CASE NO. 1130168

SUPREME COURT OF ALABAMA

Amada Harrison, as mother and next of friend of Benjamin C. Harrison,

Appellant,

v.

PCI Gaming d/b/a Creek Entertainment Center, et.al.,

Appellee.

BRIEF OF THE UNITED SOUTH AND EASTERN TRIBES, INC. AND NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICI CURIAE IN SUPPORT OF APPELLEES

ON APPEAL FROM THE ESCAMBIA COUNTY CIRCUIT COURT
CIVIL ACTION NO. CV-13-900081

Attorneys for *Amici Curiae* United South and Eastern Tribes, Inc. and National Congress of American Indians:

Elliott A. Milhollin (pro hac vice)
Email: emilhollin@hobbsstraus.com
Gregory A. Smith (pro hac vice)
Email: gsmith@hobbsstraus.com
Hobbs, Straus, Dean & Walker, LLP
2120 L Street N.W.
Suite 700
Washington, DC 20037
Telephone: (202) 822-8282

Alabama Counsel for *Amici Curiae* United South and Eastern Tribes, Inc. and National Congress of American Indians

Thomas A. Woodall
Email: twoodall@sirote.com
Sirote & Permutt, P.C.
P.O. Box 55727
Birmingham, AL 35255-5727
Telephone: (205) 930-5319
Facsimile: (205) 212-2897

Facsmile: (202) 296-8834

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The United South and Eastern Tribes, Inc. (USET) is a non-profit organization representing 26 federally recognized Indian Tribes in 12 states stretching from Texas to Maine.[1] Because of their location in the South and Eastern regions of the United States, the USET member tribes have the longest continuous direct relationship with the United States government, dating back to some of the earliest treaties.

The National Congress of American Indians (NCAI) is the oldest and largest American Indian organization, with a membership of more than 250 Indian tribes and Alaska Native

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[1] The USET-member tribes include: Eastern Band of Cherokee Indians; Miccosukee Tribe of Indians of Florida; Mississippi Band of Choctaw Indians; Seminole Tribe of Florida; Chitimacha Tribe of Louisiana; Seneca Nation of Indians; Coushatta Tribe of Louisiana; Saint Regis Mohawk Tribe; Penobscot Indian Nation; Passamaquoddy Tribe - Pleasant Point; Passamaquoddy Tribe - Indian Township; Houlton Band of Maliseet Indians; Tunica-Biloxi Tribe of Louisiana; Poarch Band of Creek Indians; Narragansett Indian Tribe; Mashantucket Pequot Tribal Nation; Wampanoag Tribe of Gay Head (Aquinnah); Alabama-Coushatta Tribes of Texas; Oneida Indian Nation; Aroostook Band of Micmacs; Catawba Indian Nation; Jena Band of Choctaw Indians; Mohegan Tribe; Cayuga Nation; Mashpee Wampanoag Tribe; and Shinnecock Indian Nation. They can be found in Maine, New York, Massachusetts, Mississippi, North Carolina, South Carolina, Florida, Louisiana, Alabama, Rhode Island, Connecticut and Texas.

villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians.

While USET and NCAI take no position on the underlying merits of the dispute at issue in this case, their member tribes have a strong common interest in opposing Appellant Amada Harrison's (Appellant) attempt to collaterally attack the very existence of the Poarch Band of Creek Indians (the Tribe) in an effort to overcome the doctrine of tribal sovereign immunity from suit.

Appellant asserts that the "legal issue before this Court is the identical issue pending before this Court in *Rape v. Poarch Band of Creek Indians, et al.*, Case No. 1111250, Supreme Court of Alabama (Appeal from Montgomery County Circuit Court; CV-11-901485)," (the Rape case), App. Br. at 16, and Appellant's brief advances the same meritless arguments raised by Mr. Rape in his case. Indeed, the argument section in Appellant's brief is (with few exceptions) a word-for-word "carbon copy" of the brief filed by Mr. Rape in his pending appeal.

Although Appellant makes several other unavailing arguments not addressed in the Rape case, like Mr. Rape,

Appellant: (1) seeks to conflate the Executive branch's authority to federally recognize Indian tribes with a tribe's ability to qualify as an Indian tribe able to take land into trust under the Indian Reorganization Act of 1934 (the IRA); (2) urges this Court to adopt interpretations of the IRA that find no support in either the plain language of the Act or the Supreme Court's decision in Carcieri v. Salazar, 555 U.S. 379 (2009); and (3) wrongfully asserts that tribal sovereign immunity is a dying doctrine that courts shy away from.

Amici USET and NCAI fully support the position of the Poarch Band of Creek Indians that: (1) the tribal defendants enjoy sovereign immunity from suit in this case; (2) the U.S. Supreme Court's decision in Carcieri has no bearing on questions of federal recognition or tribal sovereign immunity; and (3) Alabama courts lack subject matter jurisdiction over a non-Indian's claims arising from conduct on Indian lands affecting the economic interests of the Tribe.

Amici USET and NCAI independently sought and were granted leave to file amicus curiae briefs by this Court in the Rape case in order to provide the Court with additional

information about the IRA and the import of the Carcieri decision, and to present this Court with a clear and accurate representation of the legal principles underlying federal Indian law and the doctrine of tribal sovereign immunity. Rather than resubmit those briefs separately, Amici are filing this joint brief and have attached the referenced briefs as exhibits for the Court's convenience. (Exhibit A - USET Brief); (Exhibit B - NCAI Brief).

ARGUMENT

Appellant conflates and confounds wholly distinct legal doctrines in an effort to convince this Court to rule in a manner inconsistent with well-settled precedent. Appellant's arguments find no basis in the law and cannot prevail.

I. The Carcieri Decision had no effect on the Poarch Band's Status as a Federally-Recognized Tribe

Similar to Mr. Rape, Appellant contends that the U.S. Supreme Court's holding in Carcieri on the meaning of the term "Indian" for purposes of the Indian Reorganization Act of 1934 limits the authority of the United States to politically recognize sovereign Indian tribes.

As Amicus USET demonstrates in its prior amicus curiae brief, the Carcieri decision does not address recognition or what constitutes a federally-recognized tribe, and did not limit federal recognition to tribes "recognized" in 1934 as Appellant suggests. Ex. A at 4-11. The Court's decision did not impose any temporal limitation on the authority of the United States to recognize tribes after 1934. Id.

The Carcieri decision has no bearing on the validity of the Department of Interior's Part 83 recognition

regulations or recognition decisions made pursuant to that authority. Ex. A at 11-21. The statutory authority for the Part 83 regulations is not based on the IRA at issue in Carcieri, but rather on the Secretary's authority under its organic act to issue regulations. Id. at 12-13. In any event, the authority of the United States to federally recognize tribes through the Part 83 regulations was specifically ratified by Congress with the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a et seq., which required the Department of Interior to maintain a definitive list of federally-recognized tribes. Ex. A at 13-14.

