

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**

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

In its amicus brief, the government agrees with petitioners that the Alabama Supreme Court’s decision below flouts this Court’s precedent¹ and conflicts with decisions of “other state and federal courts,” which “have consistently held Indian tribes immune from suit, including where plaintiffs have advanced tort claims arising from tribes’ or tribal employees’ off-reservation activities.”² U.S. Br. 7–12, 14. Because of proposed amendments to the Tribe’s tort claims statute, however, the government urges to the Court to grant, vacate, and remand for the Alabama Supreme Court to reconsider its decision. In the alternative to that course, the government recommends that the petition be denied, because (1) the decision below “is an outlier” and, accordingly, “other state and federal courts are unlikely to adopt

¹ The case for overruling this Court’s longstanding tribal immunity precedents is undercut by *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019). Overruling *Nevada v. Hall*, 440 U.S. 410 (1979), *Hyatt* held that a state retains sovereign immunity in actions filed against it in the courts of another state. 139 S. Ct. at 1492–99. The dissents in both *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760–61, 765 (1998) (Stevens, J., dissenting), and *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 815–19 (2014) (Thomas, J., dissenting), relied on *Nevada v. Hall* and the principle underlying it. So did the Alabama Supreme Court in one of the companion cases, *Rape v. Poarch Band of Creek Indians*, 250 So. 3d 547, 554–55 (Ala. 2017).

² In addition to the cases cited in the petition and reply brief, see *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694 (8th Cir. 2019). The Eighth Circuit rejected the plaintiff’s argument that immunity was “an anachronistic relic” that “should be eliminated from American law,” concluding that “it is too late in the day ... to take issue with a doctrine so well-established.” *Id.* at 697.

its reasoning or conclusion” (*id.* at 17) and (2) the decision below is interlocutory, and this Court should defer review until after final judgment and a further appeal to the Alabama Supreme Court (*id.* at 18–19).

As explained below, the Court should grant the petition. There is no reason to believe that the Alabama Supreme Court will alter its decision in light of the amendments to the tribal code; the decision below, as well as the opinions in the two companion cases decided the same day,³ betray unrelenting hostility to tribal immunity. And the unavailability of a remedy in tribal court played no role in the state court’s core holding.

Moreover, the government’s reasoning for alternatively recommending denial of the petition is faulty. Yes, the Alabama Supreme Court’s decision is “an outlier” and clearly and obviously inconsistent with this Court’s precedent and numerous decisions of other state supreme courts and federal courts of appeals. But the solution is not subjecting the Tribe—indeinitely—to a legally incorrect affront to its sovereignty and threat to its governmental resources. Instead, the solution is a reversal—perhaps even a summary reversal. Finally, the Court should not defer merits consideration until after final judgment for the same reason it hears interlocutory cases involving other immunities, such as qualified immunity: The immunity to which the Tribe is entitled is an *immunity from suit*, not just from liability, and that immunity would be largely lost if the Court awaits trial and subsequent appeals.

³ See *Harrison v. PCI Gaming Auth.*, 251 So. 3d 24 (Ala. 2017); *Rape v. Poarch Band of Creek Indians*, 250 So. 3d 547 (Ala. 2017).

I. THE TRIBE’S PROPOSED AMENDMENTS TO ITS TORTS CLAIMS ACT, WHICH BROADEN THE TRIBE’S WAIVER OF IMMUNITY, WOULD PERMIT RESPONDENTS TO SEEK A REMEDY IN TRIBAL COURT.

The government’s recommendation that the Court grant, vacate, and remand for reconsideration is based on proposed amendments to the Tribe’s laws, so we begin there.⁴

Under current law, the Poarch Band of Creek Indians Tort Claims Act, Code of Ordinances §§ 29–1–1, *et seq.*,⁵ does not apply to claims such as those alleged by respondents. However, on June 6, 2019, the Tribal Council is scheduled to consider amendments to the Tort Claims Act that broaden the scope of the Tribe’s waiver of sovereign immunity. *See* Supp. App. 1a–12a. The amendments would make two changes relevant here. First, the amendments would eliminate language restricting the immunity waiver to injuries “that occur in a Gaming Facility.” Code § 29-2-2. The Tribe would waive immunity for tort claims such as respondents’ regardless of the location of the injury.

⁴ Respondents contend, without citing any evidence, that the Tribe’s contemplated adoption of the amendments is “an unfair or manipulative litigation strategy’ designed to have an unfavorable decision vacated.” Resp. Supp. Br. 3 (quoting *Lawrence v. Chater*, 516 U.S. 163, 168 (1996)). Their accusation fails, for the simple reason that, as explained in this brief, petitioners do not want this Court to grant, vacate, and remand.

