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Overlooking Canon: How the Alabama Supreme Court Used a Footnote to Disregard Tribal Sovereign Immunity in *Wilkes v. PCI Gaming Authority*

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OVERLOOKING CANON: HOW THE ALABAMA SUPREME COURT USED A FOOTNOTE TO DISREGARD TRIBAL SOVEREIGN IMMUNITY IN *WILKES v. PCI GAMING AUTHORITY*

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I. Introduction

The Poarch Band of Creek Indians—unsuccessfully—petitioned for a writ of certiorari to the Supreme Court following an Alabama Supreme Court decision against it. In *Wilkes v. PCI Gaming Authority*,[1] a decision proving disastrous for tribes across the country, the Alabama high court rejected the time-honored doctrine of tribal sovereign immunity. The court's decision against the Poarch Band of Creek Indians defies Supreme Court precedent and congressional authority, both of which have, for well over a century, reinforced a tribe's right to sovereign immunity in the absence of waiver. Further, the Alabama Supreme Court's decision is a clear intrusion on federal law, an area in which state courts do not have the power to rule. Supreme Court precedent is clear; it is of upmost importance to examine it and consider the implications flowing from the Alabama court's decision, not just for the Poarch Band of Creek Indians, but for all tribes.

II. Law Before the Case

In *Wilkes*, the Supreme Court of Alabama, like many courts throughout history, was asked to address the common law doctrine of tribal sovereign immunity. However, unlike previous courts, the Alabama Supreme Court reached a shocking conclusion by consciously rejecting precedent—holding that a tribe *could* be sued, despite the absence of congressional or tribal waiver. While the general premise behind the doctrine of sovereign immunity is simple—one cannot sue a sovereign government—the doctrine's origin in common law renders its application significantly more nuanced. Rather than defining the contours and scope of tribal immunity with one specific piece of legislation, courts should defer to years of precedent when addressing a tribe's immunity from suit. In order to

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1. No. 17-1175, 2017 WL 4385738 (Ala. Sept. 29, 2017). The case is known on appeal as *Poarch Band of Creek Indians v. Wilkes*. *See* 139 S. Ct. 305 (2018) (mem.).

understand the scope of the issue, it is paramount to address how the Supreme Court has historically discerned the limits of tribal immunity. Although the Court's relatively recent decisions in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*[2] and *Michigan v. Bay Mills Indian Community*[3] are most commonly cited, the concept of tribal sovereign immunity made its first appearance in Supreme Court precedent nearly two centuries ago. The first three cases, known as the Marshall Trilogy, began with *Johnson v. M'Intosh*[4] in 1823, followed by *Cherokee Nation v. Georgia*[5] in 1831, and *Worcester v. Georgia*[6] a year later. Lastly, the 1919 landmark opinion *Turner v. United States*[7] established tribal sovereign immunity as we know it today.

The Supreme Court's ruling in *Johnson v. M'Intosh* was the first time the Court established federal supremacy over tribes. *Johnson*, on its face, dealt with a property dispute involving land granted by the Illinois and Piankeshaw Indians.[8] However, the primary takeaway is, in deciding that tribal lands could only be transferred to the federal government, the Court established that federal law governed the Tribe.[9]

In *Cherokee Nation v. Georgia*, the Supreme Court characterized Indian tribes as "domestic dependent nations" that are not subject to state regulation but are rather "completely under the sovereignty and dominion of the United States."[10] This 1831 case thus equated tribes to a level of statehood. One year later, the Court reinforced the idea that tribes should be afforded status equal to that of states by holding, in *Worcester v. Georgia,* that "Indian territory [is] completely separated from that of the states," and that any interaction with tribes is to be carried out solely by the federal government.[11] The Court described tribes as distinct communities, holding their own territory and boundaries "in which the laws of [the state] can have no force."[12] States had no power over tribes or tribal lands because, as stated above, this power was explicitly reserved for the federal

2. 523 U.S. 751 (1998).
3. 572 U.S. 782 (2014).
4. 21 U.S. (8 Wheat.) 543 (1823).
5. 30 U.S. (5 Pet.) 1 (1831).
6. 31 U.S. (6 Pet.) 515 (1832).
7. 248 U.S. 354 (1919).
8. *Johnson*, 21 U.S. (8 Wheat.) at 572.
9. *Id.* at 587.
10. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.
11. *Worcester*, 31 U.S. (6 Pet.) at 557.
12. *Id.* at 520.

government.[13] These two landmark cases illustrate early conversations regarding the federal government's sole authority to govern tribal affairs. In essence, these cases laid the foundation for the Supreme Court to establish the borders between state rights and tribal sovereignty, carried out through "the clear doctrine of federal preeminence and Congressional authority over Indian affairs."[14]

While *Cherokee Nation v. Georgia* and *Worcester v. Georgia* are responsible for promulgating the "supremacy of the federal government [which] has been a staple of Indian affairs,"[15] the notion of tribal sovereign immunity was brought to fruition in *Turner v. United States*. In *Turner*, individual members of the Muscogee (Creek) Nation were sued for tearing down a fence built on Indian lands by a ranching company that had Tribal authorization to build it.[16] After the company failed to secure compensation from the Tribe, the federal government briefly seized control over the Tribe.[17] With express authorization from Congress, the ranching company sued both the Tribe and "the United States as trustee of [the Tribe's] funds."[18] The Supreme Court held, apart from receiving authorization from Congress or express tribal consent, a Tribe cannot be sued in any court.[19] Thus, though the ranching company *did receive* authorization from Congress to sue in this scenario, the essential takeaway is—for the first time—the Court makes clear that absent congressional authorization or tribal waiver, tribes retain their right to sovereign immunity.