Prior to the promulgation of the Part 83 regulations, there was no formal process for recognition and recognition decisions by the political branches were generally viewed as presenting political questions not subject to review by the Courts. Id. at 15-16. The Carcieri decision did not, as Appellant suggests, App. Br. at 33, retroactively terminate any tribe recognized since 1934. Rather, it merely stated that in order to be considered an "Indian tribe" for purposes of the IRA to take land into trust, a Tribe must demonstrate it was "under federal jurisdiction"

in 1934. Ex. A at 11-12.[2] The Court did not provide any guidance on what it meant to be "under federal jurisdiction" in 1934, and any such determination must be made on a case-by-case basis against the backdrop of federal Indian law in a manner that accounts for the unique history of each tribe and its relationship with the United States. Id. at 19-21.

II. Tribal Sovereign Immunity is Settled Law and Bars State Court Jurisdiction over Indian Tribes, Tribal Entities, Tribal Officials and Tribal Employees

Like Mr. Rape, Appellant asserts there is a "trend" in the law whereby the courts "increasingly disfavor tribal immunity," App. Br. at 19, arguing that the Supreme Court has refused to "chain[] itself to a rigid and inflexible rule regarding tribal sovereignty" and, by implication, has abrogated the doctrine of sovereign immunity. App. Br. at 19-22.

In its prior amicus curiae brief, NCAI demonstrates that the doctrine of tribal sovereign immunity is well established and controlling in this case. Ex. B at 4-12. The U.S. Supreme Court has addressed the question of tribal

[2] "Congress has defined 'Indian' for a wide variety of purposes," and "[t]here is no single statute that defines 'Indian' for all federal purposes." *Cohen's Handbook of Federal Indian Law* § 3.03[4].

sovereign immunity on six occasions since 1977, and it has affirmed the validity and viability of the doctrine on each occasion. Id. Similarly, every U.S. Circuit Court of Appeals (except the Third Circuit where there are no federally-recognized tribes) has issued opinions affirming the continued viability of the doctrine of tribal sovereign immunity. Ex. B at 12-17. And state courts of last resort have also consistently affirmed the doctrine. Ex. B at 17-21.

Similar to Mr. Rape, Appellant confuses the doctrine of tribal sovereign immunity with the doctrine of Indian preemption (over application of state law) in an attempt to convince this Court to reach a conclusion inconsistent with well-settled law. App. Br. at 20-21; see also Ex. B at 21-25. As noted, tribal sovereign immunity and the Indian preemption doctrine may ultimately bar legal claims against a tribe, but each doctrine is applied by a court to resolve distinctly different questions. Ex. B at 21-25.

The reasoning behind tribal sovereign immunity is the same as that for federal and state governments: it avoids interference with governmental functions and a government's control of its funds and property. Id. at 26. Tribal

sovereign immunity does not derive from the Constitution, but rather is a manifestation of inherent tribal sovereignty that predates the Constitution. Id. at 26-27. Accordingly, tribal immunity is a matter of federal law, and is not subject to diminution by the States. Id. at 25-27.

III. Collateral Attacks on Tribal Recognition or the Trust Status of Tribal Lands are Impermissible

In this appeal, Appellant attempts to shore-up the arguments first raised by Mr. Rape, arguing: (1) that the Ninth Circuit's recent decision in Big Lagoon Rancheria v. State of California, 741 F.3d 1032 (9th Cir. 2014), allows collateral attacks against the recognized status of Indian tribes pursuant to Carcieri, App. Br. at 41-42 and 49; and (2) that the burden has somehow shifted to the Tribe to demonstrate it was under federal jurisdiction in 1934, and because it has not made such a showing, it was not properly recognized and is therefore subject to suit. App. Br. at 49-50. Both arguments should fail.

As an initial matter, it is noteworthy that a petition for panel rehearing and rehearing en banc has been filed in the Big Lagoon Rancheria case and is pending. Big

Lagoon Rancheria v. State of California, Case No. 10-17803, Dkt. No. 61 (March 6, 2014). Amici USET and NCAI have filed an amici curiae brief in the case in support of the petition for panel rehearing and rehearing en banc. Big Lagoon Rancheria v. State of California, Case No. 10-17803, Dkt. No. 67-2 (March 17, 2014).

To date, only one court has fully considered the import of the Big Lagoon decision, and has soundly rejected the Ninth Circuit panel decision's reasoning as utterly unconvincing. In State of Alabama v. PCI Gaming, the Court stated: "This court respectfully declines to follow the majority's reasoning in Big Lagoon, a non-binding case, as it finds more persuasive Big Lagoon's dissent." Memorandum Opinion and Order at 43, No. 2:13-CV-178-WKW (M.D. Ala. April 14, 2014). The court found five additional reasons not to follow the *Big Lagoon* majority:

> In addition to the points made by the dissent, there are at least five reasons to question *Big Lagoon's* persuasiveness. First, *Big Lagoon's* majority essentially undid a federal agency's final decision and divested that agency's title to land (if not directly, then indirectly), seemingly without concern that the federal agency was not a party to the action. Second and relatedly, the panel admitted that some of the issues relevant to whether the tribe was under federal jurisdiction in 1934 were "perhaps beyond [its] competence to answer," yet at the same time it failed to

> obtain input (as it could have under the APA) from the federal agency that had the specific expertise that the court lacked. *Cf. United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001) ("Determining whether a group of Indians exists as a tribe is a matter requiring [ ] specialized agency expertise."). Third, *Big Lagoon* majority's opinion did not acknowledge or apply the Secretary's two-part standard for analyzing "under federal jurisdiction" in the post-*Carcieri* world, *see supra* note 19. Fourth, the *Big Lagoon* panel essentially conducted a *de novo* review of the Indian-lands status, notwithstanding that a court that reviews a final agency decision "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006). Fifth, it cannot be ignored that *Big Lagoon* is the subject of a pending petition for rehearing.

Id. at 44-45.

Appellant also errs in seeking to shift the burden to the Tribe to demonstrate that it was "under federal jurisdiction in 1934." Appellant argues that the Tribe "failed to introduce evidence that it was under federal jurisdiction in 1934, and no judicial or administrative proceeding has determined that the Poarch Band was under federal jurisdiction in 1934." App. Br. at 49. Similarly, Appellant argues that "the Defendants did not establish that the property on which the alleged incident occurred was properly recognized 'Indian lands.'" App. Br. at 50.

But it is no surprise that the Poarch Band submitted no such evidence, as it properly asserted a jurisdictional defense to suit based on sovereign immunity. Amici are very troubled by this line of argument, which would suggest that by merely mounting an after-the-fact collateral attack on the Tribe's recognition or the trust status of its lands, a plaintiff may somehow shift the burden to the Tribe to affirmatively demonstrate it meets a "test" constructed by Appellant. The Tribe is a federally-recognized Tribe - conclusively recognized as such on the list of Federally-Recognized Tribes, 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014), 25 U.S.C. 479a-1 - and entitled to all of the privileges and immunities of federally recognized tribes, 25 U.S.C. 476(f). Appellant may not impermissibly shift the burden to the Tribe to prove its already conclusively established existence as a federally-recognized tribe based on a test concocted by Appellant that has no basis in the law.