⁵ *Available at*

https://library.municode.com/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_ordinances?nodeId=TIT29_TOCLAC_CHIGEPR.

§ 29-2-4, Supp. App. 12a. The Tribe's waiver of sovereign immunity would be limited to actions in tribal court that comply with the specified claims exhaustion procedures.⁶

Second, notwithstanding the time limitations in the Tort Claims Act, the amendments would expressly permit a claimant with a pending lawsuit in federal or state court, which is later dismissed on immunity grounds, to submit a claim under the Act, and to obtain the benefits of the sovereign immunity waiver, within 90 days after the claim is dismissed in court. § 29-2-7, Supp. App. 17a–18a.

Under the proposed amendments to the Tort Claims Act, therefore, if this Court reverses the judgment and holds that petitioners have immunity, respondents could submit a claim pursuant to the Tort Claims Act and then, if the claim were not resolved, re-file this action in tribal court. In such an action, respondents would receive the benefit of the Tribe's waiver of immunity.

II. THE TRIBAL CODE AMENDMENTS DO NOT JUSTIFY DENYING REVIEW.

The government contends, in light of the proposed tribal Tort Claims Act amendments, that this case is not “an appropriate vehicle for considering whether the Court should depart from its precedent concerning

⁶ Among other things, a claim must first be filed with the Tribe's Claims Administrator, who has 120 days to evaluate and attempt to resolve the claim. § 29-2-5, Supp. App. 12a–16a. If the claim is not resolved, the claimant may then file an action in tribal court. § 29-2-6, Supp. App. 16a–17a. The Tort Claims Act also includes limitations on the types and amounts of recoverable damages. § 29-2-9, Supp. App. 18a–19a.

tribal sovereign immunity.” U.S. Br. 7. Thus, the government suggests that the Court grant the petition and vacate and remand for further consideration in light of the amendments.

But respondents never asked this Court to *depart* from precedent in the manner left open in footnote 8 of *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 799 n.8 (2014). Instead, they contended (Opp. 5) that the decision below is “*consistent with*” precedent. As the government recognizes, that argument is flat wrong. It is clear that after a vacatur and remand the Alabama Supreme Court would again erroneously deny petitioners immunity, so the course recommended by the government would be futile. Further, the reasons advanced by the government for alternatively denying the petition are makeweight and inconsistent with this Court’s practice with respect to analogous doctrines. The Court should grant the petition.

A. There Is No Need to Give the Alabama Supreme Court an Opportunity to Reconsider the Case.

Petitioners do not believe that it is appropriate to grant, vacate, and remand for the Alabama Supreme Court to reconsider its decision for a simple reason: There is little doubt that the court will reaffirm its previous decision. *See Lawrence*, 516 U.S. at 167. As explained in the petition (at 9–11 & n.9), the trio of tribal immunity decisions that court decided on the same day (*see* note 3, *supra*) demonstrate unrelenting hostility to the very concept of tribal immunity and stark unwillingness of that court to adhere to this Court’s precedent. Moreover, while the court referenced that respondents “have no way to obtain

relief” if the Tribe is immune,⁷ Pet. App. 10a, that supposed fact did not play a role in the court’s reasoning for denying immunity. *See id.* at 10a–12a. Instead, the Alabama Supreme Court “decline[d] to extend” tribal immunity “beyond the circumstances in which the Supreme Court of the United States itself has applied it,” in light of the fact that respondents “did not voluntarily choose to engage in a transaction with the tribal defendants.” *Id.* at 11a, 13a. The proposed amendments to the Tort Claims Act impact this reasoning not at all.

The government also justifies its recommendation because, in light of the proposed amendments to the Tort Claims Act, “there is a serious question” whether the Alabama state courts might “lack jurisdiction to adjudicate *part* of respondents’ suit under *Williams v. Lee*, 358 U.S. 217 (1959).” U.S. Br. 16 (emphasis added). The Tribe agrees,⁸ but the government does not suggest that *Williams v. Lee* would apply to the claim arising from the accident itself, which did not occur on the reservation. And, in any event, in the companion *Rape* case, the Alabama Supreme Court held that the Tribe did *not* have exclusive jurisdiction to “adjudicate contract and tort disputes ... that involve a non-member,” *even if they arise on Indian land*. *See Rape*, 250 So. 3d at 564–65. While the government views the state courts’ lack of jurisdiction of the negligent hiring/supervision claim as a “serious

⁷ Even before the amendments to the Tort Claims Act, this assertion was incorrect. *See* Pet. 25; Reply Br. 3.

