No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the judicial doctrine of tribal sovereign immunity bars civil claims against an Indian tribe based on its intentional torts and criminal conduct that occurred off-reservation against non-members of the tribe.

PARTIES TO THE PROCEEDING

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

Lewis Tein, P.L. has no parent company and has no publicly held company owning any interest in it.

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JURISDICTION

The opinion of the Third District Court of Appeal was entered on August 9, 2017. The Petitioners moved to have the court certify the question decided as one of great importance to the Florida Supreme Court, which would allow the Florida Supreme Court to exercise its discretionary review authority. The court denied the request for certification on September 26, 2017. (App. 35.) This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1257(a).

INTRODUCTION

This case provides the Supreme Court with the opportunity to address the off-reservation reach of tribal sovereign immunity in an area that it has expressly left open, in which lower courts have reached conflicting decisions, and in which this Court has repeatedly recognized the potential for unfairness (of which this case is a prime example).

As "domestic dependent nations," Indian tribes enjoy some of the attributes of sovereignty, including sovereign immunity—the right not to be subject to suit without their consent. *Michigan v. Bay Mills Indian Community*, __U.S.__, 134 S. Ct. 2024, 2039 (2014). The core concerns of tribal sovereign immunity have traditionally been tribal self-governance and the

management of tribal lands. *See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). The Supreme Court has extended the doctrine of tribal sovereign immunity to the context of commercial relationships between Indian tribes and non-Indians. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998), the Court held 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 reservation." *Kiowa*, however, was decided over a three-Justice dissent, which subsequently became a four-Justice dissent. *See Bay Mills*, 134 S. Ct. at 2045 ("I am now convinced that *Kiowa* was wrongly decided; that in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention.") (Scalia, J., dissenting).

As will be discussed below, (1) the Court's ruling in *Kiowa* acknowledged that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," 523 U.S. at 758; (2) the dissenting Justices in *Kiowa* and subsequent cases have sharply questioned the applicability of tribal sovereign immunity to <u>any</u> off-reservation conduct, let alone off-reservation torts; and (3) the Court has expressly left open the issue of whether tribal sovereign immunity applies to tortious conduct committed against non-Indians that occurs <u>off</u>-reservation. There is, in effect, a jurisprudential gap that has been left to lower courts to fill. That gap has been filled with decisions that conflict with each other.

This case presents the question whether the sovereign immunity of an Indian tribe can be stretched so far as to protect it from intentional torts, and even criminal conduct, that it inflicts on non-Indians, off-reservation. The Alabama Supreme Court has recently and correctly held that the answer is no. But in the decision below, the Florida appellate court (following a decision of the Connecticut Supreme Court) has reached the opposite conclusion. As long as this conflict exists, there will be uncertainty about whether the 567 federally-recognized Indian tribes in the United States are free to commit torts (not to mention intentional torts or even criminal acts) outside of their reservations against non-Indians without facing the civil law consequences of such acts in the state and federal judicial systems. This case is an ideal vehicle for filling in that jurisprudential gap and resolving this important legal question.

STATEMENT OF THE CASE

Statement of Facts. From 2005 to January 2010, Guy Lewis and Michael Tein, through their law firm Lewis Tein, P.L. (collectively "Lewis Tein"), professionally, honestly and effectively represented the Miccosukee Tribe of Indians of Florida (the "Miccosukee Tribe" or the "Tribe") and individual members of the Tribe in a variety of civil, criminal and administrative matters. Lewis and Tein are former federal prosecutors and former partners in a prestigious national law firm. In December 2009, their relationship with the Miccosukee Tribe changed dramatically when a new Chairman of the Tribe was narrowly elected and took power. (App. 39, 45.)