CONCLUSION

The Court should affirm the Circuit Court's judgment dismissing this case.

Respectfully submitted,

/s/ Thomas A. Woodall

Thomas A. Woodall
Email: twoodall@sirote.com
Sirote & Permutt, PC
2311 Highland Avenue South
Birmingham, AL 35205
Telephone: 205-930-5319
Facsimile: 205-212-2897
Counsel for Amici Curiae, United South and Eastern Tribes, Inc. and National Congress Of American Indians

OF COUNSEL:

Elliott A. Milhollin
Email: emilhollin@hobbsstraus.com
Gregory A. Smith
Email: gsmith@hobbsstraus.com
Hobbs, Straus, Dean & Walker LLP
2120 L Street NW
Washington, D.C. 20037
Telephone: 202-822-8282
Facsimile: 202-296-8834
Pro Hac Vice

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing brief and argument by email on each counsel of record for Ms. Harrison and Appellees, as noted below:

R. Graham Esdale
Email: graham.esdale@beasleyallen.com
Dana G. Taunton
Email: dana.taunton@beasleyallen.com
BEASLEY, ALLEN, CROW, METHVIN,
PORTIS & MILES, P.C.
218 Commerce Street
Montgomery, AL 36104
Telephone: (334) 269-2343
Facsimile: (334) 954-7555

Kasie M. Braswell
kasie@braswellmurphy.com
D. Brian Murphy
Brian@braswellmurphy.com
BRASWELL MURPHY, LLC
59 St. Joseph Street
Mobile, AL 36602
Telephone: (251) 438-7503

Charles A. Dauphin
Email: cdauphin@dauphinparis.com
300 Vestavia Parkway
Suite 3400
Birmingham, AL 35216
Telephone: (205) 637-0591
Facsimile: (205) 979-6019

DATED this 13 day of May, 2014

/s/Thomas A. Woodall

Thomas A. Woodall
Email: twoodall@sirote.com
Sirote & Permutt, PC

P.O. Box 55727
Birmingham, AL 35255-5727
Telephone: 205-930-5319
Facsimile: 205-212-2897
Counsel for Amici Curiae, United South and Eastern Tribes, Inc. and National Congress Of American Indians

OF COUNSEL:

Elliott A. Milhollin
Email: emilhollin@hobbsstraus.com
Gregory A. Smith
Email: gsmith@hobbsstraus.com
Hobbs, Straus, Dean & Walker LLP
2120 L Street NW
Washington, D.C. 20037
Telephone: 202-822-8282
Facsimile: 202-296-8834
Pro Hac Vice

EXHIBIT "A"

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SUPREME COURT OF ALABAMA

Jerry Rape,

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Attorneys for *Amicus Curiae* United South and Eastern Tribes, Inc.:

Gregory A. Smith (pro hac vice pending)
Email: gsmith@hobbsstraus.com
Elliott A. Milhollin (pro hac vice pending)
Email: emilhollin@hobbsstraus.com
Hobbs, Straus , Dean & Walker, LLP
2120 L Street N.W.
Suite 700
Washington, DC 20037
Telephone: (202) 822-8282
Facsimile: (202) 296-8834

Alabama Counsel for *Amicus Curiae* United South and Eastern Tribes, Inc.

Thomas A. Woodall
Email: twoodall@sirote.com
Sirote & Permutt, P.C.
2311 Highland Avenue South
P.O. Box 55727
Birmingham, AL 35255-5727
Telephone: (205) 930-5319
Facsimile: (205) 212-2897

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative History

Other Authorities

Interest of *Amicus*

The United South and Eastern Tribes, Inc. ("USET") is a non-profit organization representing 26 federally recognized Indian Tribes in 12 states stretching from Texas to Maine.[1] USET-member Tribes had the earliest contact with European colonists, the earliest contact with the newly formed States, and the earliest contact with the new United States. They have the longest continuous direct relationship with the United States government, and a long

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[1] Established over forty years ago, USET works at the regional and national level to assist federal, state and local governments implement policies consistent with the unique historic and political status of its member tribes.

The USET-member tribes include: Eastern Band of Cherokee Indians; Miccosukee Tribe of Indians of Florida; Mississippi Band of Choctaw Indians; Seminole Tribe of Florida; Chitimacha Tribe of Louisiana; Seneca Nation of Indians; Coushatta Tribe of Louisiana; Saint Regis Mohawk Tribe; Penobscot Indian Nation; Passamaquoddy Tribe - Pleasant Point; Passamaquoddy Tribe - Indian Township; Houlton Band of Maliseet Indians; Tunica-Biloxi Tribe of Louisiana; Poarch Band of Creek Indians; Narragansett Indian Tribe; Mashantucket Pequot Tribal Nation; Wampanoag Tribe of Gay Head (Aquinnah); Alabama-Coushatta Tribes of Texas; Oneida Indian Nation; Aroostook Band of Micmacs; Catawba Indian Nation; Jena Band of Choctaw Indians; Mohegan Tribe; Cayuga Nation; Mashpee Wampanoag Tribe; and Shinnecock Indian Nation. They can be found in Maine, New York, Massachusetts, Mississippi, North Carolina, South Carolina, Florida, Louisiana, Alabama, Rhode Island, Connecticut and Texas.

history of working with the Indian Reorganization Act of 1934 ("IRA").

USET-member Tribes today retain only small remnants of their original homelands. The IRA was enacted in 1934 to help Tribes regain economic self-sufficiency and control over their own affairs. For many years, USET-member tribes have relied on the authorities in the IRA to realize its promise to revitalize tribal self-government and develop diversified and self-sustaining economies benefitting Tribal citizens and the surrounding community alike. The IRA is an area of federal Indian law in which USET has particular interest and expertise.

Summary of Argument

In this case, Mr. Rape seeks to collaterally attack the well established status of the Poarch Band of Creek Indians (the "Tribe") as a federally recognized Tribe. In doing so, Mr. Rape urges the Court to adopt novel interpretations of the IRA that find no support in either the plain language of the Act or the Supreme Court's decision in Carcieri v. Salazar, 555 U.S. 379 (2009), which involved a USET-member Tribe, the Narragansett Indian Tribe. We submit this brief *Amicus Curiae* to provide the Court with additional

information about the IRA and the import of the Carcieri decision that we believe will not be fully addressed in the briefs of the parties to this case.

Argument

In an attempt to defeat the Tribe's defenses of sovereign immunity and lack of jurisdiction, Mr. Rape seeks to collaterally attack the Tribe's status as a federally-recognized Tribe. USET agrees with the Tribe that Mr. Rape cannot raise these claims in this case and in this forum.