⁸ *See Navajo Nation v. Dalley*, 896 F.3d 1196, 1204 (10th Cir. 2018) (“It is axiomatic that absent clear congressional authorization, state courts lack jurisdiction to hear cases against Native Americans arising from conduct in Indian country.”).

question,” the Alabama Supreme Court’s *Rape* holding means that the state courts will adjudicate this claim.

B. The Court Should Grant the Petition.

The government alternatively recommends that the Court deny the petition. But the reasons it advances—that the decision below is “an outlier” and is interlocutory—are specious.

1. That the Alabama Supreme Court’s decision is “an outlier” does not justify denial. An outlier decision that flouts this Court’s precedents satisfies Rule 10(c) by “decid[ing] an important federal question in a way that conflicts with relevant decisions of this Court.” Sup. Ct. R. 10(c). Indeed, the Court has exercised its summary reversal power to correct decisions “flatly contrary to this Court’s controlling precedent.” *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). Particularly in cases involving immunity questions, this Court often intervenes in such circumstances. For example, this Court regularly summarily reverses denials of qualified immunity in cases that are fact-bound outliers. *See, e.g., City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam); *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). “Because of the importance of qualified immunity ‘to society as a whole,’ the Court often corrects lower courts when they wrongly subject individual officers to liability.”

San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (internal citation omitted). There is no reason for not doing so in the context of the analogous doctrine of tribal sovereign immunity; indeed, there is a *greater* justification, since the decision involves not a solitary governmental officer but a “separate sovereign[] pre-existing the Constitution.” *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Perhaps for this reason, this Court has summarily reversed in sovereign immunity cases. *See, e.g., Fla. Dept. of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass’n*, 450 U.S. 147 (1981) (Eleventh Amendment).

And denying relief to the Tribe because the Alabama Supreme Court’s decision was so wrong that it is “an outlier” will have substantial—even tragic—adverse consequences for the Tribe. The decision eviscerates a “core aspect[] of sovereignty” that the Tribe possesses. *Id.* It also could threaten the financial well-being of the Tribe over the long run. *See* Pet. 22–23; *see also Bay Mills*, 572 U.S. at 809–14 (Sotomayor, J., dissenting). There is little doubt that, if a lower-court decision did the same to a state, this Court would intervene to correct “an outlier” decision. *See Fla. Dept. of Health & Rehabilitative Servs, supra.* This Court should accord the same protection to the Tribe, a “domestic dependent nation[] that exercise[s] inherent sovereign authority.” *Bay Mills*, 572 U.S. at 788 (internal quotation marks and citations omitted).

2. The government also contends that review is not warranted because the case is interlocutory, as the Alabama Supreme Court reversed the final judgment entered by the trial court. The government, however,

ignores the fact that this petition involves a question of *immunity*.

In the analogous contexts of qualified immunity and Eleventh Amendment immunity, this Court has explained that the applicable immunity is immunity from *suit*, not immunity from liability. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143–44 (1993) (Eleventh Amendment); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity). As this Court explained for both contexts, “absent immediate appeal, the central benefits” of immunity—“avoiding the costs and general consequences of ... the risks of discovery and trial—would be forfeited.” *Puerto Rico Aqueduct*, 506 U.S. at 143–44. When “[t]he entitlement is an immunity from suit rather than a mere defense to liability,” this Court explained, “it is effectively lost if a case is erroneously permitted to go to trial.” *Id.*

This Court has described tribal immunity as “immunity from suit.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). Likewise, the federal courts of appeals have unanimously applied this principle to tribal sovereign immunity. *See Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1157 (10th Cir. 2014); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1089 (9th Cir. 2007); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004); *Seminole Tribe of Fla. v. Fla.*, 11 F.3d 1016, 1021 (11th Cir. 1994), *aff’d*, 517 U.S. 44 (1996).

The government’s suggestion that review await a final judgment, therefore, would “effectively” deprive

the Tribe of the immunity itself.⁹ *Puerto Rico Aqueduct*, 506 U.S. at 143–44. That the decision below was interlocutory hardly counsels against review.