After assuming his position, the new Chairman and his newly appointed Tribal Attorney executed a "purge" in which they fired a large number of people in a wide variety of positions employed by the former Chairman's administration. In addition to firing Lewis Tein, the Miccosukee Tribe also fired its in-house general counsel and its entire in-house legal department, the Tribe's long-serving outside general counsel (a former U.S. Attorney for the Southern District of Florida), the supervisor of its Accounting Department, its Financial Director, its outside tax advisors, its Chief of Police, the manager of the Miccosukee Resort hotel, and even the head of the Miccosukee School. The Miccosukee Tribe's purpose was malicious and corrupt: to consolidate the new administration's financial and political power, punish those who served under the former Chairman, silence the new Chairman's critics, and to eliminate any potential threats to his re-election. (App. 39-40.)

In furtherance of the scheme, the Tribe maliciously injected itself—inexplicably and in contravention of its own interests—into pending litigation in the Florida state court system known as the Bermudez wrongful death action. Lewis Tein had zealously and effectively represented two Tribe members who were the defendants in the wrongful death action through trial. The Miccosukee Tribe injected itself into the proceedings by assisting its adversary, the wrongful death plaintiffs' counsel, in an effort to have Lewis Tein sanctioned on the ground that, contrary to their representations to the state court presiding over the case, the Tribe (and not the individual clients) had been paying their fees. The Tribe proceeded to hide evidence, present false testimony and obstruct justice in an effort to hide the truth—namely, that the

individual clients had been responsible for the attorney's fees throughout by taking loans from the Tribe off of the quarterly distributions they received as Tribe members. (App. 40-41, 49-61.)

The Tribe furthered this effort by filing a series of false lawsuits against Lewis Tein and other fired professionals in Florida state and federal courts perpetuating the false claim that Lewis Tein had been paid for its representation of individual Tribe members through a system of "fraudulent loans" from the Tribe to its members. These lawsuits also made numerous other false allegations, including that Lewis Tein:

- had fraudulently billed the Tribe for legal work that was "fictitious" or "unnecessary";
- had paid cash "kick-backs" to the former Chairman;
- had "knowing[ly] failed to report all or some of the income" received from the Tribe and filed "false tax returns"; and
- had engaged in a "money-laundering scheme."

(App. 40-41.)

The allegations were completely false. The false allegations were designed to damage and discredit Lewis Tein. Although completely false, the allegations had the malicious effect that the Tribe sought: they caused severe economic damage to the Lewis Tein law firm and severe economic and reputational damage to Guy Lewis and Michael Tein personally. (App. 41.)

Also in furtherance of its criminal scheme, the Miccosukee Tribe committed numerous criminal acts that harmed Lewis Tein, including:

- repeated instances of witness tampering, witness retaliation and suborning perjury from witnesses;
- repeated instances of perjury;
- repeated acts of obstructing justice by hiding, destroying and altering evidence; and
- making a false 911 emergency police report.

(App. 41-42.)

These are more than mere allegations about the Miccosukee Tribe's conduct in a civil complaint brought by the Petitioners. The United States District Court for the Southern District of Florida and the Florida state court have made extensive factual findings supporting these allegations against the Tribe, after more than a dozen days of evidentiary hearings and argument.[1] The U.S. Court of Appeals for the Eleventh Circuit and Florida's Third District Court of Appeals have both affirmed these findings.[2] Every claim brought by the Tribe against Lewis Tein has now been fully and finally dismissed on the merits by the state and federal courts

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[1] *Miccosukee Tribe v. Lewis, et al.,* 21 Fla. L. Weekly Supp. 323(a) (Dec. 15, 2013); *Miccosukee Tribe of Indians v. Cypress*, 2015 WL 235433 (S.D. Fla. Jan. 16, 2015).

[2] *Miccosukee Tribe of Indians of Florida v. Cypress*, 2017 WL 1521735 (11th Cir. Apr. 28, 2017); *Miccosukee Tribe of Indians of Florida v. Lewis*, 165 So.3d 9 (Fla. 3d DCA 2015).

after years of extensive discovery. Beyond dismissing the lawsuits, both the federal court and the state court have sanctioned the Tribe and its Tribal Attorney for the bringing of the claims. (App. 42.)

