IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Appellant,

Case No. 3D16-2826
L.T. Case No. 2016-CA-21856

vs.

LEWIS TEIN, P.L., GUY LEWIS, and MICHAEL TEIN,

Appellees.

UNITED SOUTH AND EASTERN TRIBES, INC. AND NATIONAL CONGRESS OF AMERICAN INDIANS *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT'S OPPOSITION TO APPELLEES' MOTION FOR CERTIFICATION

CRAIG A. PUGATCH
Florida Bar No.: 653381
RICE PUGATCH ROBINSON STORFER & COHEN PLLC
101 NE 3rd Ave, Suite 1800
Fort Lauderdale, FL 33301
Telephone: (954) 462-8000
capugatch@rprslaw.com

Attorney for Amici Curiae Inc.

GREGORY A. SMITH
D.C. Bar No.: 413071
KAITLYN E. KLASS
D.C. Bar No.: 1032219
HOBBS, STRAUS, DEAN & WALKER
2120 L Street, NW, Suite 700
Washington, DC 20037
Telephone: (202) 822-8282
gsmith@hobbsstraus.com

Attorneys for United South and Eastern Tribes,

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Ave.
2nd Floor
Washington, D.C. 20036
Telephone: (202) 466-7767
jdossett@ncai.org

General Counsel for the National
Congress of American Indians

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

Other Authorities

INTERESTS OF *AMICI CURIAE*

The United South and Eastern Tribes, Inc. (USET) is a non-profit organization representing 26 federally recognized Tribal Nations in 12 states stretching from Texas to Maine.[1] Established in 1969, USET works at the regional and national level to educate federal, state, and local governments about the unique historic and political status of its member Tribal Nations, and it operates a number of programs for the benefit of its membership.

USET has particular expertise in the doctrines of tribal sovereignty and sovereign immunity. Due to their location in the Southern and Eastern regions of the United States, the USET member Tribal Nations have the longest continuous direct relationship with the United States government, dating back to some of the earliest treaties that established government-to-government relationships between Tribal Nations and the United States. These early relationships formed the basis for

[1] The USET member Tribal Nations include the following: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

recognition of Tribal Nations' sovereignty and sovereign immunity under United States federal law. *See* William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1623–24 (2013).

The National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest American Indian organization in the United States, representing more than 250 Indian Tribes and Alaskan Native villages from every region of the United States. NCAI shares a strong interest in this case because of the sweeping impact its resolution could have on a foundational doctrine of Federal Indian law, with far-reaching ramifications for a host of relationships that Tribal Nations have entered into with both public and private entities.

In the modern era, tribal sovereign immunity has taken on new significance for Tribal Nations across the United States. As Tribal Nations' economies have had an increasingly significant impact on the surrounding communities and their economies, Tribal Nations have developed advanced court systems, adopted government tort claims acts similar to federal and state governments, and entered into countless contracts and agreements where they have carefully negotiated limited waivers of sovereign immunity for a myriad of purposes and as part of a bargained-for exchange. All of these developments are based on established doctrines regarding the nature of tribal sovereign immunity found in federal law and set forth in this memorandum.

The Court's decision upholding tribal sovereign immunity was correctly reached and in line with well-established law. A decision by the Court to now certify appellees' question as an issue of great public importance warranting Florida Supreme Court review would breathe life into appellees' wrongful attempt to narrow tribal sovereign immunity. It would imply that case law regarding tribal sovereign immunity in this context is anything less than steadfast and clear. *Amici* therefore have a strong interest in urging this Court not to certify the question to the Florida Supreme Court.

USET previously filed with this Court an *amicus curiae* brief associated with this case, United South and Eastern Tribes, Inc. (USET) *Amicus Curiae* Brief in Support of Appellant, *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, No. 3D16-2826 (Fla. Dist. Ct. App. Jan. 23, 2017) (hereinafter USET Amicus). NCAI, in joining this amicus brief, fully endorses the arguments put forward in the USET Amicus.

In the USET Amicus, we summarized the origins and scope of tribal sovereign immunity, including the many Supreme Court cases in which the doctrine was upheld. We also explained the primary role of the United States Congress in altering the scope of tribal sovereign immunity. Additionally, we provided a detailed analysis of tribal waiver of sovereign immunity, with a focus on waiver through litigation conduct. At that point, appellees were asserting that Tribal Nations may

waive their sovereign immunity through their litigation conduct undertaken in a separate case where that conduct is alleged to have been in bad faith.

Now that this Court has ruled that the litigation conduct at issue did not waive sovereign immunity for this suit, appellees assert broadly that alleged criminal or tortious activity outside reservation land qualifies as a Tribal Nation waiver of sovereign immunity. Therefore, we submit this brief to supplement our previous brief and hope that it will be helpful to the Court as it considers appellees' new arguments.

