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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars tort claims asserted by individuals who have no personal or commercial relationship with the tribe and who have been injured by the tribe's off-reservation commercial conduct.

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OPINIONS BELOW

The opinion of the Alabama Supreme Court (Pet. App. 1a-14a) is not yet reported but is available at 2017 WL 4385738. The opinion of the Circuit Court of Elmore County, Alabama (Pet. App. 19a-23a, 15a-16a) is not reported.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on September 29, 2017, and was modified on rehearing on October 3, 2017. On December 12, 2017,

Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 1, 2018. On January 26, 2018, Justice Thomas further extended the time to March 2, 2018, and the petition was filed on February 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. Shortly before 11:00 a.m. on January 1, 2015, Casey Marie Wilkes and Alexander Jack Russell were driving on State Highway 14 near Elmore, Alabama, when a Chevrolet Silverado pickup truck crashed into a guardrail, crossed into oncoming traffic, and struck their vehicle head-on. Wilkes and Russell both suffered serious injuries, including, in Wilkes's case, a traumatic brain injury. Pet. App. 3a; Third Am. Compl. ¶22.

The pickup truck was owned by the Wind Creek Casino & Hotel Wetumpka, and its driver was Barbie Spraggins, who worked at the casino as a facilities-management administrator. Having spent much of the previous night drinking, Spraggins arrived at work at approximately 8:00 a.m. and then decided to travel to a warehouse located in Montgomery—approximately 10 miles from the casino—to retrieve lamp shades needed for the hotel. A blood test administered almost two hours after the accident revealed that Spraggins had a blood-alcohol level of 0.293. Spraggins has been unable to remember why she was driving on Highway 14 that morning. Pet. App. 2a-3a.

Spraggins's employment record indicates that she had a history of drinking while at work. During her two years with the casino, Spraggins had been reported to management at least six times for smelling of al-

cohol on the job. On at least two occasions, she was tested for alcohol, including once in February 2014, when she had a blood-alcohol level of .078. Following that incident, Spraggins spent the next six months participating in an employee-assistance program. Pet. App. 2a.

2. The Wind Creek Casino & Hotel Wetumpka is operated by PCI Gaming Authority (the Gaming Authority), an instrumentality of the Poarch Band of Creek Indians (the Tribe). Wilkes and Russell brought this action against Spraggins, the Gaming Authority, and the Tribe in the Circuit Court of Elmore County, Alabama. They asserted negligence and wantonness claims against all defendants based on Spraggins's operation of the pickup truck, and against the Tribe and the Gaming Authority based on their hiring, retention, and supervision of Spraggins. Pet. App. 2a-4a.

The Tribe and the Gaming Authority moved for summary judgment, arguing that they were protected by the doctrine of tribal sovereign immunity. The trial court granted the motion. Pet. App. 19a-23a. The court concluded that it lacked "subject matter jurisdiction to hear and adjudicate claims against the Poarch Band of Creek Indians where they have not consented to civil suits and where Congress has not acted to limit their immunity." *Id.* at 21a.

3. The Alabama Supreme Court reversed. Pet. App. 1a-14a. The court began by acknowledging this Court's statement that "[a]mong the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 6a (quoting *Michigan v. Bay*

Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014)) (internal quotation marks omitted). The court then reviewed this Court's discussion of tribal sovereign immunity in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) and *Bay Mills*, including the fact that "the doctrine is a common-law doctrine that 'developed almost by accident." Pet. App. 7a (quoting *Kiowa*, 523 U.S. at 756).

The Alabama Supreme Court noted that in *Bay Mills*, this Court observed that it has never "specifically addressed . . . 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." Pet. App. 10a (quoting *Bay Mills*, 134 S. Ct. at 2036 n.8). This case, the court explained, "presents precisely that scenario: Wilkes and Russell have alleged tort claims against the tribal defendants, and they have no way to obtain relief if the doctrine of tribal sovereign immunity is applied to bar their lawsuit." *Id.* The court concluded that extending tribal sovereignty would "be contrary to the interests of justice, especially inasmuch as the tort victims in this case had no opportunity to negotiate with the tribal defendants for a waiver of immunity." *Id.* at 11a. For that reason, and "[i]n light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this," the court "decline[d] to extend the doctrine beyond the circumstances to which that Court itself has applied it." *Id.* at 10a-11a.

ARGUMENT

The Alabama Supreme Court correctly held that tribal sovereign immunity does not bar tort claims arising from off-reservation commercial activity and asserted by individuals who lack any connection to the tribe. Petitioners argue (Pet. 24) that the decision below "defies this Court's authority," but in fact the court faithfully applied *Bay Mills*, in which this Court explained that it had not "specifically addressed . . . 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." 134 S. Ct. at 2036 n.8. Petitioners also assert (Pet. 15-21) that the decision below conflicts with various other decisions of lower courts. Most of those decisions, however, predate this Court's decision in *Bay Mills*. Examination of that case may lead those courts to reconsider their positions, and in any event, this Court would benefit from allowing the issue to percolate further in the lower courts before it intervenes to elaborate on *Bay Mills*. Further review is not warranted.