* * *

The government agrees that the Alabama Supreme Court flouted decades of this Court’s tribal immunity precedents, and did so in conflict with numerous decisions by other state supreme courts and by federal courts of appeals. Even a cursory review of the decision below, particularly in conjunction with the companion opinions in *Harrison* and *Rape*, makes perfectly clear that the Alabama Supreme Court simply disagrees with this Court’s precedent and does not want to follow it. Its decision is not only an affront to this Court, but also to Congress, to whom the Constitution assigns the “job ... to determine whether or how to limit tribal immunity.” *Bay Mills*, 572 U.S. at 800. In such circumstances, the fact that the decision below is “an outlier” does not justify looking the other way, as the government suggests; rather, it demands this Court’s intervention.

⁹ For the same reasons, this Court has jurisdiction under the fourth category explained in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482–83 (1975). Neither the government nor respondents suggest otherwise.

CONCLUSION

The Court should grant the petition for certiorari,
or should summarily reverse.

Respectfully submitted.

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APPENDIX

APPENDIX — ORDINANCE TO AMEND TITLE 29

**ORDINANCE TO AMEND TITLE 29
(TORT CLAIMS ACT) AND SECTION 5-1-1 OF THE
TRIBAL CODE AND TO REPEAL SECTIONS 3-1-8,
3-5-5, AND 8-1-15 OF THE TRIBAL CODE**

WHEREAS, the Poarch Band of Creek Indians is a federally recognized Tribe (the “Tribe”) organized pursuant to 25 CFR, Part 83;

WHEREAS, the Constitution of the Poarch Band of Creek Indians authorizes the Tribal Council to enact, amend or repeal an ordinance;

WHEREAS, on July 15, 2007, the Tribal Council enacted Title 29 (Tort Claims Act) (see TCO 07-010) and was later amended by TCO 09-006 on June 22, 2009 and TCO 12-003 on February 2, 2012;

WHEREAS, Title 5 (Limitation of Actions) was enacted by Tribal Council motion on October 25, 1986, was ratified by TCO 07-005, and includes Section 5-1-1, which establishes a one-year statute of limitations for civil matters;

WHEREAS, Title 3 (Judicial) includes Sections 3-1-8 and 3-5-5, which provide immunity to the judges, Tribal Court Clerk, and Tribal Court Administrator;

WHEREAS, Title 8 (Criminal) includes Section 8-1-15, which provides immunity to the prosecutor;

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WHEREAS, the Tribal Council desires to substantially revise the Tribal Tort Claims Act;

WHEREAS, revisions to the Tort Claims Act include expanding the limited waiver of sovereign immunity granted therein for torts arising from or occurring at all Tribal entities, modifying the claims process, allowing current claims pending in state court to be refilled in Tribal Court, and increasing the limits of awards;

WHEREAS, to provide adequate time for the filing and processing of Claims, the Tribal Court desires to revise the statute of limitations for torts filed under Title 29 to two (2) years from the date of injury and must therefore amend Section 5-1-1;

WHEREAS, Title 29 includes a section titled, “Actions Immune from Liability”, which currently includes Emergency Management Workers, workers reporting abuse, and volunteers;

WHEREAS, actions of judges, prosecutors, the Tribal Court Clerk, and the Tribal Court Administrator were previously immune, but were not part of the section known as “Actions Immune from Liability”;

WHEREAS, the Tribal Council desires to consolidate all of those actions into the same section; and

WHEREAS, in accordance with § 2-3-1(b) of Title 2 (Legislative), this ordinance was introduced by Tribal

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Council motion at the regularly scheduled official meeting on May 16, 2019.

NOW THEREFORE BE IT ORDAINED that the Tribal Council hereby amends and replaces Title 29 in its entirety with the version of Title 29 attached hereto as Exhibit “A”;

BE IT FURTHER ORDAINED that the Tribal Council hereby amends Section 5-1-1 to read as follows:

Sec. 5-1-1 – Civil

- (a) Except as set forth in subsection (b), all civil actions must be commenced within one year from the date of act or omission which is the subject of the complaint or petition, except that if the act or omission is not of such character as to immediately manifest itself then one year from that date that a reasonably prudent person would have discovered said act or omission. Any civil action not brought within the time limitations set forth herein shall be forever barred in the Tribal Court.
- (b) All civil actions commenced under Title 29 (Tort Claims Act) must be commenced within two years from the date of the act or omission which is the subject of the complaint. Any civil action not brought within the time limitations set forth herein shall be forever barred in Tribal Court.

BE IT FURTHER ORDAINED that the Tribal Council hereby repeals Sections 3-1-8, 3-5-5, and 8-1-15 and declares that rather than renumbering the subsequent

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sections that the following be added after the Section number and title:

[Repealed and Replaced with Section 29-3-3]

APPROVAL

I, the Chair of the Poarch Band of Creek Indians, hereby affix my signature to this ordinance authorizing it to become official this 6th day of June, 2019.