The *Turner* Court reasoned that tribes exercise sovereign powers because they have fully functioning governments, laws, and systems of checks and balances with executive, legislative, and judicial branches.[20] One stone left unturned in *Turner*, which was later addressed in *Kiowa Tribe of Oklahoma*

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13. *Id.*

14. Brief for Amicus Curiae United South & Eastern Tribes, Inc., in Support of Petitioners at 17, Poarch Band of Creek Indians v. Wilkes, No. 17-1175 (U.S. Mar. 26, 2018), https://sct.narf.org/documents/poarch_v_wilkes/cert_amicus_united_south_and_eastern_tribes.pdf.

15. Brief of Indian Law Scholars as Amici Curiae in Support of Petitioners at 16, Poarch Band of Creek Indians v. Wilkes, No. 17-1175 (U.S. Mar. 26, 2018), https://sct.narf.org/documents/poarch_v_wilkes/cert_amici_scholars.pdf [hereinafter Brief of Indian Law Scholars].

16. Turner v. United States, 248 U.S. 354, 357 (1919).

17. Brief of Indian Law Scholars, *supra* note 15, at 5.

18. *Turner*, 248 U.S. at 357; *see also* Act of May 29, 1908, ch. 216, § 26, 35 Stat. 444, 457.

19. *Turner*, 248 U.S. at 358.

20. *Id.* at 355.

v. Manufacturing Technologies, Inc., was the applicability of tribal sovereign immunity to tort cases.[21] Tort cases are distinct because of the possibility that an individual, without willingly entering into a relationship with a tribe, could develop a tort claim against a tribe. Because tribes hold sovereign immunity, the individual is left without a remedy under these circumstances. However, the *Turner* Court could not have reached its conclusion without explicitly recognizing tribal sovereign immunity.[22] Thus, *Turner* established that "Indian tribes are immune from all claims arising in tort unless Congress or the tribe consents to the suit or waives immunity."[23]

In 1986, the Supreme Court reinforced tribal sovereign immunity through *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*.[24] This case further defined the broad scope of sovereign immunity that tribes enjoy and reinforced that tribal immunity is only subordinate to federal law or a tribe's decision to waive it. In *Three Affiliated Tribes*, the tribes sued a nonmember for tort and contract claims in state court.[25] The case followed a state court decision disallowing tribes from suing in state court unless they waived their tribal sovereign immunity.[26] The Supreme Court reversed because it found the waiver requirement to be "unduly intrusive" on tribal common law sovereign immunity, as immunity "is a necessary corollary to Indian sovereignty and self-governance."[27] The Court referenced the potentially disastrous declension of tribal governance which tribes would be subjected to by acquiescing to "coercive jurisdiction" by state courts for issues arising on tribal lands.[28]

The court in *Three Affiliated Tribes* clarified that sovereign immunity is an issue of federal law: "[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."[29] Further, because "any potential counterclaims involved in that matter would have sounded in tort," *Three Affiliated Tribes*

21. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756–57 (1998).
22. Brief of Indian Law Scholars, *supra* note 15, at 6.
23. *Id.*
24. 476 U.S. 877 (1986).
25. *Id.* at 878.
26. *Id.*
27. *Id.* at 890–91.
28. *Id.* at 891.
29. *Id.*

recognized that tribes are immune—even in the case of a tort—in any case without the tribe's consent or congressional approval.[30]

The common law doctrine of tribal sovereign immunity has continually resurfaced in recent cases. The Supreme Court, however, has remained vigilant in upholding tribal immunity, be it "on or off reservation, in a governmental or a commercial context, in contract or tort."[31] This was seen in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[32] where the Court considered tribal sovereign immunity in the context of civil contract suits.[33]

Although *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* was based on a contract claim, the Court used the case to address tribal sovereignty with respect to the unique nature of tort claims—specifically considering scenarios where tribal sovereign immunity has the ability to injure individuals unaware of tribal immunity and situations where an individual did not choose to deal with a tribe, as seen in tort cases.[34] The Court recognized the potential dangers that can accompany sovereign immunity, but the holding clearly emphasizes that sovereign immunity extends to tribes in tort cases. This case is a prime example of the importance the Supreme Court has placed on the doctrine of tribal sovereign immunity. Even in the face of adverse consequences, the Court defends tribal immunity and shows steadfast deference to legislative action.

The *Kiowa* Court emphasized that the subject and legality of tribal immunity should be considered by Congress, not by courts.[35] The Court echoed the *Three Affiliated Tribes* decision to fully uphold sovereign immunity unless Congress allows the suit or the tribe waives its immunity.[36] The Supreme Court explicitly chose to follow prior precedent, completely deferring to Congress, believing in Congress's wisdom and ability to limit tribal sovereign immunity through legislative action.[37] Thus, because Congress has yet to say otherwise, the Court, once again, ruled that sovereign immunity governed.[38] In addition to upholding tribal immunity,

30. Brief of Indian Law Scholars, *supra* note 15, at 7.
31. *Id.*
32. 523 U.S. 751 (1998).
33. *Id.* at 760.
34. *Id.* at 758.
35. *Id.*
36. *Id.* at 754.
37. *Id.* at 752.
38. *Id.* at 760–61.