A. The decision below is consistent with this Court's cases, which have not applied sovereign immunity to bar tort actions arising from a tribe's off-reservation commercial activity

Although this Court's cases have "often recite[d] the rule of tribal immunity from suit" in broad terms, the Court's application of the rule has been more limited. *Kiowa*, 523 U.S. at 753. In *Kiowa*, for example, the Court considered an action against a tribe to enforce a promissory note. *Id.* at 753-54. After survey-

ing the Court's cases, as well as "considerations [that] might suggest a need to abrogate tribal immunity," the Court chose to "defer to the role Congress may wish to exercise" in modifying immunity. *Id.* at 758. The Court concluded 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 (emphasis added).

More recently, in *Bay Mills*, the Court reexamined the rule of tribal sovereign immunity and declined to overrule *Kiowa*. 134 S. Ct. at 2036. The Court noted that "tribes across the country, as well as entities and individuals doing business with them, have for many years relied on *Kiowa* (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal immunity." *Id.* It also emphasized that "Congress has now reflected on *Kiowa* and made an initial . . . decision to retain *that form of tribal immunity*." *Id.* at 2038 (emphasis added).

In the course of that discussion, the Court identified an important limitation on the immunity that it had recognized: "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." *Bay Mills*, 134 S. Ct. at 2036 n.8. The Court expressed that limitation not only in footnote 8 but also in the body of the opinion. Michigan had argued that application of immunity to bar a suit based on illegal off-

reservation gaming would leave the State without the ability to enforce state law, but the Court explained that while the State "lacks the ability to sue a tribe for illegal gaming," it nonetheless "has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory." *Id.* at 2034. The State could, for example, "deny a license to Bay Mills for an off-reservation casino." *Id.* at 2035. Alternatively, it could "bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license," or it might "resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment." *Id.* "Finally, if a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity." *Id.* In sum, the Court concluded, Michigan retained a "panoply of tools . . . to enforce its law on its own lands." *Id.* In that discussion, the Court reinforced the point made in footnote 8: when the application of immunity would leave an injured party without a remedy, the availability of immunity cannot be assumed.

In this case, the Alabama Supreme Court addressed the precise issue raised by this Court in footnote 8 of *Bay Mills*. Confronted with tort claims asserted by individuals who had no voluntary relationship with a tribe and who were injured by the tribe's off-reservation commercial conduct, the court below correctly "decline[d] to extend the doctrine of tribal sovereign immunity beyond the circumstances in which the Supreme Court of the United States itself has applied it." Pet. App. 13a.

Petitioners object (Pet. 15) that the decision below is inconsistent with what they call "the broad immunity principle adopted in this Court's cases." That objection ignores footnote 8 and the accompanying discussion in *Bay Mills*. And to the extent petitioners' argument relies on broad statements in this Court's earlier decisions, it is contrary to the principle that "general expressions in every opinion are to be taken in connection with the case in which those expressions are used," and "[i]f they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). Petitioners correctly point out (Pet. 24-25) that lower courts are bound to follow the rationale of this Court's cases, not merely their results. But when this Court itself has specifically identified a limitation on the rule articulated in its decisions, the Alabama Supreme Court cannot be faulted for respecting that limitation.

B. There is no historical justification for applying tribal sovereign immunity to off-reservation torts

1. In *Kiowa*, the Court observed that the doctrine of tribal sovereign immunity "developed almost by accident." 523 U.S. at 756. The decision frequently cited as establishing the doctrine—*Turner v. United States*, 248 U.S. 354 (1919)—"simply does not stand for that proposition." *Kiowa*, 523 U.S. at 756.

In *Turner*, the Court addressed whether the Creek Nation was liable for damage to property for failing to keep the peace. 248 U.S. at 357-58. The Court con-

cluded that it was not, explaining that "[t]he fundamental obstacle to recover is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Id.* As this Court later explained in *Kiowa*, the reference to "immunity of a sovereign to suit" merely assumed "immunity for the sake of argument." 523 U.S. at 757. Nonetheless, "*Turner*'s passing reference to immunity" became "an explicit holding that tribes had immunity from suit" in *United States v. United States Fidelity & Guaranty Co.* (*USF&G*), 309 U.S. 506 (1940). *Kiowa*, 523 U.S. at 757.