In unsparing terms, the United States District Court for the Southern District of Florida excoriated the Tribe for its conduct: "[T]here was no evidence, or patently frivolous evidence, to support the factual contentions set forth [in the Second Amended Complaint], which form the basis of [the Tribe's] claims against Defendants Lewis Tein . . . ." *Miccosukee Tribe of Indians v. Cypress*, 2015 WL 235433, at *4 (S.D. Fla. Jan. 16, 2015). The federal court found that the "tribe is not relenting with its legal crusade" against Lewis Tein and that its allegations were "inexcusable." The federal court then sanctioned the Tribe and its Tribal Attorney over $1 million. The court concluded the Tribal Attorney's behavior had been "egregious and abhorrent" and referred him to the Florida and federal bars "for investigation and appropriate disciplinary action." *Id.*

In equally unsparing terms, the Florida state court similarly excoriated the Tribe for its bad faith: "[The Tribal Attorney] and the Tribe together pursued this litigation in bad faith. Motivated by personal animosity for Lewis Tein and the firm's close and financially lucrative relationship with the Tribe's former Chair, the Tribe and [the Tribal Attorney] acted without regard for the truth." (App. 42-43.) As the state court summed up: "The Tribe and [the Tribal Attorney] filed this lawsuit in bad faith." (App. 43.)

The Petitioner's lawsuit seeks relief for the intentional torts and criminal acts committed against Lewis Tein. These acts caused severe economic damage to the Lewis Tein law firm and severe economic and reputational damage to Guy Lewis and Michael Tein personally. Their complaint includes a claim seeking relief under Florida's Civil Remedies for Criminal Practices Act (Florida's analogue to the federal RICO statute), pleading numerous felonies and intentional torts as predicate acts, and claims sounding in intentional tort for common-law malicious prosecution. (App. 87-94.)

Procedural Statement. The Miccosukee Tribe moved to dismiss all claims brought by the Petitioners based on the doctrine of tribal sovereign immunity. The trial court denied the motion. (App. 26.) The Tribe filed an interlocutory appeal. The intermediate court of appeal, Florida's Third District Court of Appeal, reversed and held that the Tribe was protected by sovereign immunity and that the Tribe's conduct did not amount to a waiver of sovereign immunity. The court acknowledged that "Lewis and Tein had a right not to have their reputations ruined and their business destroyed by the Tribe." (App. 24.) The court found, however, that the "immunity juice . . . is worth the squeeze" even though Lewis and Tein would "suffer from the squeezing." (App. 24-25.) The Petitioners moved to have the appellate court certify the question decided as one of great importance to the Florida Supreme Court, which would allow the Florida Supreme Court to exercise its discretionary review authority. The court denied the request for certification on September 26, 2017. (App. 35.)

REASONS FOR GRANTING THE PETITION

I. THE FLORIDA COURT'S DECISION FALLS INTO A GAP IN THE COURT'S TRIBAL SOVEREIGN IMMUNITY JURISPRUDENCE, AND THAT GAP HAS BEEN FILLED WITH CONFLICTING LOWER COURT DECISIONS.

A. The Supreme Court's More Recent Cases Indicate the Extension of Tribal Sovereign Immunity to Off-Reservation Commercial Conduct Rests on Shaky Ground.

The Supreme Court has recognized that the doctrine of tribal sovereign immunity is a common-law doctrine that "developed almost by accident"; that the Supreme Court opinion on which the doctrine is said to rest "simply does not stand for that proposition"; and that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756-58 (1998). There is no federal statute or treaty defining the doctrine and what, if any, limits the doctrine may have. This Court has made clear that tribes certainly have the power "to make their own substantive law in internal matters . . . and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). The application of the doctrine, however, becomes murkier when tribes interact with those who are not members of the tribe.

In the absence of any foundational statute or treaty, it has been left to the Supreme Court to define the limits of tribal sovereign immunity in situations where tribal and non-tribal members interact. *See, e.g., Kiowa*, 523 U.S. at 759 ("Although the Court has taken

the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation."). The Court, however, has repeatedly expressed its reservations about extending the doctrine beyond the core concerns of tribal governance and tribal control of tribal lands.

Beginning with *Kiowa*, the first case in which the Court expressly extended tribal sovereign immunity to off-reservation conduct, the Court stated:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians.