In the event that this Court entertains Mr. Rape's claims, however, it should dismiss them. Mr. Rape seeks to vastly and impermissibly expand the holding and import of the Supreme Court's Carcieri decision to impose a new rule of law that would retroactively terminate any Tribe that had been recognized by the United States since 1934. The Carcieri decision involved the right of tribes to take land into trust, not the Secretary's authority to recognize Indian tribes. Mr. Rape's argument finds no support in either the plain language of the Supreme Court's decision or the IRA. In Carcieri, the Supreme Court held only that a Tribe must demonstrate that it was "under Federal jurisdiction" in 1934 for certain limited purposes, none of

which include Federal recognition and the attributes of tribal sovereignty associated therewith, such as sovereign immunity. It did not hold - or even imply as Mr. Rape argues - that a Tribe must also demonstrate it was a "recognized Indian tribe" in 1934. Nor did it define what it means to be under Federal jurisdiction in 1934. That is an inquiry that has traditionally been left by Congress and the Courts to the Executive Department to make. As Mr. Rape's claims all rest on characterizing the Carcieri decision as something it is not, they must be dismissed.

I. The Carcieri Decision Does Not Address Recognition

Mr. Rape argues that the Supreme Court in Carcieri "necessarily found that in order to meet the definition of a tribe under the IRA, the Narragansetts had to be *both* 'recognized' and 'under federal jurisdiction' at the time of the enactment of the IRA in 1934." Appellant's Brief at 34. Mr. Rape then leaps to the conclusion that if these two "standards" are not met in 1934, a Tribe cannot be federally recognized today by the Department of the Interior. This argument and this leap of logic find no support in the Court's decision in Carcieri, the plain language of the IRA, or its legislative history.

The IRA granted the Secretary of the Interior authority to take land into trust status for "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. §§ 465, 479. In Carcieri, the Supreme Court concluded that the phrase "now under Federal jurisdiction" meant that an applicant tribe had to be "under Federal jurisdiction" at the time the IRA was enacted in 1934 in order to have land taken into trust. Nothing in the decision or the IRA suggests that an applicant tribe also must show that it was a "recognized Indian tribe" in 1934 in order to satisfy the requirements of the Act. The Supreme Court did not address what constitutes a federally recognized tribe and most certainly did not limit Federal recognition to tribes "recognized" in 1934, a period in Federal Indian law where there were no established procedures for such recognition.

The Carcieri decision is focused solely on the meaning of the phrase "now under Federal jurisdiction," not the phrase "recognized Indian tribe." The Court framed the question presented in the case as follows: "In reviewing the determination of the Court of Appeals, we are asked to interpret the statutory phrase 'now under federal jurisdiction' in § 479." Carcieri, 555 U:S. at 382.

Nowhere does the Court indicate it is also deciding the meaning of the phrase "recognized Indian tribe." Rather, the holding in the case mirrors the question presented: "We agree with Petitioners and hold that, for purposes of §479, the phrase 'now under federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment." Id.

The concurring opinions in the case explain the majority opinion as determining only the meaning of the phrase "now under Federal jurisdiction." Justice Breyer correctly notes that the terms "recognized" and "under Federal jurisdiction" were not synonymous, and that the "[t]he statute, after all, imposes no time limit on recognition." Id. at 398 (Breyer, J., concurring). Justices Souter and Ginsburg, in the concurring portions of their opinion, state:

> The disposition of the case turns on the construction of the language from 25 U.S.C. § 479, "any recognized Indian tribe now under Federal jurisdiction." Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that

> tribe from having been under federal jurisdiction at the time. See Memorandum from Associate Solicitor, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 7. And giving each phrase its own meaning would be consistent with established principles of statutory interpretation.

Carcieri, 555 U.S. at 400 (Souter, J., concurring in part and dissenting in part). Nowhere in the decision is there any implication, as Mr. Rape asserts, that a Tribe must also demonstrate that it was "recognized" in 1934 in order to come under the provisions of the IRA.

Basic principles of statutory interpretation and the legislative history of the Act dictate that the word "now" only modifies the phrase "under Federal jurisdiction" and not the preceding phrase "recognized Indian tribe." As a matter of statutory interpretation, the word "now" modifies only "under Federal jurisdiction" because it directly precedes only that phrase. See, e.g., United States v. Villanueva-Sotelo, 515 F.3d 1234, 1238 (D.C. Cir. 2008) (holding that the phrase "knowingly and willingly" only modified the language that followed it regarding false, fictitious and fraudulent statements, and not the language preceding it regarding jurisdiction). Moreover, as an

adverb, the modifier "now" can modify only the adjective phrase "under Federal jurisdiction" not the subject noun "recognized Indian tribe." Villanueva-Sotelo, 515 F.3d at 1238 ("An adverb, in standard English, modifies almost anything except a noun.") (quoting ROBERT FUNK ET. AL., THE ELEMENTS OF GRAMMAR FOR WRITERS 62 (MacMillan 1991)).

That the word "now" modifies only "under Federal jurisdiction" and not "recognized Indian tribe" is also supported by the legislative history of the IRA. The word "now" was included in the phase "now under Federal jurisdiction" when that phrase was added to the original text of the IRA through an amendment offered by Commissioner Collier to address a concern that the original phrase "recognized Indian tribe" would be too inclusive. Hearing on S.2755 and S.3645 Before the S.Comm. on Indian Affairs, 73rd Cong. at 266 (May 17, 1934).

The Supreme Court held in Carcieri that this new language was intended to impose a temporal limitation on the right to acquire lands in trust for those tribes that were "under Federal jurisdiction" in 1934. It was not intended to impose any temporal limitation on the recognition of a tribe, and such recognition could come

after 1934 and with it federal acknowledgment that a tribe possesses the attributes of tribal sovereignty, including sovereign immunity.

Courts that have considered this question since Carcieri treat this aspect of the Supreme Court's decision as self-evident. In Sandy Lake Band of Mississippi Chippewa v. United States, for example, the United States District Court for the District of Minnesota noted that:

> In *Carcieri*, the Supreme Court held that the term 'now' as used in Section 479 was unambiguous and imposed a temporal restriction on Indian tribes 'under Federal jurisdiction.' The Supreme Court in *Carcieri* did not reach the issue of whether the term 'any recognized Indian tribe' was unambiguous. Nor did the Supreme Court conclude that an Indian tribe must have been federally recognized in 1934 to be eligible for IRA benefits.

2012 WL 1581078, *8 n.1 (D.Minn. 2012). Similarly, in Stand Up for California! v. U.S. Dep't of Interior, the United States District Court for the District of Columbia noted that the Carcieri decision "left unanswered" the question of "whether a tribe must have been 'recognized' in 1934 to be eligible for trust land." 2013 WL 324035, *13 (D.D.C. 2013) (noting that the modern formal requirements for federal recognition were not contemplated in 1934 and do not apply in 1934).

Even the Supreme Court has noted the distinction, citing Justice Breyer's Carcieri concurrence in declining to address a claim that a Tribe must also be recognized in 1934. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. ___, 132 S. Ct. 2199, 2204 n.2 (2012).

