No. 17-1175

IN THE

Supreme Court of the United States

POARCH BAND OF CREEK INDIANS AND PCI GAMING AUTHORITY D/B/A WIND CREEK CASINO AND HOTEL WETUMPKA,

Petitioners,

v.

CASEY MARIE WILKES AND ALEXANDER JACK RUSSELL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the decision below creates a split with decisions of many other state supreme courts and federal circuits—indeed, they concede that there is a split. Opp. 16. Nor do respondents dispute that the issue is an important one worthy of this Court's review—indeed, they concede that it "may warrant this Court's review." *Id.* at 17. Rather, respondents ask this Court to ignore the split and the issue's importance and, instead, wait to see if lower courts "reconsider their position" (*id.*) in light of footnote 8 of *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014).

Respondents' argument misses the point. Footnote 8 indicates that this Court has not addressed the question of immunity for off-reservation torts. But the decision below was broader, applying to all "tort claims asserted … by non-tribe members," even if the tort occurred on the reservation. Pet. App. 12a. Moreover, respondents asserted a claim for negligent hiring and supervision—a tort that, under Alabama law, occurred *on* the reservation and thus falls outside of footnote 8 of *Bay Mills*. And, whatever the scope of this Court's previous immunity decisions, the lower courts have addressed immunity for tort claims—repeatedly—and at least 10 state supreme courts and federal courts of appeals have applied tribal immunity to tort claims. There is nothing in *Bay Mills* that might cause courts to reassess those holdings. Indeed, courts after *Bay Mills* have continued to apply tribal immunity to tort claims.

Because the decision below conflicts with the decisions of at least 10 other state supreme courts and federal circuits on an important issue, and because

further percolation is unnecessary—and indeed the resulting delay will cause substantial, unanticipated burdens for any tribes denied immunity—the Court should grant the petition and address this important tribal immunity question now.

I. IN LIGHT OF THE CONCEDED CONFLICT IN THE LOWER COURTS AND CONCEDED IMPORTANCE OF THE ISSUE PRESENTED, THE COURT SHOULD REVIEW THIS CASE.

Respondents address the certworthiness of the petition almost as an afterthought, consigned to the last page and one-half of their opposition brief. And this treatment is understandable. After all, as respondents acknowledge, the decision below "is inconsistent" (Opp. 16) with many state supreme court and federal circuit court decisions. Respondents also concede the importance of the question presented, granting that "it may warrant this Court's review." *Id.* at 17. Faced with an undeniable split on an undeniably important question, respondents are left with a solitary plea—*not now*, because of footnote 8 in *Bay Mills*. But as much as respondents would like to evade this Court's review, this argument is makeweight. Footnote 8 said nothing to alter the trajectory of lower-court decisions—and, indeed, the lower courts have continued to apply tribal immunity to tort claims even after *Bay Mills*.

A. To begin with, respondents err in suggesting that this case falls within the ambit of footnote 8, for two reasons.

First, footnote 8 related to "off-reservation commercial conduct" when "no alternative remedies were available." *Bay Mills*, 134 S. Ct. at 2036 n.8.

Here, respondents asserted a claim alleging that petitioners "were negligent and/or wanton in hiring, retaining, supervising, and/or monitoring Defendant Spraggins while she was employed by the Defendants." Record 413–14. Under Alabama law, such a claim arises at "the location of the wrongful acts or omissions" by the defendants. *Ex parte Jim Burke Auto., Inc.*, 200 So. 3d 1153, 1155–56 (Ala. 2016). In other words, respondents' negligent hiring and retention claim related to *on*-reservation conduct.