523 U.S. at 758. The Court extended the doctrine with apparent reluctance, addressing only off-reservation commercial activity, while flagging the potential unfairness of the application of the doctrine to off-reservation tortious conduct. The Court noted that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* (emphasis added). A three-Justice (Justices Stevens, Thomas and Ginsburg) dissent argued that the doctrine should not be

extended beyond its present contours to include off-reservation commercial conduct. *See id.* at 764. The dissenters echoed the majority's theme and further cautioned against the unfairness of applying the doctrine to off-reservation torts:

> [T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; . . . . Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.

Id. at 766.

Next, in *Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S. Ct. 2024 (2014), in a 5-4 decision, the Court held that tribal sovereign immunity barred the State of Michigan's lawsuit against an Indian tribe under the Indian Gaming Regulatory Act dealing with a casino outside of Indian territory. The majority again acknowledged that its decision dealt only with off-reservation commercial activity. *See id.* at 2036 n.8 ("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 . . . has no alternative way to obtain relief for off-reservation commercial conduct." (emphasis added)). A now-four-Justice dissent (Justices Thomas, Scalia, Ginsburg and Alito) argued that *Kiowa,* "wrong to begin with, has only worsened with the passage of time. In the 16 years since *Kiowa*, tribal commerce has proliferated and the inequities engendered by

unwarranted tribal immunity have multiplied."[3] *Id.* at 2046 (Thomas, J., dissenting). Notably, the four-Justice dissent also flagged the unanswered question as to the applicability of tribal sovereign immunity to off-reservation torts and invited the opportunity to resolve that question:

> The majority appears to agree that the Court can revise the judicial doctrine of tribal immunity, because it reserves the right to make an "off-reservation" tort exception to *Kiowa's* blanket rule . . . I welcome the majority's interest in fulfilling its independent responsibility to correct *Kiowa's* mistaken extension of immunity "without any exceptions for commercial or off-reservation conduct."

Id. at 2053 n. 5 (Thomas, J., dissenting).

And most recently, last Term, in *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285 (2017), the Court broached the issue of off-reservation torts by tribal employees. The Court unanimously rejected the application of tribal sovereign immunity to negligence claims against tribal employees in their personal capacity for off-reservation torts, even though the torts had been committed within the scope of their employment by the tribe and even though the tribe was legally required to indemnify the employees. *See id.* at 1288. The Court did not need to reach the issue of whether the tribe itself would have

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[3] Justice Scalia, who had joined the majority in *Kiowa*, dissented in *Bay Mills*, stating: "I am now convinced that *Kiowa* was wrongly decided; that in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention." 134 S. Ct. at 2045.

been immune from liability for the off-reservation tort. Significantly, two Justices concurred in the result, but specifically wrote to add that "tribes, interacting with nontribal members outside reservation boundaries, should be subject to non-discriminatory state laws of general application," *id.* at 1294-95 (Ginsburg, J., concurring), and that "tribal immunity does not extend to suits arising out of a tribe's commercial activities beyond its territory," *id.* at 1294 (Thomas, J., concurring). A third Justice observed at the oral argument that the tribe's position would "push[] the notion of tribal sovereign immunity off the reservation into a place where there are just no remedies for victims at all."[4]

B. The "Gap" in this Court's Tribal Sovereign Immunity Jurisprudence Has Been Filled with Conflicting Decisions.

While the Supreme Court has addressed the applicability of the doctrine of tribal sovereign immunity to off-reservation commercial conduct in close decisions, it has not resolved the doctrine's applicability to off-reservation torts. *See, e.g., Bay Mills,* 134 S. Ct. at 2036 n.8 ("We have never, for example, 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." (emphasis added)).

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[4] *Lewis v. Clarke*, No. 15-1500, Transcript of Oral Argument before the United States Supreme Court, at 41-42 (Jan. 9, 2017) (comments of Breyer, J.), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1500_5g68.pdf (last visited Aug. 22, 2017).