SUMMARY OF ARGUMENT

The United States Supreme Court has already conclusively addressed appellees' question, and thus it should not be certified to the Florida Supreme Court for review. In a long line of cases, the Supreme Court has upheld Tribal Nations' sovereign immunity from suit. Just three years ago, the Supreme Court in *Bay Mills* reaffirmed this principle.

Under the doctrine of sovereign immunity, Tribal Nations possess sovereign immunity unless a Tribal Nation clearly waives that immunity or Congress expressly abrogates it. Thus, the baseline presumption of the doctrine is that a Tribal Nation possesses its sovereign immunity intact unless it is shown that the immunity has been removed by a proper waiver or abrogation. No court need find that tribal sovereign immunity exists in a particular fact pattern, as tribal sovereign immunity

does not originate from a court holding. Rather, it is the underlying foundational presumption.

Thus, courts have rejected plaintiffs' attempts to claim tribal sovereign immunity is not applicable under certain fact patterns. Courts that have examined whether sovereign immunity exists for off reservation conduct or for allegedly criminal or tortious conduct have found it applicable. In *Bay Mills*, the Supreme Court addressed a fact pattern involving allegedly illegal conduct outside reservation land. There, the Supreme Court refused to create a freestanding exception or carve out from the general applicability of tribal sovereign immunity for allegedly criminal or tortious Tribal Nation conduct outside reservation land.

Further, engaging in such conduct does not qualify as waiver by a Tribal Nation of its sovereign immunity. Waiver must be clear, but the courts have found that conduct does not constitute a clear waiver.

Tribal Nations' inherent sovereign immunity arises from their status as sovereign entities and also as a matter of federal law and. The United States Congress is the proper body to address imposition of any limitations on tribal sovereign immunity. Thus, appellees' question should not be certified for Florida Supreme Court review.

ARGUMENT

I. The United States Supreme Court already conclusively addressed appellees' question.

This Court may certify a question allowing for discretionary jurisdiction of the Florida Supreme Court only if the question is "of great public importance." Fla. R. App. P 9.030(a)(2)(A)(v). Appellees' question is a federal rather than state law matter that has been conclusively decided and recently affirmed by the United States Supreme Court. It is not an issue of first impression, an issue that relies on old precedent, or an issue made murky by unclear case law. Thus, the Court should not certify the question to the Florida Supreme Court.

Just three years ago, the United States Supreme Court in *Bay Mills* reaffirmed the continuing validity of the broad and sweeping doctrine of tribal sovereign immunity from suit. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014). There a Tribal Nation engaged in gaming activity on land plaintiffs alleged did not qualify as Indian land eligible for gaming under federal statute. Plaintiffs asserted that the gaming violated state as well as federal law. The Supreme Court found that the case was barred by tribal sovereign immunity. The Supreme Court's recent holding in *Bay Mills* is in line with many years of judicial precedent upholding Tribal Nations' sovereign immunity. *See* USET Amicus at 4–8. Thus, the doctrine of tribal sovereign immunity is not in question.

Tribal Nations possess sovereign immunity from suit. *See* USET Amicus at 4–6. Like federal and state governments, Tribal Nations enjoy sovereign immunity as an outgrowth of their powers as sovereign entities. The Supreme Court has "time

and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030–31 (2014) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 756 (1998)).[2] Therefore, a Tribal Nation possesses its sovereign immunity from suit unless and until Congress expressly abrogates its immunity or it clearly waives its own immunity.

As this Court acknowledged, a court will not find that a Tribal Nation waived its sovereign immunity unless the waiver is "clear." USET Amicus at 10–11 (citing *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Tribal Nations exercise their powers as sovereign entities by choosing when and how to waive their sovereign immunity, and many have done so, just as the federal government and state governments do so, in specific instances for

[2] The Supreme Court has issued many decisions upholding tribal sovereign immunity as applicable to all suits against Tribal Nations unless Congress has abrogated tribal sovereign immunity or a Tribal Nation has waived its sovereign immunity. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997); *Blatchford v. Native Vill. of Noatak and Circle Vill.*, 501 U.S. 775, 782 (1991); *Okla. Tax Comm'n v. Citizens Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877, 890–91 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.,* 433 U.S. 165, 172–73 (1977); *United States v. U. S. Fid. & Guar. Co.*, 309 U.S. 506, 512–13 (1940).

a host of reasons, including promoting economic development and establishing enforceable dispute resolution mechanisms.