Stephanie A. Bryan, Tribal Chair
Poarch Band of Creek Indians

5a

Appendix

EXHIBIT “A”

TITLE 29 TORT CLAIMS ACT

CHAPTER I GENERAL PROVISIONS

Section 29-1-1 Title

This Title of the Tribal Code shall be known as the Poarch Band of Creek Indians Tort Claims Act.

Section 29-1-2 Authority

This Title is adopted pursuant to the sovereign authority of the Poarch Band of Creek Indians and Article IV, Section 4(k), (m), (n) of the Constitution of the Poarch Band of Creek Indians.

Section 29-1-3 Sovereign Immunity

The Poarch Band of Creek Indians is a sovereign Tribal nation that is immune from suit except to the extent that it explicitly waives such immunity. The Tribe’s sovereign immunity extends and applies with full force to the Tribal Government, all Tribal Entities, and all officials, employees, agents, and volunteers thereof to the fullest extent permissible under Tribal and federal law and remains in full force and effect except to the extent that it is expressly waived by this Act.

Appendix

Section 29-1-4 *Definitions*

Unless otherwise required by the context, the following words and phrases shall be defined as follows:

- (a) “Act” means this Poarch Band of Creek Indians Tort Claims Act.
- (b) “Actual Damages” means the ascertainable loss of money or tangible personal property sustained as a result of an injury covered under this Act.
- (c) “Award” means money damages which the Tribal Court determines are payable to compensate for a Compensable Injury recognized under this Act.
- (d) “Claim” means a written document, together with required supporting information as well as additional supporting information a Claimant may wish to provide, that satisfies the procedural and substantive requirements of this Act, alleges a Compensable Injury, and is timely filed.
- (e) “Claimant” means an individual allegedly suffering a Compensable Injury subject to this Act, or if the Claim is one for death by negligent act or omission, either the personal representative, the surviving spouse, or next of kin of the deceased.
- (f) “Claims Administrator” means the person or agency designated by the Poarch Band of Creek Indians to review, investigate, and, if appropriate, attempt to settle Claims filed under this Act.

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- (g) “Compensable Injury” means:
- (1) Death, physical harm to a person, or damage to or loss of tangible personal property;
 - (2) Resulting from an alleged act or omission that, if proven, would constitute a tort under Tribal law or, if it were applicable, federal or Alabama law;
 - (3) The proximate cause of which was the negligent or intentional act or omission of a Tribal official, officer, employee, or agent acting in the course and scope of his or her employment with the Tribe, the Tribal Government, or a Tribal Entity and within the scope of his or her authority; and
 - (4) Is not an excluded claim under this Act, beyond the limitations on awards as set forth in this Act, or otherwise not in compliance with terms of this Act.
- (h) “Emergency Management Worker” means any full or part-time paid, volunteer, or auxiliary employee of the Tribe, the State of Alabama, or other states, territories, possessions or the District of Columbia, or of the United States Government, or of any agency or organization performing emergency management services on any Tribally-owned lands subject to the order or control of, or pursuant to a request of, the Tribal Council, Tribal Government, or Tribal Entity.
- (i) “Tribal Council” means the Poarch Band of Creek Indians Tribal Council, the Poarch Band of Creek

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Indians' governing body which shares all aspects of the Poarch Band of Creek Indians' sovereign immunity.

- (j) "Tribal Entity" means all authorities, commissions, enterprises, and other entities established by the Tribal Council.
- (k) "Tribal Government" means the Tribal Council, the office of the Tribal Chairman, and all offices and departments that report directly to the Tribal Chairman.
- (i) "Tribe" or "Tribal" means the Poarch Band of Creek Indians, a federally recognized sovereign Indian Tribal government which possesses sovereign immunity from unconsented legal actions absent an express, unequivocal waiver of sovereign immunity.

Section 29-1-5 Prior Inconsistent Law

Upon the effective date of this Act, any prior, inconsistent resolutions, policies, ordinances, and/or procedures of the Tribal Government and Tribal Entities are hereby superseded and/or amended to comply with this Tribal Code.

Section 29-1-6 Severability

If any provision of this Act shall be found to be invalid by any administrative agency, or similar body, or Court of competent jurisdiction or found to be in violation of any

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existing loan covenants for the Poarch Band of Creek Indians or one of its Tribal Entities as of the effective date of this Act, such findings shall not affect the remaining provisions of this Act, and all other provisions herein shall remain in full force and effect.

