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

REPLY BRIEF FOR PETITIONERS

CURTIS MINER
Counsel of Record
ROBERTO MARTINEZ
COLSON HICKS EIDSON, P.A.
255 Alhambra Circle, Penthouse
Coral Gables, FL 33134
(305) 476-7400
curt@colson.com

Counsel for Petitioners

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

I. THE RELEVANT ISSUE WAS RAISED BELOW. 1

II. THERE IS A NEED FOR THIS COURT TO ADDRESS THE APPLICABILITY OF TRIBAL SOVEREIGN IMMUNITY TO OFF-RESERVATION TORTS. 2

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THIS IMPORTANT ISSUE. 5

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Bert v. Bermudez,
95 So.3d 274 (Fla. 3d DCA 2012) 7, 8

Hollynn D'Ill v. Cher-Ae Heights Indian Community of the Trinidad Ranchera,
2002 WL 33942761 (N.D. Cal. March 11, 2002) . . 3

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,
523 U.S. 751 (1988) 3

Miccosukee Tribe of Indians v. Cypress,
2015 WL 235433 (S.D. Fla. Jan. 16, 2015) . . . 5, 6

Michigan v. Bay Mills Indian Community,
__ U.S. __, 134 S. Ct. 2024 (2014) 2, 3, 5

Upper Skagit Indian Tribe v. Lundgren,
389 P.3d 569 (Wash. 2017) 4, 5

Wilkes v. PCI Gaming Authority,
2017 WL 4385738 (Ala. Oct. 3, 2017) 3, 4, 5

REPLY

I. THE RELEVANT ISSUE WAS RAISED BELOW.

The Miccosukee Tribe preliminarily argues that Petitioners failed to raise below the issue that is presented by this Petition. That is not the case, however. Petitioners have always framed their challenge to the Miccosukee Tribe's assertion of sovereign immunity as being based on the Tribe's intentional torts and criminal conduct that the Tribe voluntarily undertook in a non-tribal venue—the Florida state and federal court systems. Moreover, regardless of whether the issue is looked at through the prism of waiver or through the prism of a limitation on the types of claims to which the doctrine of tribal sovereign immunity applies, the core issue remains the same: whether the lower court has jurisdiction to hear claims based on the Miccosukee Tribe's off-reservation, tortious conduct.

In addition, the Miccosukee Tribe itself took Petitioners argument as including a challenge to the scope of the doctrine itself. For example, the Tribe argued in its briefing to the appellate court below that if the court accepted Petitioner's arguments, "the long-standing doctrine of tribal sovereign immunity will be weakened beyond recognition." Similarly, it made numerous policy arguments protesting against any erosion of the scope of the doctrine. Petitioners suggest that these concerns are significantly overblown, but the point remains that the appellate court was presented with arguments going to the core applicability of the doctrine of tribal sovereign immunity to the facts at issue here.

II. THERE IS A NEED FOR THIS COURT TO ADDRESS THE APPLICABILITY OF TRIBAL SOVEREIGN IMMUNITY TO OFF-RESERVATION TORTS.

The Miccosukee Tribe takes issue with Petitioners' contention that there is a "gap" in the Court's jurisprudence when it comes to the application of the judicial doctrine of tribal sovereign immunity to torts that are committed off-reservation. But this argument is not simply woven by Petitioners, it comes directly from this Court's own decisions (and dissents from those decisions).

Specifically, 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 expressly acknowledged that the Court has never specifically addressed the applicability of the doctrine to off-reservation torts: "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." *Id.* at 2036 n.8 (emphasis added)). And, the four-Justice dissent (Justices Thomas, Scalia, Ginsburg and Alito) specifically flagged this unanswered question and invited the opportunity to resolve it:

> 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 Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1988)*'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). It is this "interest" that the dissent "welcomed" the opportunity to address that Petitioners seek to have addressed through the present case.

Lower courts are cognizant of this "quandary," as one federal court has termed it. *See Hollynn D'Ill v. Cher-Ae Heights Indian Community of the Trinidad Ranchera*, 2002 WL 33942761, at *7 (N.D. Cal. March 11, 2002) ("[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.") (emphasis added).

Significantly, the Alabama Supreme Court recently addressed the same "quandary", and reached a different result from the appellate court below—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 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." *Id.* 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.

The Indian tribe in the *Wilkes* case has indicated it intends to file a petition for certiorari, and the Court has granted the tribe an extension of time until February 1, 2018 to do. *See* Order, dated December 12, 2017, in Case No. 17A-626. Lewis Tein suggests that the *Wilkes* case also provides an appropriate vehicle for the Court to resolve the issue of the applicability of the doctrine of tribal sovereign immunity to off-reservation torts. If the Court grants certiorari to review of the *Wilkes* case, Petitioners request that the Court hold this case pending the resolution of *Wilkes*.[1]

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[1] In addition, on December 8, 2017, this Court granted certiorari to review a decision of the Supreme Court of Washington on tribal sovereign immunity in *Upper Skagit Indian Tribe v. Lundgren*, 389 P.3d 569 (Wash. 2017). The question presented for review is: "Does a court's exercise of *in rem* jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THIS IMPORTANT ISSUE.

