitioners only focused on *Wilkes*, yet *Harrison* is equally instructive as to why the cases are limited and resolution of Petitioners' facts will not affect *Wilkes*, and vice versa.[5] (Petition at 14-17.) Regardless, these two companion cases are the only precedent on the subject, and that is far too undeveloped for this Court to consider. There is no circuit split. There are no contrary decisions by the highest courts of other states.

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[4] Although initially issued on September 29, 2017, the Alabama Supreme Court issued a modified opinion on October 3, 2017.

[5] The holding in *Rape*—the third case—focused on gambling regulations and their effect on tribal sovereign immunity. Ultimately, the Alabama Supreme Court held that those statutes did not create a waiver so as to allow a casino patron to dispute his gambling winnings in state court. *Rape*, 2017 WL 4325017, at *13.

In *Wilkes*, the Alabama Supreme Court held that tribal sovereign immunity did not bar tort claims brought by a car-accident victim harmed by a drunk casino employee driving a casino-owned vehicle. *Wilkes*, 2017 WL 4385738, at *1. The harm to the victim occurred in a company car and on Alabama-state roads with no connection to the tribe or casino. *Id.* This mattered to the Alabama Supreme Court because, as it explained, the victims "did not voluntarily choose to engage in a transaction with the tribal defendants," could not "'bargain for a waiver of immunity' beforehand," and had "no alternative way to obtain relief" if immunity applied. *Id.* at *3 - *4 (quoting *Bay Mills*, 134 S. Ct. at 2035). It also mattered that the conduct was connected to the tribe's commercial casino activities. *Id.* These features caused the Alabama Supreme Court to reject tribal sovereign immunity if it "shield[s] tribes from tort claims asserted by individuals ***who have no personal or commercial relationship to the tribe***." *Id.* (emphasis added.)

What *Wilkes* articulates, *Harrison* reiterates. The Alabama Supreme Court in *Harrison* expressed misgivings about applying tribal sovereign immunity to bar tort claims brought by the estate of a car accident victim killed by an overserved casino patron. *See Harrison*, 2017 WL 4324716, at *1. Once again, the court held that immunity does not bar tort claims where the plaintiff had no notice it was interacting with a sovereign, no advance opportunity to bargain for waiver and no other avenue for relief. *See id.* at *8.[6]

[6] Petitioners suggest that the Court should combine consideration of this case with a potential forthcoming *certiorari* petition from the *Wilkes* defendants. (Petition at 15 n.5.) There is no indication

Wilkes and *Harrison* do not address the question presented by this petition. As discussed more fully in Section III, unlike the plaintiffs in those cases:

- Petitioners knew they were interacting with a sovereign nation. For that matter, they knew full well about the perils of representing a sovereign nation; on multiple occasions, they briefed and argued tribal sovereign immunity on the Miccosukee Tribe's behalf.
- Petitioners had an opportunity to bargain for a waiver every time they voluntarily chose to represent the Miccosukee Tribe or its individual members.
- Petitioners already recovered multi-million dollar attorneys' fee awards as redress for the Miccosukee Tribe's lawsuits against them.
- Petitioners represented the Miccosukee tribal government in civil cases, and represented individual tribal members in civil and criminal cases. Except peripherally, they were not involved in the Miccosukee Tribe's commercial pursuits.
- It was the Miccosukee tribal government, not its business entities, who filed the lawsuits against the Petitioners.

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that those defendants will even seek *certiorari*. Moreover, as discussed throughout this opposition, the question presented by the *Wilkes* case differs substantially from the question presented here. And, presumably, the *Wilkes* petitioners would present a question that the lower courts actually addressed.

This Court may someday face a split between the Alabama Supreme Court and some other court regarding whether an Indian tribe can assert tribal sovereign immunity against an unknowing tort victim of a commercial entity who did not deal with the Tribe. But there is no split currently; there are no other pertinent cases discussing *Bay Mills*'s footnote to provide guidance; and this case does not present the same question as *Wilkes* and *Harrison* because Petitioners' claims arise out of a long-standing, fully informed, attorney-client relationship between Petitioners and the Miccosukee Tribe.[7]

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[7] On December 8, 2017, the Court granted *certiorari* to review an unrelated case about the impact of *in rem* jurisdiction on tribal sovereign immunity in *Upper Skagit Indian Tribe v. Lundgren*, No. 17-387. Not only does *Lundgren* entail a distinguishable circumstance where *in rem* jurisdiction outweighs tribal sovereign immunity, but also that case exemplifies why this case is not fit for review: (i) there was a clear divide between three state supreme courts and a federal appellate court over the precise issue presented there; and (ii) this Court's precedent previously considered the issue and the Washington Supreme Court arguably came out the opposite way. Further demonstrating the difference, none of the *certiorari*-stage briefs cite the Florida appellate court's opinion, even though the petition was filed a month after that opinion issued.

III. This Case is an Improper Vehicle for Contemplating a Limitation of Tribal Sovereign Immunity.

A. Petitioners voluntarily chose to represent the Miccosukee Tribe and individual members in numerous legal matters for several years.

As seasoned lawyers who once used the tribal sovereign immunity doctrine in defense of the Miccosukee Tribe and voluntarily chose to commence and continue their attorney-client relationship with the Tribe for many years, Petitioners are completely different from the unwitting plaintiffs in *Wilkes* and *Harrison,* or other hypotheticals.