Second, as explained in the petition (at 25), respondents *have* an "alternative way to obtain relief," *Bay Mills*, 134 S. Ct. at 2036 n.8, by pursuing their pleaded claims against Spraggins. Respondents dismiss this option, suggesting that their claims against Spraggins "would leave Wilkes and Russell without a remedy" for the wrongs by petitioners.[1] Opp. 14–15. True enough—every application of immunity leaves the plaintiff "without a remedy" from the immune defendant. But respondents ignore the fact that they can be made completely whole for their injuries through their claims against Spraggins. And at no point do respondents deny that their claims against Spraggins can provide them with a full remedy. Thus, this case falls outside of footnote 8 because, as in *Bay Mills* itself, respondents "ha[ve] no need to sue the Tribe to right the wrong [they] allege[]." 134 S. Ct. at 2036 n.8.

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[1] Respondents attribute this reasoning to the Alabama Supreme Court, Opp. 15, but that court appears to have overlooked Spraggins' claims; the court asserted baldly that respondents "have no way to obtain relief if the doctrine of tribal sovereign immunity is applied to bar their lawsuit." Pet. App. 10a. That statement simply is not correct.

B. In any event, contrary to respondents' suggestion (Opp. 17), nothing this Court said in footnote 8 of *Bay Mills* could have any effect on what lower courts hold in the future. That footnote simply stated that this Court had not "specifically addressed" immunity in the context of an off-reservation tort where "no alternative remedies were available." 134 S. Ct. at 2036 n.8. It says nothing about how courts should address that situation in the future, nor does it even hint that immunity would not be available under the Court's existing precedent. Indeed, quite the contrary: the Court *expressly* explained that declining to find immunity in that situation would require "a 'special justification' for abandoning precedent." *Id.* Needless to say, only *this Court*, not any lower court, can "abandon[]" (*id.*) this Court's precedent. *See* Pet. 25–26. By this statement, therefore, footnote 8 of *Bay Mills* actually acknowledges that immunity is required under existing doctrine for off-reservation torts where the claimant has no other remedy. In short, footnote 8 is hardly a reason to expect lower courts to deny immunity in future cases.

The cases issued after *Bay Mills* confirm that footnote 8 has not caused lower courts to "reconsider their position." Opp. 17. Since *Bay Mills*, courts have continued to apply immunity to tort claims asserted by non-members—including the 9th Circuit and the Utah Supreme Court. *See Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation*, 416 P.3d 401, 412–13 (Utah 2017), *pet. for cert. pending*, No. 17-1301 (filed

Mar. 14, 2018);[2] *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563 n.8 (9th Cir. 2016).[3] The split explained in the petition remains alive and well after *Bay Mills*.

Further, respondents are simply wrong in contending (Opp. 16) that "none of the courts" finding immunity after *Bay Mills* "considered the issues raised by that decision." In fact, the Ninth Circuit in *Tohono O'odham* specifically discussed footnote 8 of *Bay Mills*, explaining—just as indicated above—that this "Court was discussing the principle of *stare decisis*" and declining to depart from Ninth Circuit precedent. 818 F.3d at 563 n.8. And while the Utah Supreme Court in *Harvey* did not address footnote 8 specifically, the majority and dissent both cited *Bay Mills*, *see* 416 P.3d at 433; *id.* at 438 (Lee, A.C.J., concurring in part and dissenting in part), so they plainly did not believe that it changed anything about immunity for tort actions.

C. Respondents have framed the issue decided below differently from how the Alabama Supreme Court explained its holding. The court below "h[e]ld

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[2] The questions presented in the *Harvey* certiorari petition involve the tribal remedies exhaustion doctrine, not tribal immunity.

[3] *See also 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), *appeal filed*, No. 18-1166 (6th Cir. filed Feb. 16, 2018); *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 171–18 (W.D. Mich. 2017); *Sun v. Mashantucket Pequot Gaming Enter.*, 309 F.R.D. 157, 162–64 (D. Conn. 2015); *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).

that the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members." Pet. App. 12a. This holding is not limited to torts that occur off the reservation, and it is also not limited to plaintiffs with no previous relationship with the tribe. The holding, therefore, is substantially broader than the circumstance addressed by footnote 8 of *Bay Mills*. By contrast, respondents narrow the issue to claims by "individuals who have no personal or commercial relationship with the tribe" and injuries caused by "the tribe's off-reservation commercial conduct." Opp. i. Of course, the Alabama Supreme Court's actual holding—not respondents' effort to narrow it to fit into footnote 8 of *Bay Mills*—is before this Court and is relevant to the decision whether to grant certiorari.