Kiowa also reiterated that sovereign immunity "is a matter of federal law and is not subject to diminution by the States."[39]

Following the Supreme Court's decision in *Kiowa*, Congress considered two bills that attempted to bring clarity to tribal immunity from tort claims. The first, the American Indian Tort Liability Insurance Act, explored the option of giving federal courts jurisdiction over tort actions, and by doing so, waiving tribal immunity.[40] The second, the American Indian Equal Justice Act, proposed waiving tribal sovereign immunity on tort cases, while giving both federal and state courts jurisdiction to preside over tribes.[41] This Act was intended to equate tribal liability to that which non-sovereign individuals and entities hold.[42] Congress held extensive hearings on both of these bills.[43] It is paramount to recognize that both of these bills would have waived tribal sovereign immunity, and both of these bills ultimately failed.[44] The failing of both bills seemingly signifies that Congress does not wish to detract from tribal sovereign immunity.

The conversation about sovereign immunity did not end with *Kiowa*. The Supreme Court addressed tribal sovereign immunity again in *Michigan v. Bay Mills Indian Community*,[45] which involved an alleged breach of a gaming compact between the Tribe and the State of Michigan.[46] The compact allowed the Tribe to operate a casino on tribal land within Michigan but prohibited the Tribe from doing so elsewhere.[47] Bay Mills subsequently opened a second casino on property "purchased through a congressionally established land trust," with the belief that it qualified as tribal land.[48] Michigan did not agree, and the State accordingly sued Bay Mills under a statute allowing a state to enjoin gaming activity located on Indian lands when it violates a tribal-state compact.[49]

Consistent with Supreme Court precedent, the Sixth Circuit found the Michigan suit barred by tribal sovereign immunity, noting Congress has

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39. *Id.* at 756.

40. *See* S. 2302, 105th Cong. (1998), *discussed in* Brief of Indian Law Scholars, *supra* note 15, at 12–13.

41. *See* S. 1691, 105th Cong. (1998), *discussed in* Brief of Indian Law Scholars, *supra* note 15, at 12–13.

42. Brief of Indian Law Scholars, *supra* note 15, at 12–13.

43. *Id.* at 13.

44. *Id.*

45. 572 U.S. 782 (2014).

46. *Id.* at 787.

47. *Id.* at 786.

48. *Id.* at 782.

49. *Id.* at 786–87.

neither passed legislation nor provided Michigan a waiver to file suit.[50] Importantly, the statute "only authorized suits to enjoin gaming activity located 'on Indian lands,'" and Michigan's primary contention was that the land in question was outside of tribal territory.[51] On certiorari, the Supreme Court held Michigan's suit was barred by tribal sovereign immunity.[52] Once again, this decision echoes a promise of deference to legislation.

The Supreme Court has repeatedly deferred to congressional authority on the issue of tribal sovereign immunity because of tribes' unique status as nations within, yet apart, from the United States. Thus, the judiciary tends to resist any decision which could jeopardize the centuries-old protected status of tribes. In reaching its decision in *Bay Mills*, the Supreme Court cited its long history in upholding tribal sovereign immunity. Justice Kagan, writing for the Court, termed Indian tribes as "domestic dependent nations" who exercise intrinsic sovereign authority,[53] while also, because of their dependent status, fall under the plenary power of Congress.[54] Justice Kagan emphasized that Indian tribes remain "separate sovereigns pre-existing the Constitution,"[55] concluding that "unless and 'until Congress acts, [tribes] retain' their historic sovereign authority."[56] Justice Kagan further stressed that tribal sovereign immunity, despite the amount of times it has come before the Court, is and will continue to be settled law, absent tribal waiver or congressional authorization.[57]

The Supreme Court in *Bay Mills* also referenced steps Congress took following its decision in *Kiowa*.[58] While Congress directly referenced *Kiowa* and considered abrogating tribal immunity in regard to most torts, they ultimately decided against it, taking a decidedly less intrusive approach, instead "requiring tribes either to disclose or to waive their

50. *Id.* at 787.
51. *Id.* at 782.
52. *Id.* at 785.
53. *Id.* at 788.
54. *Id.*; *see also* United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.").
55. *Bay Mills,* 572 U.S. at 788 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).
56. *Id.* (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).
57. *Id.* at 789 (citing Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998)).
58. *Id.* at 794.

immunity in contracts needing the Secretary of the Interior's approval."[59] The *Bay Mills* Court concluded by emphasizing that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."[60] The Supreme Court's ruling in *Bay Mills* illustrates current precedent regarding the common law doctrine of tribal sovereign immunity.

This legal background brings us to the present case—*Wilkes v. PCI Gaming Authority*. In *Wilkes*, Respondents Casey Wilkes and Alexander Russell[61] rely on an argument hinging on footnote 8 of the majority opinion in *Bay Mills*.[62] Footnote 8 highlights that the Supreme Court has never 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."[63] Although this footnote initiates a fervent conversation between the parties, its status as a footnote falls short to undermine the *Bay Mills* majority's precedential value. Although insignificant compared to the multitudes of tribal sovereignty precedent, this lone footnote has resulted in the State of Alabama abandoning years of consistent Supreme Court precedent to reach a surprising outcome.