Section 29-1-7 Effective Date

This Act shall be deemed to have taken effect on June 22, 2009; however, Chapter 3, Actions Immune From Liability, §§ 29-3-1 to 29-3-3 shall be deemed effective as of July 15, 2007. Any future amendments to this Act shall become effective on the date such amendments are approved by the Tribal Council. Any provision of this Act referring to Limitations on Awards shall become prospectively effective on the date that it is approved by the Tribal Council and shall not apply to any claims or Tribal Court lawsuits that are pending as of that date.

CHAPTER II - TORT CLAIMS*Section 29-2-1 Purpose*

The purpose of this Act is to provide a limited waiver of the Tribe's sovereign immunity that allows individuals who suffer Compensable Injuries to obtain redress for those injuries through the administrative process set forth herein or in the Poarch Band of Creek Indians Tribal Court. The process and remedies provided in this Act constitute the sole and exclusive means of redress for Compensable Injuries.

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Section 29-2-2 Construction

This Act, and particularly the limited waiver of sovereign immunity set forth herein, shall be strictly and narrowly construed.

Section 29-2-3 Claims Beyond the Scope of the Act

The limited waiver of sovereign immunity set forth in this Act does not apply to actions alleging or based on injuries or disputes beyond the scope provided for under this Act. Injuries and disputes outside the scope of the Act, and therefore outside the scope of the limited waiver of sovereign immunity provided here, include, by way of example and not limitation:

- (a) Disputes arising from actual or prospective contractual agreements regardless of the parties thereto;
- (b) Claims for punitive or exemplary damages, attorneys or expert witness fees, or damages that are not available or compensable under Alabama tort law;
- (c) Any claim based on an alleged breach of fiduciary duty;
- (d) Any claim based on a theory of strict liability;
- (e) Any injury proximately caused by a negligent or intentional act or omission that was committed outside of the course and scope of employment and/or authority of a Tribal Official, officer, employee, or agent;

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- (f) Any injury allegedly caused by the issuance, denial, suspension, or revocation of any Tribal gaming license or any other license, permit, certificate, approval, or authorization;
- (g) Any purported claim by any third party, including without limitation any injury allegedly arising from a claim for a loss of consortium or any other third party claim, or equitable indemnity or contribution arising from third party litigation:
- (h) Any purported claim arising out of or related to gaming transactions or promotions, such as, but not limited to, the operation or play of gaming machines, claims for winnings, claims for machine malfunction, claims for promotions or prizes, claims for points;
- (i) Any claims that are based on action or inaction that could be filed in federal court under the Federal Tort Claims Act;
- (j) Any claims based on alleged legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature, including but not limited to decisions to adopt or not adopt a law and decisions relating to Tribal membership; or
- (k) Any claim based on injuries that are covered by workmen's compensation.

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Section 29-2-4 *Limited Waiver of Sovereign Immunity*

- (a) The Tribal Council hereby provides a limited waiver of the Tribe's sovereign immunity from suit in the Poarch Band of Creek Indians Tribal Court for the sole purpose of resolving claims for potentially Compensable Injuries under this Act, subject to the provisions for limitations on awards and the other provisions of this Act.
- (b) This Act does not constitute or provide a waiver of the Tribe's sovereign immunity from any suit in any state or federal Court, or any other state or federal forum, for any purpose. Neither the Tribal Council nor any official, officer, employee or agent thereof shall be authorized by this Act to waive the Poarch Band of Creek Indians' sovereign immunity in those forums.
- (c) No interest in land, whether tangible or intangible, legal or beneficial, vested or contingent, or any occupancy or other rights or entitlements therein or related thereto, shall be subject to attachment, execution, lien, judgments or other enforcements or satisfaction of any kind, in whole or in part, with respect to any Award under this Act.

Section 29-2-5 *Processing of Claims*

- (a) *Filing of Claim*

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A Claim under this Act must be in writing, and, except as set forth in § 29-2-7, must be filed within 180 days of the date of an alleged Compensable Injury. A Claim is deemed filed upon its actual physical delivery to the office of the Tribe's Attorney General, located at 5811 Jack Springs Road, Atmore, AL 36502, by certified mail or similar form of physical delivery providing written confirmation of receipt. In the absence of written confirmation of delivery, the date of receipt recorded by the Tribe's Attorney General shall be presumed correct. The Claim must present all available material facts that relate to the alleged incident or injury. The Attorney General shall submit the Claim to the Claims Administrator.