Amici State of Alabama and Jim Hildreth both make the mistake of conflating these requirements. Br. of Amicus State of Alabama at 10; Br. of Amicus Jim Hildreth at 11. They both argue that the Tribe must demonstrate it was a recognized Indian tribe in 1934 in addition to demonstrating it was "under Federal jurisdiction" in 1934 in order to take land into trust, characterizing it as a two pronged inquiry. But the Supreme Court held only that a Tribe must show it was under Federal jurisdiction in 1934. It did not also state that a Tribe must show it was recognized in 1934 in order to take land into trust today. Of course, the plain language of the IRA dictates that a Tribe seeking to take land into trust today would have to show that it is a "recognized Indian tribe" as of today, but it would not also have to show it was recognized in 1934.

Amici State of Alabama and Jim Hildreth suggest that the Tribe cannot demonstrate it was "recognized" as of 1934 because it was not recognized until 1984, some 50 years later. Even if recognition in 1934 were required, however, the Tribe's formal recognition in 1984 under the Department's Part 83 regulations does not create any implication that the Tribe was not a "recognized Indian tribe" as that term was used in the IRA in 1934. As discussed below, the Department's Part 83 regulations were not implemented until 1978, and create a stringent formal process for recognition that did not exist in 1934. As a result, the fact that a Tribe did not meet new standards for recognition until after they were implemented in 1978 has no bearing on whether the Tribe was a "recognized Indian tribe" as that term was understood in 1934.

II. Carcieri has no bearing on the validity of the Department of Interior's Part 83 regulations or recognition decisions made pursuant to that authority

Mr. Rape argues that the import of the Supreme Court's Carcieri decision is that the Department of Interior's Part 83 regulations are invalid, and that any determinations made pursuant to those regulations are similarly invalid. Carcieri stands for nothing of the sort. It held only that

the phrase "now under Federal jurisdiction" means under Federal jurisdiction in 1934 for the purpose of taking lands into trust, and does not address federal recognition.

Mr. Rape suggests that because Carcieri concluded that the plain meaning of Section 479 of the IRA was limited to Tribes that were "under Federal jurisdiction" in 1934, that means that the Department's Part 83 regulations are invalid because they allow Tribes to be federally recognized after 1934. Appellant's Brief at 32-41. This argument suffers from several infirmities. First, as discussed above, this argument incorrectly conflates recognition and jurisdiction. The Carcieri decision imposes no time limit on recognition, and therefore has no bearing on Part 83 recognition determinations made after 1934. Second, the Part 83 regulations do not depend at all on Section 479 of the IRA. Rather, they were implemented pursuant to 5 U.S.C. § 301,[2] 25 U.S.C. §§ 2,[3] 9,[4] and 43 U.S.C. § 1457.[5]

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[2] 5 U.S.C. §301 provides that "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

Accordingly, any limitation imposed by the Carcieri Court on the proper interpretation of 25 U.S.C. § 479 has no bearing on the Part 83 regulations, as they were promulgated pursuant to independent statutory authorities.

Mr. Rape appears to recognize this weakness in his argument, and argues that the authorities relied upon by the Secretary of the Interior in promulgating the Part 83 regulations are insufficient. Appellant's Brief at 42. Although these authorities provide ample authority to the Secretary to implement the Part 83 regulations on their own, Congress explicitly ratified the Secretary's authority

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[3] 25 U.S.C. §2 provides that "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

[4] 25 U.S.C. §9 provides that "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."

[5] 43 U.S.C. §1457 provides that "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: 1. Alaska Railroad. 2. Alaska Road Commission. 3. Bounty-lands. 4. Bureau of Land Management. 5. United States Bureau of Mines. 6. Bureau of Reclamation. 7. Division of Territories and Island Possessions. 8. Fish and Wildlife Service. 9. United States Geological Survey. **10. Indians**. 11. National Park Service. 12. Petroleum conservation. 13. Public lands, including mines." (emphasis added).

to recognize Tribes pursuant to the Part 83 regulations through the Federally Recognized Indian Tribe List Act of 1994 ("List Act"). 25 U.S.C. 479a et seq.

Congress enacted the List Act in 1994 in order to require the Secretary of the Interior to maintain a definitive list of federally-recognized Indian tribes. In doing so, Congress explicitly ratified the Secretary's Part 83 regulations. Section 103(3) of Pub. L. 103-454 provides that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court." 25 U.S.C. § 479a, note (emphasis added).

Mr. Rape argues that there is no indication that Congress intended that the Department of the Interior create a regulatory scheme for recognizing tribes after the enactment of the IRA. Appellant's Brief at 38. But as the Carcieri decision itself notes, the IRA contemplated that many Tribes would be recognized after 1934, and many Tribes were in fact recognized in the years immediately following the IRA. See Carcieri, 555 U.S. at 398-99 (Breyer, J.,

concurring) (referencing post-IRA Solicitor's opinions regarding the Stillaguamish, Mole Lake, Grand Traverse, Shoshone, St. Croix Chippewas and Nahma and Beaver Indians). Since the IRA contemplated prospective recognition of Indian tribes, it cannot properly be understood to have required tribes to have been "recognized" in 1934.

There was no list of federally recognized tribes in 1934, no formal requirements for recognition in 1934, and no standard criteria for recognition in 1934. Because no required process or standard criteria had been developed for recognition in 1934, Congress and the Executive branches of government historically made case-by-case determinations as to tribal status. These determinations by the political branches were generally viewed by the Courts as political questions not subject to judicial review:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

United States v. Holliday, 70 U.S. 407, 419 (1865). The modern standards for formal recognition were not developed until the late 1970s after the American Indian Policy Review Commission (the "Commission"), concluded that the recognition process to date had resulted in many tribes being mistakenly not formally recognized by the United States. AM. INDIAN POLICY REVIEW COMM'N, FINAL REPORT 461 (1977).

The modern standards for formal recognition, which are now set out at 25 C.F.R. Part 83,[6] require a petitioning tribe to demonstrate it meets seven mandatory criteria:

> (a) The tribe has been identified as an American Indian entity on a substantially continuous basis since 1900 [i.e., is recognized in the sense used in the IRA];
>
> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
>
> (c) The tribe has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
>
> (d) The tribe has provided a copy of the group's present governing document including its membership criteria;

[6] The Department's acknowledgment regulations have been renumbered and amended and clarified twice since they were first promulgated. 59 Fed. Reg. 9280 (Feb. 25, 1994); 65 Fed. Reg. 7052 (Feb. 11, 2000).

> (e) The tribe's membership consists of individuals who descend from an historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity, and provide a current membership list;
>
> (f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and,
>
> (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

25 C.F.R. § 83.7. Such acknowledgments are not granted lightly, with fewer than half being approved. *See* Department of Interior, Status Summary of Acknowledgment Cases, available at http://www.bia.gov/cs/groups/xofa/documents/text/idc-020611.pdf. And yet, the Tribe met all of these criteria, including notably that the "tribe has maintained political influence or authority over its members as an autonomous entity from historical ties until the present…." 25 C.F.R. § 83.7(c).