Even focusing on off-reservation torts, however, there remains a split. Many of the state supreme court and federal court of appeals decisions discussed in the petition involved off-reservation torts. These include (at least) the Ninth Circuit's decisions in *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008), and *Maxwell v. Cty. of San Diego*, 708 F.3d 1075 (9th Cir. 2013), the Eleventh Circuit's decision in *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224 (11th Cir. 2012), and the state supreme court decisions in *Seneca Tel. Co. v. Miami Tribe of Okla.*, 253 P.3d 53 (Okla. 2011); *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359 (Okla. 2013); *Beecher v. Mohegan Tribe of Indians of Conn.*, 918 A.2d 880 (Conn. 2007); and *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968). No matter how the issue presented by this case is framed, therefore, the decision below created a split on an important and recurring issue. The Court should grant the petition.

II. THE ALABAMA SUPREME COURT'S DECISION IS WRONG.

Respondents spend the bulk of their opposition asserting broad arguments against tribal immunity. Opp. 5–16. Those arguments are both unavailing and wrong.

A. To begin with, respondents' arguments against tribal immunity represent a reason to *grant* the petition. After all, if respondents are correct, then dozens of courts have been misapplying tribal sovereign immunity principles to tort claims for decades. *See* Pet. 15–21 and n.17. Only this Court's intervention can stop such continued "unjust results," as respondents describe them. Opp. 14.

B. Respondents' merits arguments are wrong. Initially, respondents err in narrowing the scope of the tribal sovereign immunity principle articulated in this Court's prior cases. To be sure, as *Bay Mills* suggests, this Court has not "specifically addressed" precisely the situation in this case. 134 S. Ct. at 2036 n.8. But as the petition notes, Pet. 12–15, the *holdings* of this Court's cases are broader. As stated in *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998), "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. This immunity is not limited or circumscribed. Accordingly, under "settled law," this Court has "dismissed *any* suit against a tribe absent congressional authorization (or a waiver)." *Bay Mills*, 134 S. Ct. at 2030–31 (emphasis added).

These principles—recently reaffirmed by the Court in *Bay Mills*—do not exclude tort actions. And

footnote 8 of *Bay Mills* itself recognizes that off-reservation torts *are* governed by this Court's existing precedent. That is why footnote 8 discusses whether this situation would require the Court to depart from *stare decisis* and "abandon[] precedent." *Id.* at 2036 n.8.

Nor are respondents correct in suggesting that Congress' legislative response to *Kiowa* has been limited to "retain[ing] that form of tribal immunity"—*i.e.*, immunity from contract actions. Opp. 6 (emphasis omitted). In fact, as *Bay Mills* explained, after *Kiowa* Congress considered two bills that "broadly abrogated tribal immunity for most torts and breaches of contract," but instead adopted a "more modest alternative" that does not apply here. 134 S. Ct. at 2038. Indeed, as the *amicus* brief by Indian Law Scholars describes in detail, Congress has considered—and rejected—many bills limiting tribal sovereign immunity. *See* Br. of Indian Law Scholars as *Amici Curiae* 12–14. Just like in *Bay Mills*, therefore, "rather than confronting … a legislative vacuum as to the precise issue presented," in this case the Court "act[s] … against the backdrop of a congressional choice: to retain tribal immunity (at least for now) in a case like this one." 134 S. Ct. at 2038–39. "When [this Court] inform[s] Congress that it has primary responsibility over a sphere of law, and invite[s] Congress to consider a specific issue within that sphere, [the Court] cannot deem irrelevant how Congress responds." *Id.* at 2039 n.12.