Lower courts have recognized the presence of this gap. As one federal court has put it: "[W]e are left in a quandary as to what the Supreme Court majority intended in its *Kiowa* ruling. Certainly, the Court has created an across-the-board rule of tribal immunity for all contractual activity regardless of where the contract is signed. But the questions of immunity for non-contractual activity is, in this Court's opinion, left open." *Hollynn D'Ill v. Cher-Ae Heights Indian Community of the Trinidad Ranchera*, 2002 WL 33942761, at *7 (N.D. Cal. March 11, 2002) (emphasis in original) (holding that tribal sovereign immunity did not bar claims against a tribe under the Americans with Disabilities Act, the Rehabilitation Act and related state common law claims for conduct occurring at an off-reservation property owned by the tribe).

The Alabama Supreme Court recently stepped into this gap, addressed the same "quandary", and reached the correct result—holding that tribal sovereign immunity does not apply to a tribe's off-reservation torts. In *Wilkes v. PCI Gaming Authority*, 2017 WL 4385738, at *4 (Ala. Oct. 3, 2017), 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-members." That case involved an off-reservation car accident between an agent of the Porch Band of Creek Indians and non-members of the tribe. The non-members brought tort claims for negligence and wantonness (an Alabama common law cause of action) for the injuries they sustained in the accident. The tribe defendants moved for summary judgment in their favor, arguing that the Porch Band of Creek Indians was a federally recognized Indian tribe and that they

were accordingly protected by the doctrine of tribal sovereign immunity. The trial court ruled in favor of the tribe, but on appeal to the Alabama Supreme Court the decision was reversed.

The Alabama Supreme Court observed that this Court had "expressed its reservations about perpetuating the doctrine" in *Kiowa* and took "particular notice of the Court's comment that tribal sovereign immunity hurts those who 'have no choice in the matter' and the Court's limitation of its holding in *Kiowa* to 'suits on contract.'" 2017 WL 4385738, at *3 (quoting *Kiowa*, 523 U.S. at 760). The Alabama Supreme Court zeroed in on the open area in this Court's tribal sovereign immunity jurisprudence: "the Supreme Court of the United States has not ruled on the issue whether the doctrine of tribal sovereign immunity has a field of operation with regard to tort claims." 2017 WL 4385738, at *4. Stepping into that open field, the Alabama Supreme Court held that "in the interest of justice we respectfully decline to extend the doctrine of tribal sovereign immunity beyond the circumstances in which the Supreme Court of the United States has applied it," *id.*, and held that tribal sovereign immunity did not apply to a tribe's off-reservation torts.[5] *Accord Hollynn D'Ill*, 2002 WL 33942761, at *6 ("Tort victims . . . have no notice that they are on Indian property, nor any opportunity to negotiate the terms of their interaction with the tribe.

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[5] In the event the Indian tribe in *Wilkes* petitions this Court for certiorari review, the Petitioners respectfully suggest that the *Wilkes* case would also be an appropriate vehicle to address this important and open issue, and that the instant case be held pending resolution of the issue.

This makes the distinction between contractual and non-contractual relationships a reasonable place to draw the line for off-reservation tribal immunity.").

The decision of the Florida court below conflicts with *Wilkes*. The Florida court applied the doctrine of sovereign immunity to the torts and criminal conduct committed by the Miccosukee Tribe off-reservation. The Florida court's decision contains an additional element of analysis not present in *Wilkes*—whether the Tribe's litigation conduct constituted a waiver of its sovereign immunity—but 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).

In fact, there are two elements of the Florida court's decision that make it an even more glaring example of the unfairness of the doctrine when applied to tort victims which this Court has lamented beginning with *Kiowa*. First, the Florida court effectively extended the doctrine not just to ordinary torts such as negligence, but also to intentional torts (malicious prosecution) and to criminal conduct (perjury, obstruction of justice and the other criminal predicate acts under the Florida statutory equivalent of RICO).[6] Second, the Florida court applied the doctrine to the Tribe's purposeful use

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[6] While the Florida courts were required to accept the Petitioners' allegations of intentional torts and criminal conduct as true in the posture in which they addressed the sovereign immunity defense (on a motion to dismiss), it is worth reiterating that these were not mere allegations but the subject of state and federal court evidentiary findings after lengthy sanctions hearings. (App. 67-69, 72-75.)