(b) *Content of Claim*

The Claim should include the following:

- (1) The Claimant's name, Social Security Number, driver's license number and state of issuance, mailing address, email address, fax number and telephone number, and, as to the Claimant's attorney, if any, the mailing address, email address, telephone number, and fax number;
- (2) A complete statement of the factual basis of the alleged incident or occurrence that gave rise to the Claim, including the date, time, place, and circumstances of the act or omission;

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- (3) The identity or description of all persons involved in the incident or occurrence that gave rise to the Claim, including the name of any Tribal employee involved, if known;
- (4) The identity or description of any witness(es) to the incident or occurrence that gave rise to the Claim, including the address, telephone number, email address, and fax number of any witness[es], if known;
- (5) A complete statement of the nature of the alleged damage or injury suffered, including complete copies of any supporting documentation (including medical records and other potentially relevant material), and a statement of the specific amount of monetary damages requested;
- (6) A complete statement of Claimant's potentially relevant medical history, including medical records, pre-existing conditions, prior legal claims and similar matters;
- (7) The signature of the Claimant or his or her representative under penalty of perjury under the laws of Alabama and the United States, attesting to the truth of all statements made therein; and
- (8) Any additional evidence the Claimant believes relevant to the Claim.

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The Claims Administrator may request additional information at any time including, without limitation, medical bills, invoices, reports, test results, checks, or other materials that the Claims Administrator deems necessary or helpful to evaluate or settle the Claim.

The failure to timely provide all information requested by the Claims Administrator or otherwise comply with this Act's provisions may constitute grounds for denial of the Claim and shall presumptively bar the admission of such information as evidence in any Tribal Court proceeding filed pursuant to this Act.

(c) *Review, Investigation and Settlement of Claims*

- (1) Within 90 days of the filing of a Claim, the Claims Administrator shall evaluate the Claim to determine its validity and merit and the amount of legitimate damages, if any, in accordance with this Act's terms. The Claims Administrator may investigate the Claim, may request additional information from the Claimant, and, at his/her sole discretion, may extend the time to complete his/her evaluation of the Claim an additional 30 additional days.
- (2) If the Claims Administrator finds the Claim to have merit, it shall attempt in good faith to resolve the Claim subject to the terms of this Act.
- (3) As a precondition to resolving any Claim, Claimant shall execute a full settlement and

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release of all Claims known and unknown in a form approved by the Poarch Band of Creek Indians, provide a completed and executed Internal Revenue Service form W-9, and consent to exclusive Tribal jurisdiction for resolving any disputes that may arise under or related to such settlement and release.

(4) Evidence of or pertaining to any determination of merit by the Claims Administrator or any offer of compromise or other attempt at settlement shall be inadmissible in any court, judicial, quasi-judicial, or administrative proceeding related to or arising out of the allegedly Compensable Injury set forth in the Claim.

(d) Nothing in this Act shall prohibit a Claimant from filing a claim with or suit against any non-Tribal party that is responsible, in whole or in part, for the alleged Compensable Injury.

Section 29-2-6 Action in Tribal Court

(a) A Claimant whose Claim is denied or is not resolved by the Claims Administrator within 120 days after the filing of the Claim may file a complaint in Tribal Court. Any such complaint is subject to the same limitations and exclusions as to types of actions permitted, scope of Compensable Injuries, appropriate defendants, and available damages/remedies that this Act applies to Claims.

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- (b) The limited waiver of sovereign immunity set forth in this Act shall not apply in any lawsuit brought in Tribal Court unless the injury alleged in that lawsuit has first been filed and evaluated as a Claim in accordance with the provisions of this Act.
- (c) In order to be considered timely filed, a Tribal Court action filed under this section must be filed within 2 years of the date of the alleged Compensable Injury.
- (d) If any lawsuit filed in Tribal Court pursuant to this section names as a defendant one or more individual officials, officers, employees, agents, or volunteers of the Tribe, the Tribal Government, or any other Tribal Entity in their official capacity, the Tribe, Tribal Government, or Tribal Entity exercising direct supervisory control over such officials, officers, employees, agents, or volunteers shall be substituted automatically as the defendant in the lawsuit.