The Miccosukee Tribe also argues that the present case is not an appropriate vehicle for the Court to address the reach of tribal sovereign immunity to off-reservation torts. To the contrary, the egregious conduct of the Miccosukee Tribe and the extraordinary unfairness of the application of the doctrine to these facts makes this case an apt vehicle. The potential for unfairness in the application of the doctrine that this Court has expressed concern about in both *Kiowa* and *Bay Mills* manifests itself in full bloom in this case.

Here, the Miccosukee Tribe did not simply find itself subject to a claim of negligence as a result of a "one-off" tort. Rather, the Tribe engaged in what one federal judge described as an unrelenting "legal crusade" against Lewis Tein. *Miccosukee Tribe of Indians v. Cypress*, 2015 WL 235433, at *4 (S.D. Fla. Jan. 16, 2015). And the wrongful conduct set forth in Lewis Tein's complaint is not merely based on allegations, but is based on judicial findings made after extensive discovery and evidentiary hearings. For example, in unsparing terms, the United States District Court for the Southern District of Florida excoriated the Tribe for its conduct: "[T]here was no

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abrogated it?" *See* Order, dated December 8, 2017, in Case No. 17-387. Although the issue is different from that in the present case, the combination of cases (*Wilkes* or *Lewis Tein* and *Lundgren*) provides the Court with an opportunity to address the conflicts or gaps in the doctrine of tribal sovereign immunity in a more comprehensive way.

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 . . . ." *Id.* at *4. 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 even the appellate court below recognized, the doctrine of tribal sovereign 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. No one knows this more than Guy Lewis and Michael Tein." (App. 2 (quotation omitted)).

In any event, the "vehicle concerns" raised by the Miccosukee Tribe are misplaced. First, the Miccosukee Tribe argues that Lewis Tein are sophisticated lawyers who voluntarily chose to represent the Miccosukee Tribe and therefore could have negotiated for an explicit waiver of the Tribe's sovereign immunity as a condition of their representation of the Tribe. That argument simply mischaracterizes the nature of Lewis Tein's claims. This lawsuit was not an action for professional malpractice by the Miccosukee Tribe; nor was it an action by Lewis Tein for collection of unpaid legal fees owed by the Miccosukee Tribe. Such actions would, presumably, be governed by the terms and conditions of any engagement agreement negotiated between Lewis Tein and the Miccosukee Tribe, in

which the parties could have bargained over the inclusion of a waiver of tribal sovereign immunity.

Rather, this case originated with a matter in which Lewis Tein was not representing the Miccosukee Tribe—the *Bermudez* wrongful death matter in the Florida state court system. As the Florida courts recognized, the Miccosukee Tribe affirmatively injected itself unnecessarily (and inexplicably in the view of the appellate court) into that matter to make false claims against Lewis Tein. Those false claims led to a course of intentional and even criminal conduct in which the Tribe obstructed justice, suborned perjury, made a false police report, among other acts—all in matters in which Lewis Tein was not representing the Miccosukee Tribe.

Second, the Miccosukee Tribe argues that Lewis Tein already received compensation for the Tribe's wrongful conduct through alternative means. The Tribe neglects to mention, however, that the court-imposed sanctions for attorney's fees served to reimburse the law firm's professional liability insurers for the sums expended on the defense of the Tribe's baseless claims. The sanctions did nothing to compensate Lewis Tein for the extraordinary economic damages caused to the law firm or the reputational harm inflicted on the lawyers. As one of the judges on the appellate court below observed at the oral argument on this appeal: "And I grant you just simply awarding attorney's fees hardly compensates for the

damaged reputation loss of business and other factors."[2]

Finally, the Miccosukee Tribe argues that it has multiple additional dispositive defenses to Lewis Tein's claims.[3] Lewis Tein disagrees, but this is not the place for that argument. Nor should it matter for purposes of consideration of this Petition. How this lawsuit ultimately turns out if the appellate court's decision below is reversed is a mater for the Florida trial court. Moreover, sovereign immunity is a jurisdictional issue, and thus will always be a threshold issue in any case in which it is raised as a defense. And, in any case in which it is raised as a defense, the defendant raising it will presumably have other defenses to the claims against it. If the lack of any other viable defenses was a prerequisite to this Court hearing a case in which the defense of sovereign immunity was raised, there would likely never be a viable vehicle for the Court to address the myriad issues surrounding sovereign immunity.

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[2] The videotape of the oral argument is available at the Third District Court of Appeals' website: http://3dca.flcourts.org/Archived_Video.shtml.

[3] For example, the Miccosukee Tribe contends that Lewis Tein's "litigation conduct scarred their professional reputation." Opposition at p. 20 (citing *Bert v. Bermudez*, 95 So.3d 274, 276-79 (Fla. 3d DCA 2012). The Tribe neglects to mention, though, that the published case it references only arose <u>because of</u> the Tribe's false and disproven accusations; Lewis Tein should not be faulted for vehemently and aggressively attempting to defend their hard-earned professional reputations in the face of the extraordinarily false and malicious allegations made by the Tribe.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CURTIS MINER
Counsel of Record
ROBERTO MARTINEZ
COLSON HICKS EIDSON, P.A.
255 Alhambra Circle, Penthouse
Coral Gables, FL 33134
(305) 476-7400
curt@colson.com

Counsel for Petitioners

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