Appellees seek to invert the doctrine of tribal sovereign immunity by inviting the Court to find tribal sovereign immunity inapplicable or waived when no court has affirmed its application in a particular fact pattern. They incorrectly claim that courts have not found sovereign immunity applicable in suits alleging criminal or tortious conduct outside reservation land, and they also incorrectly imply that this means sovereign immunity does not exist. Appellees' Motion for Certification at 4-5, 11, *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, No. 3D16-2826 (Fla. Dist. Ct. App. Aug. 24, 2017).

This is not how sovereign immunity works. The baseline presumption of the sovereign immunity doctrine is that it applies and is fully intact unless Congress abrogates immunity or a Tribal Nation waives immunity. When congressional abrogation has not taken place, a searching review for a "clear" tribal waiver is conducted with the underlying premise that sovereign immunity applies if waiver is not found.

Thus, even if no court had found that Tribal Nations possess sovereign immunity for suits alleging criminal or tortious activity outside reservation land, the lack of a case affirmatively holding that a Tribal Nation has sovereign immunity in such situations would be meaningless. Put differently, a court does not "confer"

tribal sovereign immunity by finding it applicable in a particular fact pattern, as appellees imply.

Because the baseline presumption for tribal sovereign immunity is that it exists for any suit against a Tribal Nation, the Supreme Court has been unwilling to find that, in particular fact patterns, the presumption vanishes or is carved out. For example, the Supreme Court has recently rejected claims that Tribal Nations do not possess sovereign immunity for off reservation conduct. In its 1998 *Kiowa* decision, the Supreme Court explicitly found that a Tribal Nation maintains its sovereign immunity when engaging in off reservation activity. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 754 (1998) (holding tribal sovereign immunity applies "without drawing a distinction based on where the tribal activities occurred"). The Supreme Court in *Bay Mills* acknowledged the cases before and after *Kiowa* upholding tribal sovereign immunity for off reservation activity and reaffirmed this principle, stating "we decline to revisit our prior decisions holding that, absent such an abrogation (or a waiver), Indian tribes have immunity even when a suit arises from off-reservation commercial activity." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028 (2014); *see also id.* at 2036.

Similarly, federal courts have taken as a baseline presumption that tribal sovereign immunity exists for suits in which plaintiffs have alleged a Tribal Nation undertook criminal or tortious activity. This Court noted in its opinion one such

Eleventh Circuit case in which sovereign immunity barred suit sounding in tort brought against a Tribal Nation. *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2012). In another example, plaintiffs sought to create an exception to the application of tribal sovereign immunity when a Tribal Nation "has willfully engaged in wrongful, intentional conduct which violates the individual property rights of an innocent non-Indian citizen," but the federal district court found precedent dictated sovereign immunity applied. *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 305 (N.D.N.Y. 2003) (examining claims of criminal and tortious activity in violation of state law). Similarly, courts have found that tribal sovereign immunity protects Tribal Nations and their property from legal process in criminal cases as well as civil cases. *See, e.g., Bishop Paiute Tribe v. Cty. of Inyo*, 275 F.3d 893, 900–04 (9th Cir. 2002), *vacated and remanded on other grounds sub nom., Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003) (holding tribal sovereign immunity bars execution of state search warrant in connection with welfare fraud prosecution).

In those instances where a court was faced with a Tribal Nation's allegedly wrongful conduct outside reservation land, tribal sovereign immunity has been applied as the baseline presumption. For example, a Missouri state court upheld a Tribal Nation's sovereign immunity from suit for a claim regarding the Tribal Nation's allegedly wrongful discharge of an employee, which took place outside the

reservation, acknowledging such sovereign immunity was a matter of federal law. *Ogden v. Iowa Tribe of Kansas & Nebraska*, 250 S.W.3d 822, 828 (Mo. Ct. App. 2008).

In *Bay Mills*, the Supreme Court addressed a similar fact pattern involving allegedly illegal conduct outside reservation land. There, plaintiffs alleged the Tribal Nation, among other unlawful acts, violated state gaming laws outside of its reservation land. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2029 (2014). The Sixth Circuit, before the case was elevated to the Supreme Court, held that tribal sovereign immunity applied to plaintiffs' claim that the Tribal Nation's conduct violated civil-nuisance state law related to gambling. *Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 415 (6th Cir. 2012). Plaintiffs sought review and asked the Supreme Court to hold that tribes "have no immunity for *illegal* commercial activity outside their sovereign territory." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (internal quotations omitted) (emphasis added). The Supreme Court refused to limit tribal sovereign immunity in this way, again reaffirming that tribal sovereign immunity is the baseline presumption unless abrogated or waived. *Id.* at 2039 (concluding Congress did not abrogate and Tribal Nation did not waive sovereign immunity and stating Court would not "create a freestanding exception to tribal immunity").