In addition to *Turner*, the Court in *USF&G* relied on *Adams v. Murphy*, 165 F. 304, 308 (8th Cir. 1908), and *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895). In *Turner*, the jurisdictional statute authorized suit against the Tribe but did not create any substantive right. 248 U.S. at 358. Similarly, the court in *Thebo* considered jurisdictional statutes and construed them to reflect "the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states" to guard against oppression and impoverishment. 66 F. at 375; *see id.* at 376; *accord Adams*, 165 F. at 308 (citing *Thebo* and explaining that "[u]pon considerations of public policy such Indian tribes are exempt from civil suit"). In other words, tribes were immune not because of sovereignty but because the United States had not authorized federal courts to adjudicate claims against them. *See* Gov't Br. at 20-21, *United States v. United States Fi-*

delity & Guaranty Co., *supra* (No. 569) (arguing that the "present basis" for tribal immunity "is doubtless the degree of control which the United States has long exercised over the Indian tribes, . . . and the relationship between the tribes and the United States, which is comparable to that of guardian and ward"); *Graham v. United States*, 30 Ct. Cl. 318, 336 (1895) ("The Indians being subject to the jurisdiction and control of the United States as domestic dependent nations, they have no standing in the courts either as plaintiff or defendant except by statute.") (internal quotation marks omitted).

To the extent that immunity from suit was traditionally a reflection of the limited jurisdiction of federal courts, no such limitation applies to state tort actions. State courts played no role in tribal affairs during the 19th century because the federal policy was both to isolate tribes politically and territorially and to control all intercourse with tribes. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."). In a federal territory, including 19th century Indian country, "[t]here is but one system of government, or of laws operating within [its] limits." *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850).

Today, however, tribes are not isolated, and their commercial activities are widespread. Off-reservation tribal activities do not implicate the federal interests from which the doctrine of immunity appears to have developed. When conducting off-reservation activity,

tribes operate under the laws of the State—including state tort law. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

2. Expanding tribal immunity to off-reservation activity is not only "unsupported by any rationale for that doctrine" but also "inconsistent with the limits on tribal sovereignty." *Bay Mills*, 134 S. Ct. at 2045 (Thomas, J. dissenting). This Court has characterized Indian tribes as "domestic dependent nations" that are "completely under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). While "[t]he Constitution specifically recognizes the States as sovereign entities," tribes were not parties to the Convention, and the Constitution does not guarantee their reserved sovereignty. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996). To the contrary, the "incorporation [of tribes] within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

More than a century ago, this Court recognized that Indian tribes are no longer "possessed of the full attributes of sovereignty." *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). Today, a "tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations.'" *Brendale v. Confederated Tribes & Bands of Yakima*

Indian Nation, 492 U.S. 408, 425-426 (1989) (plurality opinion) (quoting *Wheeler*, 435 U.S. at 326). Even within Indian country, "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008). They cannot exercise regulatory authority over nonmember activity occurring within their territory unless the nonmembers have entered into a consensual relationship with the tribe or their activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981).

Extending tribal sovereign immunity to off-reservation torts would be wholly inconsistent with tribes' diminished sovereignty. If, as this Court has stated, "[a] tribe's inherent sovereignty . . . is divested to the extent it . . . involves a tribe's external relations," tribal sovereign immunity cannot extend to tortious conduct toward non-members. *Brendale*, 492 U.S. at 425-26.

3. Permitting tribes to assert immunity for off-reservation torts would be particularly anomalous because it would vest tribes with a form of immunity enjoyed by no other sovereign. Had Spraggins been employed by a foreign country or by another State, her employer would not enjoy sovereign immunity. *See* 28 U.S.C. § 1605(a)(2) (commercial-activity exception to Foreign Sovereign Immunities Act); 28 U.S.C. § 1605(a)(5) (domestic-tort exception); *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 497 (2003) ("[T]he Constitution does not confer sovereign immunity on

States in the courts of sister States."); *Nevada v. Hall*, 440 U.S. 410 (1979). Indeed, if Spraggins had been employed by the United States, the Federal Tort Claims Act would have waived immunity. 28 U.S.C. § 2674.

In *Bay Mills*, this Court deemed those considerations insufficient to overcome the force of *stare decisis*. 134 S. Ct. at 2036. But in the context of tort claims, for which this Court has not previously addressed the availability of immunity, *id.* at 2036 n.8, they provide a weighty reason not to expand an immunity that rests on such shaky historical foundations.

C. Extending immunity to off-reservation torts would lead to unjust results and would undermine important state interests

The doctrine of tribal sovereign immunity articulated in *Kiowa* has undoubtedly led to unjust results for the unwary. But within the context of commercial transactions, the potential for unfairness is limited because parties choosing to deal with tribes can negotiate waivers of immunity. *See, e.g.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (tribe waived immunity by agreeing to a contract with an arbitration clause). Similarly, as this Court observed in *Bay Mills*, a State seeking the ability to sue a tribe "need only bargain for a waiver of immunity" when negotiating a gaming compact. 134 S. Ct. at 2035. That is not true, however, of "a tort victim, or other plaintiff who has not chosen to deal with a tribe." *Id.* at 2036 n.8; *see also id.* at 2034-35.