(and abuse) of off-reservation, non-tribal institutions. The *Wilkes* case involved tribal conduct off-reservation on the state's roadways—a facility that tribes will invariably and necessarily need to use in order to function in the modern world given their territorial embedment within states. Here, by contrast, the Miccosukee Tribe took advantage of state and federal institutions—the court system—that it did not need to use (having a tribal court system of its own) and affirmatively abused that system.

Finally, the Florida court's decision also lines up with a decision of the Connecticut Supreme Court. In *Beecher v. Mohegan Tribe of Indians of Connecticut*, 918 A.2d 880 (Conn. 2007), the Connecticut Supreme Court also held that a federally recognized Indian tribe had sovereign immunity in connection with intentional tort claims (vexatious litigation) that occurred off-reservation. As a result, there are conflicting decisions, at a minimum, between the Alabama Supreme Court, on the one hand, and the Florida court below and the Connecticut Supreme Court.

C. The Question Presented is Important, and This Case Would Be a Good Vehicle for Resolving It.

One thing both the majority and dissenting opinions in this Court's recent tribal sovereign immunity jurisprudence share in common is a recognition of the unfairness inherent in the doctrine when applied to tort victims. In *Kiowa*, for example, both the majority and the dissent observed that tribal sovereign immunity resulted in a particular injustice for tort victims who had no choice in their interaction with Indian tribes. *See Kiowa*, 523 U.S. at 758, 766. The

Florida court below echoed that concern here. In fact, the Florida court opened its opinion with the following show of reluctance:

> "There are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.,* 523 U.S. 751, 758 (1998). It "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* No one knows this more than Guy Lewis and Michael Tein.

(App. 2). And the Florida court concluded its opinion with a similar lament that its hands were tied:

> Lewis and Tein had a right not to have their reputations ruined and their business destroyed by the Tribe. Like any injured party, if the allegations are true they should have proper redress for their injuries. But just as every right has its remedy, every rule has its exception. The exception here is sovereign immunity. . . . The immunity juice, our federal lawmakers have declared, is worth the squeeze. Still, some suffer from the squeezing, including car accident victims, beaten detainees, and Lewis and Tein.

(App. 24-25). This case provides the Court with the vehicle to address the open issue it has recognized exists in the field of tribal sovereign immunity in the context of a paradigm example of the unfairness the doctrine can cause.

Finally, this is an issue that will undoubtedly recur. There are 567 federally-recognized Indian tribes in the

United States. *See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,* 81 Fed. Reg. 26826 (May 4, 2016). They are dramatically expanding the volume and sophistication of their activities which now extend well beyond reservation boundaries and permeate most states and sectors of the national economy:

> In the 16 years since *Kiowa,* the commercial activities of tribes have increased dramatically. This is especially evident within the tribal gambling industry. . . . But tribal businesses extend well beyond gambling and far past reservation borders. In addition to ventures that take advantage of on-reservation resources (like tourism, recreation, mining, forestry, and agriculture), tribes engage in "domestic and international business ventures" including manufacturing, retail, banking, construction, energy, telecommunications, and more. . . . Tribal enterprises run the gamut: they sell cigarettes and prescription drugs online; engage in foreign financing; and operate greeting cards companies, national banks, cement plants, ski resorts, and hotels. . . . These manifold commercial enterprises look the same as any other—except immunity renders the tribes largely litigation-proof.

Bay Mills, 134 S. Ct. at 2050-51 (Thomas, J., dissenting) (citations omitted). With this commercial backdrop, the occurrence of off-reservation torts by Indian tribes will undoubtedly recur. The Petitioners submit that the application of tribal sovereign immunity to off-reservation torts will enable and

encourage irrational and unjust practical and legal consequences. Regardless, this is an area where clarity is required, where the conflicting decisions of the lower courts discussed above should be resolved, and where the gap in the Court's tribal sovereign immunity jurisprudence can be closed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 7, 2017