III. Statement of the Case

The Supreme Court of Alabama sent ripples through the legal community via its decision in *Wilkes v. PCI Gaming Authority*.[64] The Alabama court, tasked with answering the question of whether an Indian tribe is immune from civil liability for tort claims asserted by non-members, abrogated the doctrine of tribal sovereign immunity. Chief Justice Stuart, in his opinion, explained that because the Supreme Court has acknowledged it has never applied sovereign immunity "in a situation such as this," the Alabama court will not extend the doctrine "beyond the circumstances to which that Court itself has applied it."[65] Thus, the Alabama Supreme Court held "that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by Wilkes and Russell."[66]

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59. *Id.* at 802.
60. *Id.* at 800.
61. Wilkes v. PCI Gaming Auth., No. 17-1175, 2017 WL 4385738, at *3 (Ala. Sept. 29, 2017).
62. *Bay Mills*, 572 U.S. at 799 n.8.
63. *Id.*
64. No. 17-1175, 2017 WL 4385738.
65. *Id.* at *4.
66. *Id.*

A. Facts

Petitioners, the Poarch Band of Creek Indians, employed Barbie Spraggins, who worked at the Tribe's Wind Creek-Wetumpka gaming facility.[67] Spraggins worked as a facilities manager at the casino and hotel for over a year prior to the incident provoking this case.[68] During her employment, Spraggins continually struggled with alcohol abuse during work hours.[69] There were at least six times that Spraggins' supervisor reported her for smelling like alcohol at work.[70] Spraggins blood-alcohol content was tested multiple times while at work, with a test in February of 2014 revealing a blood-alcohol content of .078.[71] Following this test, Spraggins enrolled in an employee assistance program, which included sessions with a counselor; she attended this program for nearly half a year.[72]

Only four months after completing the employee assistance program, Spraggins crashed into Casey Wilkes and Alexander Russell on the Mortar Creek Bridge, triggering the *Wilkes* litigation.[73] On the day of the collision, Spraggins arrived to work at 8:00 a.m. after a heavy night of drinking.[74] Within three hours after arriving, Spraggins decided to leave work and go to a Wind Creek-Wetumpka maintained warehouse located ten miles away.[75] Spraggins took a company vehicle intending to retrieve decor needed for hotel rooms at the warehouse.[76] On her quest, Spraggins hit a guardrail on the Mortar Creek Bridge, crossed into oncoming traffic, and hit the vehicle containing Wilkes and Russell in a head-on collision.[77]

The bridge is eight miles west of Wind Creek-Wetumpka gaming facility, is not on reservation lands, and is not en route to the warehouse where Spraggins picked up the lamp shades.[78] The facts, however, are unclear as to where Spraggins went after picking up the lamps or how Spraggins ended up on the bridge where the collision occurred. Spraggins, intoxicated at the time of the collision, did not remember why she was on

67. *Id.* at *1.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

the Mortar Creek Bridge.[79] When tested an hour and forty-five minutes after the crash, she had a blood-alcohol content of .293, significantly higher than the .08 legal limit.[80]

Following the collision, Wilkes and Russell brought suit against Spraggins and the Poarch Band of Creek Indians as her employer.[81] Wilkes and Russell alleged negligence and wantonness claims against both named defendants.[82] The claims against the Tribe were based on the fact that Spraggins had a known history of alcohol abuse and intoxication while at work.[83]

B. Decision

Wilkes and Russell filed suit against Spraggins and the Poarch Band of Creek Indians in the Elmore County Circuit Court in Alabama on February 16, 2015.[84] Wilkes and Russell's amended complaint "asserted negligence and wantonness claims" against Spraggins and the Tribe based on her operation of the vehicle resulting in the accident, as well as negligence and wantonness claims against the Tribe for its "hiring retention and supervision of Spraggins."[85] Following discovery, the Tribe moved for summary judgment, arguing that (1) as a federally recognized tribe, the Poarch Band of Creek Indians was "protected by the doctrine of tribal sovereign immunity"; or, in the alternative, (2) "Spraggins was not acting within the scope of her employment at the time of the January 2015 accident."[86] The trial court granted summary judgment in favor of the Tribe, finding an absence of subject-matter jurisdiction because of the Tribe's sovereign immunity.[87] After the trial court ruled for the Tribe, Wilkes and Russell appealed; the Supreme Court of Alabama then granted their appeal.[88] The Supreme Court of Alabama's sole issue to consider was whether "the doctrine of tribal sovereign immunity shields tribal defendants from the tort claims asserted by Wilkes and Russell."[89]

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79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at *2.

IV. Analysis

The Supreme Court of Alabama reached its decision—the Poarch Band of Creek Indians was not protected by common law sovereign immunity—relying on one primary avenue. The Alabama Supreme Court put forth an argument completely centered on footnote 8 of the majority opinion and the dissenting opinion put forth by Justice Thomas in *Bay Mills*. The footnote explains that the Supreme Court has yet to "specifically [address] . . . 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."[90] The Alabama Supreme Court believed that this case, involving Wilkes and Russell suing a tribal defendant for a tort action, fell under the footnote's proposed scenario.[91] Thus, the Alabama court took the footnote as providing the means to disagree with established precedent. The argument advanced by the Alabama Supreme Court is unsatisfactory. The argument lays an insufficient foundation to overturn a common law doctrine which has been developed by courts for over a century.

A. Foundation of Respondents' Stance

As explored above, Supreme Court precedent and the common law doctrine of sovereign immunity have remained virtually unscathed. While many cases reaffirm the notion of tribal immunity, *Kiowa* and *Bay Mills* are the two most prominent in setting forth the appropriate foundation. The two cases depict how common law sovereign immunity is viewed through the eyes of both Congress and the Supreme Court. While the two cases were brought in the context of contract claims, the Court made it clear that tribal sovereign immunity does not just apply to contract cases. Rather, immunity applies to any case involving tribal sovereigns. However, while the two cases gave what the Supreme Court—depicted in its majority holding in *Bay Mills*—believed to be absolute tribal sovereign immunity, the Alabama Supreme Court addressed a valid point: what happens when tribal sovereign immunity is "contrary to the interests of justice, especially inasmuch as the tort victims in this case" had no alleged "opportunity to negotiate with the tribal defendants for a waiver of immunity"?[92]

With this in mind, relying on the content in footnote 8 and the Alabama Supreme Court decision, Respondents Wilkes and Russell advance several

90. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799 n.8 (2014).
91. *Wilkes*, 2017 WL 4385738, at *4.
92. *Id.* at *4.

arguments speaking to why they believe the Alabama Supreme Court's reasoning is correct. Foremost, Respondents argue the Alabama court did not stray from authority, seeing as the Supreme Court has never directly addressed tort immunity when the non-tribal party had not chosen to interact with the tribe.[93] Thus, Respondents argue the Alabama court decision is consistent with the Supreme Court's previous holdings.[94]

Further, Respondents draw on the idea that the decisions advanced in *Kiowa* and *Bay Mills* are solely focused on the context of contracts, implying that the common law doctrine of tribal immunity does not protect tribes from other types of suits.[95] Referencing the Court's clear call for congressional intervention following *Kiowa*, and the subsequent legislation considered by Congress, Respondents focus on Congress's "decision to retain that form of tribal immunity."[96] Concluding this prong of their defense, Respondents argue that a tribe holds a "panoply of tools . . . to enforce its law on its own lands."[97] In essence, Respondents see the Alabama Supreme Court's decision as falling squarely within the scope of tribal immunity. They argue that the Poarch Band of Creek Indians' arguments are centered on broad immunity, ignoring footnote 8 and the discussion surrounding it in the *Bay Mills* dissent.[98]

In their brief opposing certiorari review, Respondents also argue that "[t]here is no historical justification for applying tribal sovereign immunity to off-reservation torts."[99] Wilkes and Russell claim the reasoning behind this idea stems from a line in *Kiowa*, which describes common law tribal sovereign immunity as developing almost by accident.[100] However, this point need not be addressed because it is created from cobbled bits of sentences from various court cases, most of which occurred in the late nineteenth century.[101]

As to Respondents' claim that off-reservation torts are not covered by tribal sovereign immunity, they once again rely on Justice Thomas's dissent in *Bay Mills*. Quoting the dissent, Respondents write, "Expanding tribal

93. *Id.* at *3.

94. Brief for the Respondents in Opposition at 6, Poarch Band of Creek Indians v. Wilkes, No. 17-1175 (U.S. June 8, 2018), https://sct.narf.org/documents/poarch_v_wilkes/cert_opposition.pdf [hereinafter Brief for the Respondents].

95. *Id.*

96. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 801 (2014).

97. Brief for the Respondents, *supra* note 94, at 7.

98. *Id.* at 7–8.

99. *Id.* at 8.

100. *Id.* (citing Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998)).

101. *Id.* at 8–9.

immunity to off-reservation activity is not only 'unsupported by any rationale for that doctrine' but also 'inconsistent with the limits on tribal sovereignty.'"[102] This argument is erroneous. As stated previously, the Supreme Court has definitively ruled that tribal sovereign immunity, unless Congress says otherwise, is unequivocal in its authority.[103]

The last leg of Respondents' argument is focused on the immunity of tribes versus other sovereigns. They believe "[p]ermitting 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."[104] Respondents argue that if Spraggins were employed by another sovereign, such as a state or foreign nation, they would not fall under sovereign immunities' umbrella of protection.[105] This statement hits at the very core of what sovereign immunity means to tribes. Tribes enjoy that level of immunity because they are domestic dependent nations. Thus, like states, but unlike foreign nations, tribes fall under congressional authority; conversely, like foreign entities, but unlike states, tribes are sovereign nations. This combination creates a level of sovereignty unlike any other, which is why tribal immunity is completely unique. As Justice Kagan said in the *Bay Mills* opinion, tribes are separate sovereigns, and they are sovereigns that pre-exist the Constitution.[106] Arguing that they enjoy immunity unlike that of a state or a foreign nation goes to the very core of the doctrine of tribal sovereign immunity. Furthermore, this argument does not stand alone because *Bay Mills* made it unequivocally clear that tribes enjoy sovereign immunity unless or until Congress abrogates that protection. Since Congress has yet to do so, tribal sovereign immunity stands.

B. Finding the Correct Interpretation of Footnote 8

Respondents did not want this case to be taken up on certiorari because, as discussed more thoroughly below, precedent is against them. This is illustrated by the holdings of the Supreme Court, at least three circuit courts (the Ninth, Tenth, and Eleventh), and several state supreme courts.[107]

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102. *Id.* at 11 (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 813 (2014)).
103. *Bay Mills,* 572 U.S. at 790.
104. Brief for the Respondents, *supra* note 94, at 12.
105. *Id.*
106. *Bay Mills,* 572 U.S. at 788.
107. *Id.*; *see* Cook v. AVI Casino Enters., 548 F.3d 718 (9th Cir. 2008); Furry v. Miccosukee Tribe of Indians of Fla., 685 F.3d 1224 (11th Cir. 2012); Maxwell v. City of San Diego, 708 F.3d 1075 (9th Cir. 2013); Morgan v. Colo. River Indian Tribe, 443 P.2d

Instead, Respondents want the Supreme Court to allow lower courts to "reconsider their positions," most of which rule in favor of tribal sovereign immunity.[108] Wilkes and Russell believe the Supreme Court would "benefit from allowing the issue to percolate further in the lower courts before it intervenes to elaborate on *Bay Mills*."[109] The implications of this assertion are dangerous; this opens the door of dissention between the courts, potentially resulting in negative ramifications for tribes everywhere.