In the context of torts, application of immunity would lead to unjust results and would defeat a key purpose of tort law, which is to compensate those who have been injured. *See Hannah v. Brown*, 400 So. 2d 410, 410 (Ala. Civ. App. 1981) ("[I]t is the purpose of the law to fairly compensate the injured for the wrong committed."); *Birmingham Ry., Light & Power Co. v. Sprague*, 72 So. 96 (Ala. 1916). Tort victims often have no recourse for the injuries they suffer from negligent tribal conduct. As the Alabama Supreme Court explained, "none of the other rationales offered by the majority in *Bay Mills* as support for continuing to apply the doctrine of tribal sovereign immunity to tribes' off-reservation commercial activities sufficiently outweigh the interests of justice so as to merit extending that doctrine to shield tribes from tort claims asserted by individuals who have no personal or commercial relationship to the tribe." Pet. App. 12a; *see Upper Skagit Indian Tribe v. Lundgren*, No. 17-387, 2018 WL 2292445, at *6 (May 21, 2018) (Roberts, C.J., concurring) (noting that the law should provide a means for "private individuals—who . . . had no prior dealings with [a] Tribe . . . to vindicate their interests").*

Petitioners suggest (Pet. 25) that Wilkes and Russell do, in fact, "have 'an alternative way to obtain relief,' and in fact have pursued it: Spraggins, the driver of the truck, is a defendant in the action that respond-

* Even if this Court had previously held that immunity applies to torts arising from off-reservation commercial conduct, the potential for unfairness in cases such as this "would present a 'special justification' for abandoning precedent." *Bay Mills*, 134 S. Ct. at 2036 n.8 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

ents filed." But the Alabama Supreme Court explained the flaw in that reasoning: "Wilkes and Russell have alleged tort claims against the tribal defendants, and they have no way to obtain relief if the doctrine of tribal sovereign immunity is applied to bar their lawsuit." Pet. App. 10a. In other words, Wilkes and Russell have claims not only against Spraggins but also against the Tribe and the Gaming Authority for their negligent and wanton hiring, retention, and supervision of Spraggins, as well as for the negligent and wanton conduct imputable to them as Spraggins's employer. Application of immunity would leave Wilkes and Russell without a remedy for those wrongs. *See Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting) ("Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.").

Applying immunity to off-reservation torts would also undermine important state regulatory interests. Tort judgments are a means by which a State "enforce[s] its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035. As this Court has explained, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)); *see Restatement (Second) of Torts* § 901 (1979). But when a tribal enterprise enjoys sovereign immunity, it need not comply with rules of conduct established by state tort law, including taking precautions to prevent accidents, because it will not be forced to internalize the cost of its misconduct. In the circumstances of this

case, immunity would frustrate the state interest in promoting safety by discouraging commercial enterprises from employing individuals who drive while intoxicated.

D. The conflict in the lower courts does not warrant review at this time

The Alabama Supreme Court acknowledged that its decision is inconsistent with lower-court decisions that have extended tribal sovereign immunity to bar tort actions. Pet. App. 13a. But most of those decisions predate *Bay Mills*. Even in the few cases decided after *Bay Mills*, none of the courts considered the issues raised by that decision and explored by the court below. *See, e.g.*, *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563 n.8 (9th Cir. 2016) (rejecting argument based on footnote 8 of *Bay Mills* and adhering to prior Ninth Circuit holding that tribal sovereign immunity bars tort claims, *see Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008), *cert. denied*, 556 U.S. 1221 (2009)); *Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation*, 416 P.3d 401, 412-13 (Utah 2017), *petition for cert. pending*, No. 17-1301 (filed Mar. 14, 2018) (holding exhaustion of tribal court remedies prerequisite to federal action involving claims of tortious interference with economic relations); *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 661 (Fla. Dist. Ct. App. 2017), *cert. denied*, 138 S. Ct. 741 (2018) (dismissing tort claims without discussing *Bay Mills*); *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians*, No. 16-CV-13643, 2018 WL 508471 (E.D. Mich. Jan. 23, 2018) (extending immunity without discussing *Bay Mills*);

Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians, 259 F. Supp. 3d 713, 717-18 (W.D. Mich. 2017) (dismissing for lack of diversity jurisdiction without discussing footnote 8).

Further examination of *Bay Mills*, and especially of factual circumstances raising considerations identified by the Court in footnote 8, may lead some of the courts that have adopted a contrary view to reconsider their position. If the conflict nevertheless develops, it may warrant this Court's review in an appropriate case. This Court would be best served by allowing further percolation so that, if and when it does confront the issue, it will have the benefit of a variety of considered decisions from the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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