Moreover, respondents' policy arguments against tribal immunity for tort claims (Opp. 10–16)—even if they are relevant to the certiorari decision, and they

are not—are wrong.[4] Respondents contend (Opp. 10) that "[o]ff-reservation tribal activities do not implicate … federal interests" and such activities should have no immunity. This contention is refuted by *Kiowa*, which 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 a reservation." 523 U.S. at 760. Similarly, citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), respondents contend (Opp. 10–11) that, "[w]hen conducting off-reservation activity, tribes operate under the laws of the State—including state tort law." But *Mescalero Apache*'s holding was not so broad; if it were, it would be inconsistent with decisions like *Kiowa*. That decision involved the narrower question whether the Indian Reorganization Act permitted a state to impose a non-discriminatory gross receipts tax on a business off the reservation owned by a tribe. That holding has no application here.

Relying on Justice Thomas' dissent in *Bay Mills*, respondents contend (Opp. 11–12) that application of tribal immunity to "off-reservation torts would be wholly inconsistent with tribes' diminished sovereignty." This argument is little more than an *ipse dixit*. It is true that this Court has recognized that *some* aspects of tribes' inherent sovereignty is limited, but this Court has also held that such limits do not restrict immunity from lawsuits. Indeed, *Bay Mills*

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[4] Respondents also discuss this Court's early tribal immunity cases (Opp. 8–11), but offer no response to the scholars who have demonstrated that tribal immunity was as firmly established in American law as other forms of sovereign immunity. *See* Pet. 14 n.11; *see also* Br. of Indian Law Scholars as *Amici Curiae* 5–8.

expressly reaffirmed that, "[a]mong the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally employed by sovereign powers." 134 S. Ct. at 2030 (quotation marks omitted).

Equally unavailing is respondents' misleading suggestion (Opp. 12–13) that providing immunity for off-reservation torts "would vest tribes with a form of immunity enjoyed by no other sovereign." Foreign sovereigns and the United States would not have immunity in similar circumstances only because Congress abrogated that immunity. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) and (5); Federal Tort Claims Act, 28 U.S.C. § 2674. Congress could similarly abrogate tribes' immunity in these circumstances—but has declined to do so. And the principle that a state has no immunity in the courts of another state also does not help respondents here. Indeed, *Kiowa* expressly rejected the analogy to state sovereign immunity. The Court explained that, because "tribes were not at the Constitutional Convention," they were "not parties to the 'mutuality of … concession' that 'makes the States' surrender of immunity from suit by sister states plausible.'" 523 U.S. at 756 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)).

Finally, respondents contend (Opp. 14–16) that application of immunity here would be "unjust" by failing "to compensate those who have been injured." As noted above, this assertion is simply untrue, as respondents can obtain a full recovery for their injuries by pursuing their claims against Spraggins. In any event, "[t]he essence of sovereign immunity" is that the remedies available against the sovereign

"differ from 'general remedies principles' applicable to private litigants." *Sossamon v. Texas*, 563 U.S. 277, 291 n.8 (2011). Indeed, every application of sovereign immunity leaves the plaintiff unable to recover against the immune defendant; if the inability to recover were sufficient to overcome a plea of immunity, sovereign immunity would never apply. To the contrary, however, a sovereign's immunity from liability is well-established in Anglo-American law. *See Alden v. Maine*, 527 U.S. 706, 713–15 (1999); *United States v. Lee*, 106 U.S. 196, 205–07 (1882).

C. This Court's cases could not be clearer that the scope of tribal immunity is a question for *Congress*. "[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2037. It is still less the job of the states. The federal government has "plenary and exclusive" authority with respect to Indian tribes, *see United States v. Lara*, 541 U.S. 193, 200–02 (2004), and thus only the federal government can modify the scope of tribal sovereign immunity, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa*, 523 U.S. at 756; *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986). Yet that is precisely what the Alabama Supreme Court did in its opinion below—in derogation of the immunity principle articulated in many of this Court's cases and inconsistent with the decisions of many state supreme courts and federal courts of appeals.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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