Respondents' argument struggles for many reasons, all of which boil down to a misrepresentation of footnote 8. Respondents set out to show that footnote 8 is a call to action—a statement granting lower courts permission to go against precedent. This argument is built on sand, as footnote 8 lacks any precedential force. As it reads, footnote 8 in *Bay Mills* is merely a comment on scenarios the Supreme Court has not addressed. At its core, however, footnote 8 is a reinforcement of the Court's decisions in *Kiowa* and *Bay Mills*. The comment put forward by Justice Thomas speaks to the broad sovereign immunity the Supreme Court has ruled in favor of time and time again. Respondents' characterization pits one footnote against more than one hundred years of federal Indian law.

As stated previously, footnote 8 states that the Supreme Court has yet to address if immunity applies in the "ordinary way" when a tort victim or individual who has not willingly entered into a relationship with the tribe "has no alternative way" to acquire relief from "off-reservation commercial conduct."[110] Respondents' footnote 8 argument first fails because they assert that they have no alternative way to obtain relief. This assumption ignores the potential of possible relief from suing Spraggins alone, thus avoiding the Tribe and the issue of sovereign immunity completely. Nonetheless, Respondents argue that applying immunity would leave Wilkes and Russell "without a remedy" for the wrongs allegedly committed by the Tribe.[111] The inability to sue the Tribe does not take away from the possibility of full recovery. Respondents, hyper-focused as they are on the tort claim against the Tribe, overlook two crucial points. First, sovereign immunity, absent waiver or congressional intervention, provides full protection from suit. While Respondents argue that immunity should be

421 (Ariz. 1968); Beecher v. Mohegan Tribe of Indians of Conn., 918 A.2d 880 (Conn. 2007); 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).

108. Brief for the Respondents, *supra* note 94, at 5.

109. *Id.*

110. *Bay Mills,* 572 U.S. at 799 n.8.

111. Brief for the Respondents, *supra* note 94, at 15.

abrogated in this case, under the scenario described in footnote 8, they are actually arguing for a full upheaval of tribal immunity. If limited in the way Respondents argue it should be, tribal immunity becomes more akin to conditioned liability than any real form of sovereignty. Naturally, this goes against precedent and the basic premise that tribes are domestic, sovereign nations.

Second, their argument fails to acknowledge that the inability to gain recovery from the Tribe is part of the privilege held by tribes as sovereigns. After all, any application of the concept of immunity will leave the opposing party without a remedy. However, this does not mean that Respondents are remediless, only that they cannot recover from the Tribe. In this case, Respondents have the potential, although they ignore it, to "be made completely whole" by filing a suit against Spraggins herself.[112] This illuminates the fact that *this case is not the scenario* described in footnote 8. Footnote 8 theorizes a case where the injured party is left without a remedy. Thus, because full recovery is available to Respondents via Spraggins, there is "no need to sue the Tribe to right the wrong [alleged]."[113]

The notion that Respondents could fully recover from the accident by suing Spraggins is reinforced by *Lewis v. Clarke*,[114] a case the Supreme Court addressed in 2016. This case involved a tort claim occurring off-reservation.[115] A tribal employee, in the course of his work, crashed into Lewis, an individual with no relationship with the Tribe.[116] Lewis sued Clarke in his individual capacity.[117] On certiorari, the Court considered whether or not tribal sovereign immunity protects an employee from individual capacity damages from torts committed within their scope of employment.[118] The Supreme Court ruled in favor of Lewis, observing that the tort action was against the employee, not the Tribe itself.[119] Therefore, since the party in interest was Clarke, acting in an individual capacity, tribal sovereign immunity is not implicated.[120] It is crucial to note the parallels between this case and *Wilkes*. Foremost, *Lewis* sounded in tort for off-

112. Reply Brief for Petitioners at 3, Poarch Band of Creek Indians v. Wilkes, No. 17-1175 (U.S. June 26, 2018), https://sct.narf.org/documents/poarch_v_wilkes/cert_reply_petitioner.pdf.

113. *Bay Mills,* 572 U.S. at 799 n.8.

114. 137 S. Ct. 1285 (2017).

115. *Id.* at 1289.

116. *Id.* at 1290.

117. *Id.*

118. *Id.* at 1288.

119. *Id.* at 1289.

120. *Id.*

reservation conduct, which according to Respondent's reading of footnote 8, would mean that sovereign immunity should have been overturned. Yet, once again, the Court recognized that tribal sovereign immunity stands. Moreover, this is the perfect example of a case in which the plaintiffs were able to reach a remedy without suing the tribe in question. This further reinforces the fact that Respondents could be made whole without suing the Poarch Band of Creek Indians.

Respondents' argument regarding footnote 8 also fails because they are suing for conduct that occurred both off and on the reservation, while the footnote only speaks to "off-reservation commercial conduct."[121] One of the allegations against Petitioner is for "negligent and wanton hiring, retention, and supervision of Spraggins."[122] Alabama law dictates that a claim arises at "the location of the wrongful acts or omissions."[123] Thus, under Alabama law, the alleged negligent actions occurred on the reservation. This clearly falls outside of footnote 8's "off-reservation commercial conduct" ambit.[124] In ruling for Respondents, the Alabama Supreme Court reached its holding without considering precedent, hinging its rationale solely on footnote 8, coincidentally going even further than Respondents' suggestion. If the Alabama court followed Respondents' interpretation of footnote 8 exactly, it would have ruled in favor of Respondents and against the Tribe because Spraggins was an employee of the Tribe who was arguably in the course of her work when the accident happened. The Alabama Supreme Court, however, went beyond Respondents' claim and decided tribes are liable for torts *off or on* the reservation. This opens up the Tribe to liability in any tort case, regardless of where it happens, effectively destroying tribal sovereignty.