The import of Mr. Rape's argument is that Carcieri stands for the proposition that Congress decided to draw a line at the Tribes that were recognized in 1934, and that any recognition of any Tribe by the Department of Interior

thereafter is presumptively invalid and so too would be the Tribe's sovereign immunity. The implication of this argument would be the retroactive termination of at least 17 federally-recognized Tribes across the United States, and probably many more. Carcieri does not have such sweeping and retroactive effect.

Rather, Carcieri stands only for the proposition that a tribe must demonstrate that it was "under Federal jurisdiction" in 1934 to take land into trust. The Court in Carcieri left unanswered what it meant to be "under Federal jurisdiction" in 1934. The Court had no occasion to explain what it meant to be "under Federal jurisdiction" in 1934 because it determined, based on a concession made only by the United States (and not the Narragansett Indian Tribe), that the Narragansett Indian Tribe was not "under Federal jurisdiction" in 1934.[7]

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[7] Its holding with regard to the Narragansett Indian Tribe was not based on an application of the Tribe's factual circumstances. Rather, it relied on the fact that the petition for certiorari had asserted that the Tribe was not under federal jurisdiction in 1934 and that "[t]he respondents' brief in opposition declined to contest this assertion." Carcieri, 555 U.S. at 395-396. Because the United States failed to contest it, the petitioner's allegation was automatically accepted by operation of the Court's procedural rules. Id. ("Under our rules, that alone is reason to accept this as fact for purposes of our

After the Carcieri decision, it is incumbent on the Secretary of the Interior to determine at the time he takes land into trust, whether a tribe is recognized today, and whether it was "under Federal jurisdiction" in 1934. As an initial matter, and as set out in the Tribe's brief, this determination is one delegated by Congress to the Secretary of the Interior to make upon determining whether to take land into trust, and any challenge to such a determination must be made within the applicable six-year statute of limitations. Nothing in the Carcieri decision provides any sort of basis, once land has been taken into trust and the six-year statute has run, for a collateral attack on such a Secretarial determination.

The Secretary must make each such determination on a case-by-case basis against the backdrop of federal Indian law and in a manner that accounts for the unique history of

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decision in this case."). Furthermore, the Tribe-- which was not a party to the case -- had no opportunity to object to the petitioner's allegation or prove a factual basis for federal jurisdiction in 1934. Indeed, Justices Souter and Ginsberg noted that the parties simply did not understand that the issue was present. The two justices dissented from the Court's straight reversal and stated that they would have remanded the case so that the United States and the Narragansett Tribe would have had the opportunity to argue that the Tribe was "under Federal jurisdiction." 555 U.S. at 401.

each tribe and its relationship with the United States. The Supreme Court has announced several black letter rules that inform the Secretary's determination. The first of these is the longstanding principle that once a tribe has come under the jurisdiction of the United States, it will remain under federal jurisdiction unless that relationship has been expressly and unambiguously terminated by Congress, or the tribe itself voluntarily abandons tribal relations. See, e.g. United States v. Nice, 241 U.S. 591 (1916) (holding that "the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial").

This means that although the Executive Department or its officers may have at some points in a Tribe's history believed that a Tribe no longer fell under Federal jurisdiction, that determination will have had no effect unless ratified by Congress. As Justice Breyer recognized in his concurring opinion, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." Carcieri, 555

U.S. at 397 (Breyer, J., concurring). Another important rule is the fact that a Tribe remains under Federal jurisdiction even in cases where the United States has not continually exercised jurisdiction over the Tribe. United States v. John, 437 U.S. 634, 653 (1978) (holding that "[n]either the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them").

There is nothing to indicate in this case that the determinations made by the Secretary with regard to the Tribe's formal recognition as Indian tribe under the modern Part 83 recognition process, or his determination to take the Tribe's land into trust, was in any way inconsistent with these principles or in any way contravened the Court's ruling in Carcieri.

Conclusion

The Court should affirm the Circuit Court's judgment dismissing this case.

Respectfully submitted,
/s/ Thomas A. Woodall

Thomas A. Woodall
Email: twoodall@sirote.com
Sirote & Permutt, PC
2311 Highland Avenue South
Birmingham, AL 35205
Telephone: 205-930-5319
Facsimile: 205-212-2897
Counsel for Amicus Curiae,
United South and Eastern Tribes, Inc.

OF COUNSEL:

Gregory A. Smith
Email: gsmith@hobbsstraus.com
Elliott A. Milhollin
Email: emilhollin@hobbsstraus.com
Hobbs, Straus, Dean & Walker LLP
2120 L Street, NW
Washington, D.C. 20037
Telephone: 202-822-8282
Facsimile: 202-296-8834
Motions for Pro Hac Vice Pending

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing brief and argument by email on each counsel of record for Mr. Rape and appellees, as noted below:

Andrew J. Moak
Email: Andrew@abbottfirm.com
Matt Abbott
Email: matt@abbottfirm.com
ABBOTT LAW FIRM, LLC
308 Martin Street North
Suite 200
Pell City, AL 35125
Telephone: (205) 338-7800
Facsimile: (205) 338-7816

Luther Strange
Email: lstrange@ago.state.al.us
John C. Neiman, Jr.
Email: jneiman@ago.state.al.us
Andrew L. Brasher
Email: abrasher@ago.state.al.us
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
Telephone: (334) 242-7447
Facsimile: (334) 242-4891

Bryan M. Taylor
Email: Bryan@bryantaylorlaw.com
2005 Cobbs Ford Road
Suite 403
Prattville, AL 36066
Telephone: (334) 595-9650
Facsimile: (334) 610-3290

Ed R. Haden
Email: ehaden@balch.com
BALCH & BINGHAM LLP
Post Office Box 306
Birmingham, AL 35201-0306
Telephone: (205) 251-8100

Facsimile: (205) 226-8799

Kelly F. Pate
E-mail: kpate@balch.com
Robin G. Laurie
E-mail: rlaurie@balch.com
BALCH & BINGHAM LLP
Post Office Box 78
Montgomery, AL 36101-0078
Telephone: (334) 834-6500
Facsimile: (334) 269-3115

DATED this 17 day of April, 2013.

/s/ Thomas A. Woodall

Thomas A. Woodall
Email: twoodall@sirote.com
Sirote & Permutt, PC
2311 Highland Avenue South
Birmingham, AL 35205
Telephone: 205-930-5319
Facsimile: 205-212-2897

Counsel for Amicus Curiae,
United South and Eastern Tribes,
Inc.

Gregory A. Smith
Email: gsmith@hobbsstraus.com
Elliott A. Milhollin
Email: emilhollin@hobbsstraus.com
Hobbs, Straus, Dean & Walker LLP
2120 L Street, NW
Washington, D.C. 20037
Telephone: 202-822-8282
Facsimile: 202-296-8834

Of Counsel
Motions for Pro Hac Vice Pending

EXHIBIT “B”

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No. 1111250

IN THE SUPREME COURT OF ALABAMA

JERRY RAPE,

Appellant,

v.

POARCH BAND OF CREEK INDIANS, ET AL.,

Appellees.