Petitioners were not only aware of tribal sovereign immunity, but actively argued for its application in a number of matters over a number of years. As Mr. Tein argued on behalf of the Tribe: **"[A]s a federally recognized Indian tribe, the Miccosukee Tribe is immune from suit under the doctrine of sovereign immunity."** Tribal Court's Response to Kraus-Anderson's Emergency Motion to Compel Depositions of Tribal Judges, *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co*., No. 04-22774-CIV, 2007 WL 2254931 (S.D. Fla. Aug. 2, 2007), ECF No. 163 (emphasis added.)

And, armed with this knowledge, Petitioners could at any time have negotiated a waiver of immunity to cover their own relationship with and work for the Tribe, but never chose to do so.

Lastly, and most obviously, Petitioners purposefully and knowingly reached onto the reservation to

represent the Miccosukee Tribe and its members. They are not unwitting tort victims deprived of any opportunity to avoid sovereign immunity like the plaintiffs in *Wilkes* and *Lewis*. *E.g.*, *Wilkes*, 2017 WL 4385738, at *4 (finding that the car crash victims had no opportunity in which they could "bargain for a waiver of immunity" beforehand.) The relationship Petitioners chose to develop with the Miccosukee Tribe was purely voluntary, and as such they also do not fit in this class of persons who may be harmed by the doctrine.

B. Petitioners have already sought and received relief for their claims.

Petitioners eagerly relate that the Miccosukee Tribe was sanctioned in the lawsuits that the Tribe filed. (Petition at 7.) This actually cuts against *certiorari* as Petitioners have already received relief for the wrongdoings they allege.

Bay Mills's footnote is about "the situation . . . if no alternative remedies were available." 134 S. Ct. at 2036 n.8. Contrast that with what happened here: Petitioners detailed how they have already sought remedies through sanctions motions in the past lawsuits. And as a result, Petitioners received approximately $4 million from the Tribe as a settlement to resolve any sanctions from the prior lawsuits.[8] In other words, Petitioners already pursued and received alternative remedies.

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[8] Lewis and Tein Prevail in Long Battle against the Miccosukee Tribe and its Attorneys, http://www.lewistein.com/lewis-and-tein-prevail-in-long-battle-against-the-miccosukee-tribe-and-its-attorneys/ (last updated June 20, 2017.)

C. The Miccosukee Tribe has multiple additional dispositive defenses to Petitioners' case.

Even if this Court granted *certiorari* and reversed, Petitioners' claims would not proceed because the Miccosukee Tribe has multiple dispositive defenses. Most importantly, Petitioners waived the question presented here; the Miccosukee Tribe would immediately note to the Florida Court of Appeal on remand that as a matter of Florida procedural law the question decided by this Court was waived by Petitioners when they failed to argue it at the Florida trial and appellate courts.

The Miccosukee Tribe would also have other dispositive defenses set forth briefly below. So even if Petitioners presented a preserved question, the Court should not deploy its limited resources deciding the question in this case.

1. Advice of counsel is a complete defense to all claims for malicious prosecution.

The advice of counsel is a complete defense to an action for malicious prosecution where it appears that the prior proceeding was instituted in reliance on the advice of the attorney after a full-and-fair statement of all the facts was given to the attorney. *See Royal Tr. Bank, N.A. v. Von Zamft*, 511 So. 2d 654 (Fla. 3d DCA 1987). Without an understanding of the U.S. legal system or the complex claims asserted by counsel, the Tribe relied on the advice and representation of its outside counsel in the legal proceedings that Petitioners claim constituted malicious prosecution.

2. Petitioners' Florida RICO claims are barred by the litigation immunity privilege.

The Florida Supreme Court held that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involved defamatory statement or other tortious behavior . . . so long as the act has some relation to the proceeding." *Levin v. United States Fire Ins. Co*., 639 So. 2d 606, 608 (Fla. 1994). Petitioners' Florida RICO claim arises out of and is directly related to the Miccosukee Tribe's litigation against the Petitioners, thus barring it. (App. 87-88.)

3. Other factors caused Petitioners' alleged damages.

Petitioners contend that the Tribe's conduct and lawsuits against them were the sole cause of their financial harm. (App. 85-87.) But even a cursory review of the Petitioners' public record shows their litigation conduct scarred their professional reputation. *See e.g., Bert v. Bermudez*, 95 So. 3d 274, 276-79 (Fla. 3d DCA 2012). (finding that Mr. Tein "**was** contemptuous," and feeling "compelled to note that the unprofessional conduct of the Lewis Tein law firm was not confined to Mr. Tein's behavior" but also "[t]he petition filed in this Court, signed by Mr. Lewis, fares no better. The language, mischaracterizations, and 'spin' employed speak volumes.") (emphasis in the original.)

Therefore, this case does not present an appropriate vehicle for this Court to spend its scarce adjudicatory resources.

CONCLUSION

The petition asks the Court to address a question Petitioners did not raise below. In addition, to the extent the Court's decision three years ago in *Bay Mills* left a gap in the law, lower courts have not had a chance to address that gap; only a single court has arguably even addressed the issue. None of the factors favoring *certiorari* is present. The Court should deny this petition.

Respectfully submitted,

ROBERT O. SAUNOOKE
Counsel of Record
SAUNOOKE LAW FIRM, P.A.
18620 S.W. 39th Court
Miramar, Florida 33029
(561) 302-5297
ndnlawyer@hotmail.com

GEORGE B. ABNEY
DANIEL F. DIFFLEY
ANDREW J. TUCK
ERIC C. SCHNAPP
MICHAEL J. BARRY
ALSTON & BIRD LLP
1201 W. Peachtree St.
Atlanta, Georgia 30309
(404) 881-7000

Attorneys for Respondent

December 13, 2017