Further, setting the Supreme Court holdings in *Kiowa* and *Bay Mills* aside, footnote 8 itself reinforces the common law doctrine of tribal sovereign immunity. As Petitioners state in their reply brief to Respondents, the footnote "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."[125] The Court, throughout the opinion and within footnote 8, explains with emphasis that any deviation away from precedent requires special justification.[126] In short, the Court and Congress

121. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799 n.8 (2014).
122. Brief for the Respondents, *supra* note 94, at 15.
123. *Ex parte* Jim Burke Auto., Inc., 200 So. 3d 1153, 1156 (Ala. 2016).
124. *Bay Mills,* 572 U.S. at 799 n.8.
125. Reply Brief for Petitioners, *supra* note 112, at 4.
126. *Bay Mills,* 572 U.S. at 799 n.8.

have examined sovereign immunity from all sides, yet, they have maintained that tribes hold immunity without caveats. Thus, footnote 8 in *Bay Mills* mandates that broad immunity should be given to tribes under the common law doctrine, even in a scenario involving an off-reservation tort "where the claimant has no other remedy."[127] This further dispels any arguments that the Court's decisions in *Kiowa* and *Bay Mills* only apply to contracts cases. The footnote, thus, presents no reason to go against precedent, nor does it support Respondents' proposed argument that lower courts should be given more time to consider how they want to rule in the context of off-reservation torts. This Court has routinely dismissed suits against tribes, absent congressional authorization or waiver, making it abundantly clear that the issue of tribal sovereign immunity is settled law.[128]

Apart from their arguments regarding footnote 8, Respondents Wilkes and Russell fail to adequately address how circuit courts and state supreme courts have dealt with similar issues involving tribal defendants, either before or after the Court's decision in *Bay Mills*. While Respondents argue that the Court should not grant review, in the guise of allowing lower courts further opportunity to reach their own decisions in similar scenarios, Respondents leave out that many courts have ruled on these issues—the majority of which have ruled in favor of tribal sovereign immunity.

Petitioners point out the decision in *Bay Mills* has yet to result in any significant departure from adhering to precedential application of tribal sovereignty.[129] Petitioners reference two cases in support of their proposition: (1) the Ninth Circuit decision of *Arizona v. Tohono O'odham Nation*[130] and (2) the Utah Supreme Court decision of *Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation*.[131] Both of these cases serve as examples of courts applying immunity "to tort claims asserted by non-members."[132] These cases combat Respondents' argument that "none of the courts considered the issues raised by [the *Bay Mills*] decision."[133]

127. Reply Brief for Petitioners, *supra* note 112, at 4.

128. *See Bay Mills,* 572 U.S. at 789; *see also* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998).

129. *Id.*

130. 818 F. 3d 549, 563 (9th Cir. 2016), *cited in* Reply Brief for Petitioners, *supra* note 112, at 5.

131. 416 P.3d 401, 412-13 (Utah 2017), *cited in* Reply Brief for Petitioners, *supra* note 112, at 4.

132. Reply Brief for Petitioners, *supra* note 112, at 4–5.

133. Brief for the Respondents, *supra* note 94, at 16.

Respondents argue the Ninth Circuit in *Tohono O'odham* rejected an argument based on footnote 8 and instead adhered "to prior Ninth Circuit holding[s] that tribal sovereign immunity bars tort claims."[134] However, regarding footnote 8, *Tohono O'odham* actually referenced the Supreme Court's discussion of stare decisis and, thus, declined "to depart from Ninth Circuit precedent."[135] Even more recently, the Tenth Circuit ruled in favor of tribal sovereign immunity in a slip and fall case where the accident occurred at a tribal gaming center.[136] The Tenth Circuit emphasized that state courts do not have jurisdiction over such matters, as tribes are protected by their immune status.[137]

Another issue seen in Respondents' reply to the Petition for Writ of Certiorari is how they minimize the Alabama Supreme Court's holding. The Alabama court held that "the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members."[138] Two critical points come from this: (1) the Alabama court asserts tribes are liable for torts off and *on* the reservation; and (2) the court does *not* limit liability to individuals who have no standing relationship with the tribe, meaning the tribe can be sued by an entity it is associated with. This ruling far exceeds the scope of footnote 8 in *Bay Mills*, which speaks only to a scenario involving an off-reservation tort where an individual has no relation to the tribe. However, Respondents taper the state court holding to fit into footnote 8, arguing for claims by individuals without a "personal or commercial relationship" to the tribe when they are harmed by off-reservation conduct.[139] While this narrowing fits closer to the scenario described in footnote 8, it is a misrepresentation of the court's decision, and, therefore, does not represent the potential ramifications of the Alabama court decision.

Further, as Petitioners point out, "Even focusing on off-reservation torts[,] . . . there remains a split. Many of the state supreme court and federal court of appeals decisions . . . involved off-reservation torts. These include (at least) the Ninth Circuit[] . . . [and] the Eleventh Circuit[]," as

134. *Id.*

135. Reply Brief for Petitioners, *supra* note 112, at 5 (citing Arizona v. Tohono O'odham Nation, 818 F. 3d 549, 563 n.8 (9th Cir. 2016)).

136. Navajo Nation v. Dalley, 896 F.3d 1196, 1200 (10th Cir. 2018).

137. *Id.* at 1218.

138. Petition for a Writ of Certiorari at i, Poarch Band of Creek Indians v. Wilkes, No. 17-1175 (U.S. Feb. 16, 2018), https://sct.narf.org/documents/poarch_v_wilkes/cert_petition.pdf.

139. Brief for the Respondents, *supra* note 94, at i.

well as state supreme court decisions in Oklahoma, Connecticut, and Arizona.[140]

In essence, regardless of how the issue is framed, this case presents a pressing and frequent issue among lower courts, reinforcing the need for intervention.