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURAIE IN SUPPORT OF APPELLEES AND AFFIRMANCE

On appeal from the Circuit Court of Montgomery County
(CV-2011-901485, Hon. Eugene W. Reese presiding)

Richard A. Guest
District of Colombia Bar #477572
Joel West Williams
Pennsylvania State Bar #91691
Admitted Pro Hac Vice #2010P42P
Native American Rights Fund
1514 P Street, NW, Suite D
Washington, DC 20005
(202) 785-4166
(202) 822-0068 (fax)
Email: richardg@narf.org
Email: williams@narf.org

R. Bernard Harwood, Jr. (HAR032)
ROSEN HARWOOD, P.A.
2200 Jack Warner Parkway
Suite 200
Tuscaloosa, AL 35401
Telephone: (205) 344-5000

Facsimile: (205) 758-8358
Email: bharwood@rosenharwood.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ORAL ARGUMENT

The National Congress of American Indians ("NCAI") defers to the Poarch Band of Creek Indians' ("Tribe") position regarding oral argument.

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

Established in 1944, NCAI is the oldest and largest American Indian organization, representing more than 250 Indian tribes and Alaska Native villages. While variations exist among them, including their lands, economic bases, populations, and histories, all of the tribes share a common interest in opposing the attacks on the doctrine of tribal sovereign immunity made in this case by Plaintiff/Appellant Jerry Rape ("Plaintiff").[1]

This appeal presents an issue of first impression for this Court: whether a state court has jurisdiction over a dispute between a non-Indian plaintiff and an Indian tribe in the absence of clear congressional abrogation or waiver by a tribe of its sovereign immunity. NCAI takes no position on the underlying merits of the tribal casino

[1] In accordance with Ala. R. App. P. 28(f), Jerry Rape is herein referred to by his party designation in the lower court.

transaction dispute in this case. However, NCAI fully supports the position of the Poarch Band of Creek Indians that: (1)the tribal defendants enjoy sovereign immunity from suit in this case; (2) Plaintiff's *Carcieri*-based arguments must fail since he brings them too late, in the wrong forum, and without the United States as an indispensable party; and (3) Alabama courts lack subject matter jurisdiction over a non-Indian's claims arising from conduct on Indian lands affecting the economic interests of the Tribe. NCAI submits this brief to present this Court with a clear and accurate representation of the legal principles underlying federal Indian law and, in particular, the doctrine of tribal sovereign immunity.

NCAI is extremely concerned about the novel theory of tribal sovereign immunity advanced by Plaintiff and the Alabama Attorney General. Sovereign immunity is an aspect of sovereignty that shields governments from unpermitted lawsuits. Tribal sovereign immunity is similar, but not identical, to the immunity enjoyed by federal, state and foreign governments. Despite Plaintiff's assertions to the contrary, tribal sovereign immunity is not a dying doctrine that courts shy away from. Rather, it is a doctrine that is

widely accepted as a rule of law and applied by both federal and state courts.

The arguments of Plaintiff and the Alabama Attorney General are not new and have been debated in the proper forum: Congress. Instead of enacting a broad abrogation of tribal sovereign immunity, Congress has taken a measured approach that furthers federal policies of tribal self-determination, cultural autonomy, and sustainable economic development, balancing the broader interests of the public and non-tribal governments. The very types of arguments they make regarding the need for abrogation in the areas of torts, contracts, and commercial activities have all been considered—and rejected—by Congress.

Indeed, Plaintiff and the Alabama Attorney General urge this Court to ignore precedent, to make policy determinations, and to diminish a fundamental attribute of another government. Plaintiff asserts that the Supreme Court of the United States has "moved away from a bright line rule on tribal sovereignty" and, by implication, has abrogated the doctrine of tribal sovereign immunity. Pl.'s Br. 11-12. Rather than rely on the holdings of applicable

precedent, Plaintiff asks this Court to follow a fictional "trend" in the law wherein federal and state court judges may adopt a policy-based abrogation of tribal sovereign immunity--based on his misguided Indian pre-emption analysis.

This Court is not faced with applying a doctrine that is in transition, but has before it a case with a clearly applicable rule for which no valid exception has been offered. NCAI simply asks this Court to review the case law on point and to follow the law that governs this case.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY BARS STATE COURT JURISDITION OVER INDIAN TRIBES, TRIBAL ENTITIES, TRIBAL OFFICIALS AND TRIBAL EMPLOYEES.

A. Tribal Sovereign Immunity is Settled Law: Absent a Clear Waiver by the Tribe or Congressional Abrogation, Suits Against Indian Tribes are Barred by Sovereign Immunity.

1. Although it has expressed some reservation regarding "the wisdom of perpetuating the doctrine," the Supreme Court of the United States has consistently affirmed the doctrine of tribal sovereign immunity.

Since 1977, the Supreme Court of the United States has addressed the question of tribal sovereign immunity on six occasions, and has affirmed and reaffirmed its viability in each case. *Cohen's Handbook of Federal Indian Law* §7.05[1][a], at 636 (Nell Jessup Newton ed., 2012) [hereinafter *Cohen's Handbook*]. In *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977), the State of Washington sought to enjoin tribal members from violating state fishing laws, and the Tribe entered an appearance to represent its members. Although the Court held that the tribal members were amenable to suit in state court, tribal sovereign immunity prevented suit directly against the Tribe. 433 U.S. at 172. The Court held: "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.*

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court was faced with the question of whether Congress had abrogated tribal sovereign immunity and authorized suit against Indian tribes through the habeas corpus relief provision under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2006). In holding that Congress did not abrogate

tribes' immunity, the Court reaffirmed the rule that "Indian tribes have long been recognized as possessing the common-law immunity from suit enjoyed by sovereign powers," and it emphasized that any waiver of sovereign immunity "cannot be implied but must be unequivocally expressed" by Congress. 436 U.S at 58-59 (citations omitted).

Next, in a very unusual case, *Three Affiliated Tribes of the Fort Berthold Reservation v. World Engineering, P.C.*, 476 U.S. 877 (1986), the Court was faced with a North Dakota law requiring tribes suing non-Indian defendants in state court to waive sovereign immunity--not just on the claim filed, but a blanket waiver of all tribal sovereign immunity in state court. 476 U.S. at 881. Here, the Court found that the state law at issue was pre-empted by federal law--by the doctrine of tribal sovereign immunity--and concluded that sovereign immunity is a necessary corollary to Indian sovereignty and self-government. *Id.* at 884-85. Additionally, the Court pointed out that allowing a tribe to sue a non-Indian in state court, even though a non-Indian may not be able to sue a tribe, was no different than the same inequity that existed *vis-a-vis* federal and state government, who likewise could sue while at the same

time limit suits against themselves through sovereign immunity. *Id.* at 893.

Then, in *Oklahoma Tax Commission v. Citizen Band Pottawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the State of Oklahoma directly challenged the doctrine of tribal sovereign immunity, contending that it interfered with a state's ability to administer tax laws and, in the commercial context, was so detached from traditional tribal interests that it no longer made sense. Once again, the Court recognized that Indian tribes are entitled to immunity from suit "absent a clear waiver by the tribe or congressional abrogation." *Id.* at 509. Thus, the Court held that although the state was empowered to collect taxes on the sale of cigarettes to non-Indians, sovereign immunity barred suit against the tribe for collection of those taxes. *Id.* at 510.