Thus, it is clear that tribal sovereign immunity applies as a baseline presumption to a Tribal Nation's allegedly criminal or tortious conduct outside reservation land. Courts have affirmed tribal sovereign immunity's blanket application unless abrogated or waived. They have rejected requests to create freestanding exceptions to tribal sovereign immunity when congressional abrogation and Tribal Nation waiver are absent.

Conduct, even if allegedly criminal or tortious, cannot form the basis for a clear waiver by a Tribal Nation of its sovereign immunity. *See, e.g.*, *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224, 1235 (11th Cir. 2012) ("Moreover, we are also barred by precedent from implying or inferring waiver from the Miccosukee Tribe's conduct, such as the tribe electing to serve alcoholic beverages with the benefit of a state liquor license."). Therefore, a court's finding that allegedly criminal or tortious conduct outside reservation land does constitute waiver would be improper.

Bolstering this conclusion, courts holding there is no carve out from the general applicability of sovereign immunity when Tribal Nations engage in off reservation or allegedly criminal or tortious conduct have dismissed the suit rather than gone on to find the conduct nonetheless qualified as a Tribal Nation waiver.

No intervening law disrupts the body of case law upholding tribal sovereign immunity, including for allegedly criminal or tortious conduct outside reservation

land. Appellees claim the United States Supreme Court in the recent *Lewis* case questioned the application of tribal sovereign immunity for alleged torts committed off reservation. Appellees' Motion for Certification at 3, 6-7, *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, No. 3D16-2826 (Fla. Dist. Ct. App. Aug. 24, 2017) (citing *Lewis v. Clarke*, 137 S. Ct. 1285 (2017)). However, as they acknowledge, that case dealt with a claim brought against a *tribal employee* rather than a Tribal Nation. *Lewis* simply stands for the proposition that tribal sovereign immunity will not bar "a suit against [an individual] to recover for his personal actions, which will not require action by the sovereign or disturb the sovereign's property." *Id.* at 1291 (internal quotations omitted). Had the suit in *Lewis* been brought against the Tribal Nation itself, the Supreme Court would have been compelled to uphold tribal sovereign immunity pursuant to its longstanding jurisprudence recently reaffirmed in *Bay Mills*.

II. The United States Congress is the proper venue for addressing appellees' tribal sovereign immunity issues.

It is the role of the United States Congress, not the courts, to alter the scope of tribal sovereign immunity. USET Amicus at 8–9. As this Court acknowledged, tribal sovereign immunity is a matter of federal law. When a Tribal Nation has not waived its sovereign immunity, Congress alone has the authority to abrogate that sovereign immunity. States, including state courts, do not have the power to diminish a Tribal Nation's sovereign immunity. USET Amicus at 7–8 (citing *Three*

Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 891 (1986)); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031, 2037–39 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) ("[T]ribal immunity is a matter of federal law and is not subject to diminution by the States.").

Tribal sovereign immunity originates from the sovereign status of Tribal Nations. USET Amicus at 4–6, 8. All sovereigns under the Anglo-American legal system possess immunity from suit as part of their sovereignty. Tribal Nations' sovereign immunity from suit is "a necessary corollary to Indian sovereignty and self-governance." USET Amicus at 5 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986)); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014)).

The parties and this Court agree that Congress has not abrogated tribal sovereign immunity in this instance. Additionally, as discussed above, a Tribal Nation does not waive its sovereign immunity through engaging in activity outside its reservation, including allegedly criminal or tortious activity. Thus, in these circumstances, tribal sovereign immunity remains intact.

As we counseled previously in the USET Amicus and as this Court later affirmed, parties seeking to diminish tribal sovereign immunity upon the allegation that such immunity is unfair should look for a remedy before the United States

Congress. The Supreme Court agrees. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037–38 (2014); *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

CONCLUSION

Because the nature and breadth of tribal sovereign immunity has already been the subject of numerous controlling federal precedents and the United States Congress is the proper venue for addressing appellees' sovereign immunity issues, *amici curiae* respectfully urge this Court to deny appellees' motion for certification of their question presented as one of great public importance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by eportal, unless otherwise noted, on this 5th day of September 2017 to:

Curtis Miner, Esq.
Curtis Hicks Eidson
255 Alhambra Circle, Penthouse
Coral Gables, FL 33134
curt@colson.com

Robert O. Saunooke, Esq.
Saunooke Law Firm, P.A.
18620 SW 39th Court
Miramar, FL 33029
ndnlawyer@hotmail.com

George B. Abney, Esq.
Daniel F. Diffley, Esq.
Michael J. Barry, Esq.
Alson & Bird LLP
1201 Peachtree Street
Atlanta, GA 30309-3424
george.abney@alston.com
dan.diffley@alston.com
mike.barry@alston.com

CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Craig A. Pugatch
CRAIG A. PUGATCH