C. Impending Policy Issues

From a policy perspective, the Supreme Court's decision not to grant certiorari is unsettling, as *Wilkes* is an incorrect application of tribal sovereign immunity. Ramifications from the Alabama decision have the potential to interfere with tribal systems across the country. Further, this case provided the perfect vehicle to reaffirm Supreme Court precedent in favor of tribal sovereignty, specifically in reference to off-reservation torts. Despite their denial, and the ramifications which may follow it, the Court has been explicit when it comes to tribal sovereign immunity: it stands until Congress says otherwise.

Alabama cannot rewrite federal Indian law even if equitable considerations make circumventing tribal sovereign immunity attractive. While lower courts across the country have upheld tribal sovereignty in similar scenarios, denying this case on certiorari review voices the Court's apathy toward a critical tenant of tribal sovereignty. As this case was not overturned, some courts will likely use Alabama's decision as a pillar of strength to flout federal precedent. Although the Supreme Court has been very precise in its application of tribal sovereign immunity, reinforcing precedent on many occasions, "state courts often apply that precedent only reluctantly–even with disdain."[141] There is an understandable fear that, because this decision stands, a recurrence of "historic patterns of disregard for Tribal Nations and their sovereign status" will develop.[142] If so, the result would be a storm of dangerous decisions—decisions that could lead to the downfall of tribal governance altogether. There is potential that tribes could cease to be the "domestic dependent nations" they were recognized as

140. Reply Brief for Petitioners, *supra* note 112, at 6. *See generally* Cook v. AVI Casino Enters., 548 F.3d 718 (9th Cir. 2008); Furry v. Miccosukee Tribe of Indians of Fla., 685 F.3d 1224 (11th Cir. 2012); Maxwell v. City of San Diego, 708 F.3d 1075 (9th Cir. 2013); Morgan v. Colo. River Indian Tribe, 443 P.2d 421 (Ariz. 1968); Beecher v. Mohegan Tribe of Indians of Conn., 918 A.2d 880 (Conn. 2007); 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).

141. Brief for Amicus Curiae United South & Eastern Tribes, *supra* note 14, at 5.

142. *Id.*

in 1831.[143] This clearly goes against established precedent, which recognizes sovereignty as a "necessary corollary to Indian sovereignty and self-governance" that lies at the heart of tribal sovereign immunity.[144]

On another front, allowing the disembodiment of tribal sovereignty can create tangible challenges for tribes. Petitioners highlight that "exposing tribes to tort suits could 'impose serious financial burdens' on already 'financially disadvantaged' tribes."[145] Although some tribes have had widely publicized financial success, most tribes "still [struggle] economically."[146] In *Bay Mills*, Justice Sotomayor's concurring opinion illustrates that while public sentiment might argue if tribes are engaged in "highly lucrative commercial activity" such as gaming, they can afford suit, the reality is that such gaming income is monopolized by only a few tribes, with "[n]early half of federally recognized Tribes . . . not operat[ing] gaming facilities at all."[147] Thus, one of the tangible fears is that opening tribes up to suits such as this will cause great financial burdens and threaten their ability to survive. After all, tribes, unlike states, depend on their sovereign status because they do not receive tax-based revenue.[148]

Further, tribal sovereignty is an issue that continually resurfaces in litigation. The Supreme Court's docket has seen a multitude of tribal sovereignty cases in the last forty years.[149] Although deciding against the Alabama court would not stop future misapplications of Indian law, it is nearly certain that, as it has gone unaddressed, this scenario will emerge more voraciously than ever before. This will create a massive strain on tribes, regardless of their financial stability, and hinder the court system and, thus, the mission behind following judicial precedent. Perhaps most frustrating about the Court's denial of certiorari is the fact that *Wilkes* is an "ideal vehicle" to address the issue of tribal sovereignty in reference to off-reservation torts.[150] The question of tribal immunity in *Wilkes* is "squarely raised, fully briefed, and resolved in opinions" with "the resolution of that

143. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 10 (1831).

144. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890 (1986).

145. Petition for a Writ of Certiorari, *supra* note 138, at 22 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978)).

146. *Id.* (quoting Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 168 (2004)).

147. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 809 (2014) (Sotomayor, J., concurring).

148. *Id.* at 809–11.

149. Petition for a Writ of Certiorari, *supra* note 138, at 23.

150. *Id.*

question [being] dispositive" in the circuit court and the Alabama Supreme Court.[151] Therefore, for all of the reasons stated—from the multiple issues presented by the Respondents' footnote 8 argument, to the fact that this case provides the perfect opportunity for the Supreme Court to cleanly rule on this issue of tribal immunity—*Wilkes* should have been taken up on certiorari. Nevertheless, it was not. If nothing else, the Supreme Court's choice to allow the decision to stand will send a call to action—more clear than ever before—to Congress. Afterall, the duty of defining the scope of tribal sovereign immunity falls directly at their feet.

V. Conclusion

The Alabama Supreme Court in *Wilkes* erred in overturning the longstanding common law doctrine of tribal sovereign immunity. The United States Supreme Court and Congress have been abundantly clear that tribal sovereign immunity is solid, regardless of the type of case at issue. Allowing the Alabama Supreme Court's decision to stand will cause chaos in lower courts, result in untold amounts of ill-earned damages, and chip away at the hard-earned foundation created for tribes over the past century. Although the Supreme Court has historically made sound decisions regarding tribal sovereign immunity, denying certiorari here was a misstep. The days ahead are unclear for tribes, but hope remains that the Court's denial will send a needed message to Congress.

151. *Id.* at 23–24.