No. ___

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, Applicants,

v.

CASEY MARIE WILKES AND ALEXANDER JACK RUSSELL, Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

To the Honorable Clarence Thomas, Associate Justice and Circuit Justice for the Eleventh Circuit:

Applicants Poarch Band of Creek Indians and PCI Gaming Authority d/b/a Wind Creek Casino and Hotel Wetumpka respectfully request that the time to file a petition for a writ of certiorari in this case be extended for 30 days, to and including February 1, 2018. The Alabama Supreme Court issued its opinion on September 29, 2017 (App. A, *infra*), and then issued a modified opinion, on rehearing *ex mero motu*, on October 3, 2017 (App. B, *infra*). Applicants filed no application for rehearing. Without an extension of time, the petition would be due on January 2, 2018. Applicants file this application more than 10 days before that date. S. Ct. R. 13.5. This Court will have jurisdiction pursuant to 28 U.S.C. § 1257(a).

Background

PCI Gaming Authority d/b/a Wind Creek Casino and Hotel Wetumpka ("Wind Creek") operates a hotel and casino in Wetumpka, Alabama. The Poarch

Band of Creek Indians is a federally recognized Indian tribe that owns Wind Creek. App B at 2 and n.2.

During the time at issue in this case, Wind Creek employed Barbie Spraggins. On January 1, 2015, after arriving for work, Spraggins was driving a Wind Creek-owned vehicle when she was involved in a head-on collision with a car driven by respondent Casey Marie Wilkes. Respondent Alexander Jack Russell was a passenger in Wilkes' car. *Id.* at 3. Respondents subsequently sued Applicants and Spraggins in the Circuit Court of Elmore County, Alabama, alleging negligence and wantonness claims against Applicants and Spraggins based on the latter's operation of the truck, and negligence and wantonness claims against Applicants based on their hiring, retention, and supervision of Spraggins. *Id.* at 4.

After discovery, Applicants moved for summary judgment, arguing (among other things) that "the Poarch Band of Creek Indians was a federally recognized tribe and that they were accordingly protected by the doctrine of tribal sovereign immunity" under federal law. *Id.* at 4-5; *see also* Record 346 (Tribal Defendants' Brief in Support of Motion for Summary Judgment at 1 (Mar. 31, 2016)) (seeking summary judgment based on "the sovereign immunity of the Poarch Band of Creek Indians which extends to its commercial entities and prevents this Court from obtaining subject matter jurisdiction"); *see generally Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030–32 (2014). The trial court granted Applicants' motion, concluding that "it lacks 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," citing *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015), and *Freemanville Water Sys., Inc. v. Poarch Bank of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009). Record 795 (Summary Judgment Order at 2 (June 7, 2015)); *see also* App. B, at 5.

The trial court certified its judgment as final, and respondents appealed to the Alabama Supreme Court. App. B, at 5. The Alabama Supreme Court reversed. Relying principally on Justice Stevens' dissent in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and Justice Thomas' dissent in *Bay Mills*, the court reasoned as follows:

> In 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, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; accordingly, we hold that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by Wilkes and Russell.

App. B, at 10–11. The court acknowledged that its "holding is contrary to the holdings of several of the United States Courts of Appeals that have considered this issue," and that the question was a matter of federal, not state, law. *Id.* at 14.

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari should be extended for 30 days for the following reasons:

1. Since the decision below was issued, Applicants have been considering whether to seek this Court's review, and only recently decided to petition for certiorari. Moreover, Applicants only recently retained the undersigned counsel of

record to assist in this case. Additional time is necessary to study the record below and the legal issues in the case and to prepare a petition. Moreover, the petition is currently due on January 2, 2018, immediately after the Christmas and New Year holidays. Many of the attorneys representing Applicants in this case—including the newly retained counsel of record—have previously scheduled family obligations over the holiday season.

2. No prejudice would arise from the requested extension. If the petition were granted, the Court would hear oral argument in this case in the October 2018 Term regardless of whether an extension is allowed.

3. There is a reasonable prospect that this Court will grant the petition. The Alabama Supreme Court's decision—denying tribal sovereign immunity in a tort case involving the tribe's commercial activity—is contrary to this Court's "settled" tribal sovereign immunity jurisprudence. *Bay Mills*, 134 S. Ct. at 2030–31. As the Court has explained, "[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." *Kiowa Tribe*, 523 U.S. at 754. The decision below flouted this principle, finding no sovereign immunity even though Congress has not authorized this action and Applicants have not waived their immunity. Moreover, as noted, the Alabama Supreme Court conceded that its decision created a split, acknowledging that it was "contrary to the holdings of several of the United Sates Courts of Appeals that have considered this issue." App. B, at 14; *see*, *e.g.*, *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 563 n.8 (9th Cir. 2016); *Furry v. Miccosukee Tribe of Indians of Fla.*,

685 F.3d 1224 (11th Cir. 2012). It is also contrary to decisions by state supreme courts. *See*, *e.g.*, *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 367–72 (Okla. 2013); *Beecher v. Mohegan Tribe of Indians of Conn.*, 918 A.2d 880 (Conn. 2007). Finally, tribal sovereign immunity is an important, recurring legal doctrine that this Court previously addressed in several cases, *see Bay Mills*, *supra*; *Kiowa Tribe*, *supra*, and the Alabama Supreme Court decision below, which contradicts this Court's precedent and creates a split in authority, warrants this Court's review.

Conclusion

For these reasons, the time to file a petition for a writ of certiorari should be extended 30 days to and including February 1, 2018.

Respectfully submitted,

/s/ *Adam H. Charnes*

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December 8, 2017