Section 29-2-7 Refiling of Pending Suits as Claims under this Act

Notwithstanding any other provision of law, any Claimant with a lawsuit alleging a Compensable Injury that is pending in any state or federal court of the United States as of June 6, 2019 (a “Pending Suit”) that is thereafter dismissed on the basis of the Tribe’s sovereign immunity may seek compensation for that Compensable Injury by filing a Claim otherwise in compliance with this Act within 90 days of the date of the final order dismissing the Pending Suit in state or federal court. This provision

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shall not apply to any suit filed in any state or federal court of the United States on or after June 6, 2019; any such suit, and the allegedly Compensable Injury giving rise thereto, shall be subject to the procedures and limitations applicable to other Claims under this Act.

Section 29-2-8 Principles of Law Applicable to Determination of Claims

Any Claim or Tribal Court action brought under this Act shall be determined in accordance with applicable law, including Tribal and federal law. Federal Indian law canons of construction shall be given full force and effect. No rule of law imposing absolute or strict liability shall be applied in any Claim or Tribal Court action under this Act. While not subject to state jurisdiction, Claims under this Act may be determined with reference to principles of law applicable to similar actions brought under Alabama state laws to the extent that those principles are consistent with Tribal law as established by the Constitution, ordinances, resolutions, customs, traditions, or other sources of Tribal law.

Section 29-2-9 Limitations on Awards

In Claims made under this Act and in Tribal Court actions following the Claims Administrator's denial of or failure to timely resolve a Claim:

- (a) Regardless of the number of Tribal Entities involved, no Claim may be made, and no award may be granted, in excess of \$250,000 per Claimant and \$750,000 per incident;

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- (b) No punitive or exemplary damages or attorney's fees may be awarded;
- (c) No rule of law imposing absolute or strict liability shall be applied;
- (d) No award for pain and suffering or mental anguish shall generally be considered or granted. In exceptional cases, an award for pain and suffering may be considered as a discretionary matter, but in no case shall any such award exceed 100% of the Actual Damages;
- (e) No award for costs or expert witnesses shall be considered or granted; and
- (f) No award for loss of consortium, or other third party claims, shall be considered or granted.

Section 29-2-10 Report to the Tribal Council

The Claims Administrator shall by the 15th day following the end of each quarter submit a written report to the Tribal Council detailing:

- (a) A brief synopsis of the Claims filed in the previous quarter; and
- (b) The status of any other Claims filed in previous quarters.

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CHAPTER III - ACTIONS IMMUNE FROM LIABILITY

Section 29-3-1 Tort Claims Resulting from Emergency Management Services and Activities

- (a) All activities relating to emergency management are hereby declared to be governmental functions.
- (b) Notwithstanding anything to the contrary in this Act, no Claim or lawsuit may be brought pursuant to this Act against the Poarch Band of Creek Indians, the Tribal Government, any Tribal Entity, any Emergency Management Worker, or any other individual, partnership, association, or corporation as a result of actions taken in connection with providing or reasonably attempting to provide emergency management services or actions taken in compliance with or a reasonable attempt to comply with any order, rule, or regulation of the Poarch Band of Creek Indians, the State of Alabama, or the United States Government pertaining to the provision of emergency management services.
- (c) Any requirement for a license to practice any professional, mechanical, or other skill shall not apply to any authorized Emergency Management Worker who shall, in the course of performing his or her duties as such, practice such professional, mechanical, or other skill during an emergency management activity.

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- (d) Any Emergency Management Worker performing emergency management services on any Tribally-owned lands pursuant to agreements, compacts, or arrangements for mutual aid and assistance to which the Poarch Band of Creek Indians, Tribal Government, or any Tribal Entity is a party shall possess the same powers, duties, immunities, and privileges he or she would ordinarily possess if performing his or her duties in the state, province, or political subdivision thereof in which normally employed or rendering services.

Section 29-3-2 Tort Claims Resulting from Abuse Reports

Notwithstanding anything to the contrary in this Act, no claim or lawsuit may be brought pursuant to this Act against any person, firm, corporation or official, including members of a multidisciplinary child protection team, quality assurance team, or other authorized case review team or panel, by whatever designation, based on their participation in:

- (a) the making of a good faith report in an investigation or case review of potential child abuse or endangerment pursuant to Tribal, state, or federal law;
- (b) the removal of a child pursuant to Tribal, state, or federal law; or
- (c) a judicial proceeding resulting from any of the actions described in this Section.

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*Section 29-3-3 Tort Claims Based on Participation in
Judicial Process*

Notwithstanding anything to the contrary in this Act, no claim or lawsuit may be brought pursuant to this Act against any Tribal Court judge, Tribal Court prosecutor, Tribal Court clerk, or Tribal Court administrator based on or in connection with his or her good faith participation or involvement in any proceeding in the Poarch Band of Creek Indians Tribal Court.