Perhaps the clearest explanation and discussion by the Court of the rule governing the present case came in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). In *Kiowa*, the Oklahoma Court of Appeals had held that Indian tribes were subject to suit in state court for breaches of

contract involving off-reservation commercial transactions. *Id.* On review, the Supreme Court of the United States reiterated the rule: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. Then, the Court analyzed the Oklahoma Supreme Court's decision in *Hoover v. Oklahoma*, which the lower court had followed for the principle that "tribal immunity for off-reservation commercial activity, like the decision not to exercise jurisdiction over a sister State, is solely a matter of comity." *Id.* at 755 (citations omitted). But the Court took issue with this principle, noting that tribal sovereign immunity is not "coextensive" with state sovereign immunity since tribes, unlike the States, were not at the Constitutional Convention. *Id.* at 756 (citations omitted). Thus, the Court concluded, "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Id.*

In its discussion of tribal sovereign immunity, the *Kiowa* Court did express reservation regarding "the wisdom of perpetuating the doctrine," especially in light of a tribe's participation in the nation's commerce, in relation

to those who may be unaware that they are dealing with a tribe, or with respect to tort victims. *Id.* at 758. However, the Court declined the invitation to abrogate tribal sovereign immunity, either in whole or in part, and instead "defer[red] to the role Congress may wish to exercise in this important judgment." *Id.* The Court proceeded to describe the actions already taken by Congress in abrogating tribal sovereign immunity in limited circumstances (*e.g.*, mandatory liability insurance, certain gaming activities), and actions taken by Congress to preserve the doctrine (*e.g.*, financial assistance programs). *Id.* at 758-59. The Court clearly recognized that Congress, not the courts, is in the best position to "weigh and accommodate the competing policy concerns and reliance interests." *Id.* at 759.

At the same time that the Court was deciding *Kiowa*, Congress was examining tribal sovereign immunity and was well aware of the concerns being expressed by the Court and others. Between 1996 and 1999, Congress held extensive hearings on the topic of tribal sovereign immunity and heard a full range of views, including those who advocated for abrogating tribal sovereign immunity in commercial

transactions. S. Rep. No. 106-150, at 10-11 (1999). Congress considered a number of legislative bills which proposed a spectrum of tribal sovereign immunity abrogation, including allowing states to sue tribes and tribal businesses to collect state taxes and not allowing tribes to assert sovereign immunity in tort suits.[2] Through these bills and in the hearings, Congress heard the types of policy-based arguments made in the case *sub judice* for abrogating tribal sovereign immunity. Instead of broadly abrogating tribal sovereign immunity, Congress chose a more limited, measured approach that balanced the policies of self-determination and economic development with concerns of those opposing tribal sovereign immunity. Seielstad, *supra*, at 736-40, 763, 767-68.

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[2] For a full discussion of pending legislation during that time, see Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 Am. Indian Law Rev. 309, 330-55 (1999-2000), and Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 728-42, 751-52 (2002). One of the bills before Congress specifically referenced *Kiowa* in its findings. *Id.* (citing American Indian Tort Liability Insurance Act, S. 2302, 106th Cong. (1999).

And finally, the most recent tribal sovereign immunity case to come before the Court dealt with the question of whether a tribe had waived its immunity in a construction contract that contained an arbitration clause and choice of law provision. *C&L Ent. Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001). In *C&L*, the Court affirmed the continued viability of the doctrine of tribal sovereign immunity, but held that the specific and explicit nature of the arbitration clause and choice of law provision in the contract at issue was sufficiently clear to waive the tribe's immunity from suit to enforce the arbitrator's decision in state court. *Id.* at 418.

Therefore, the Supreme Court has had many opportunities to refute the doctrine of tribal sovereign immunity over the past thirty-five years and in every instance has reaffirmed the doctrine. Based on the foregoing, it should be clear that Plaintiff's arguments are not new. In addition to the Court, these arguments have also been presented to Congress, who has thoroughly examined the arguments and balanced the policy-based needs of tribes, the public, and non-tribal governments. This court, similar

to the *Kiowa* Court, should decline Plaintiff's invitation to usurp the role of Congress in this matter.

2. The lower federal courts and state courts have unsurprisingly and uniformly adhered to the doctrine of tribal sovereign immunity.

Plaintiff's contention that there is a judicial trend in the lower federal courts and state courts abrogating tribal sovereign immunity is without merit. It simply cannot be squared with *Kiowa* and the large body of federal and state case law reaffirming and applying tribal sovereign immunity. Every U.S. Circuit Court of Appeals, except the Third Circuit where there are no federally recognized tribes, has issued opinions that affirm the viability of the doctrine of sovereign immunity. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) ("doctrine of tribal sovereign immunity precludes a suit against an Indian tribe except in instances in which Congress has abrogated that immunity or the tribe has forgone it"); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir.) (claims barred against individual members of the tribal council and employees of the gaming enterprise), *cert. denied*, 543 U.S.

966 (2004); *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552 (4th Cir. 2006) (tribe was necessary and indispensable party which could not be joined under doctrine of tribal sovereign immunity); *T T E A v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999) (dismissed suit against tribe on basis on sovereign immunity and failure to state a claim); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 920-21 (6th Cir. 2009) (affirming dismissal of suit against a tribal corporation because there was no waiver); *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 689 (7th Cir. 2011) (Indian tribes are sovereign governments "immune from suit absent waiver or congressional abrogation"); *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1102 (8th Cir. 2012) (granting motion to quash third-party subpoenas against a tribe and tribal officer); *Cook v. AVI Casino Enters.*, 548 F.3d 718, 725 (9th Cir. 2008) (negligence and dram shop liability claims barred against a tribal corporation and its employees), *cert. denied*, 129 S. Ct. 2159 (2009); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292-93 (10th Cir. 2008) (breach of contract and civil

conspiracy action barred against tribal business entities and individual officers because the enterprise did not waive its immunity); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224 (11th Cir.) (wrongful death case barred against a Tribe, tribal business entities, and the tribal police), *cert. denied*, 133 S. Ct. 663 (2012); *Vann v. United States Dep't of the Interior*, 701 F.3d 927, 928 (D.C. Cir. 2012), *rehearing en banc denied* (Mar. 12, 2013) (Indian tribe is a sovereign government "entitled to sovereign immunity [which] may not be sued without its consent").

Of particular note are the recent decisions by the U.S. Court of Appeals for the Eleventh Circuit, in particular, *Freemanville Water Sys. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009); *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224; and *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 843 (2013). In *Freemanville*, the Poarch Band claimed that a rural water authority could not bring suit against it seeking declaratory and injunctive relief. 563 F.3d at 1206. The suit arose because the Poarch Band had begun developing

infrastructure to supply its own water, and some of the tribal water system was to be located within Freemanville's service area, allegedly in violation of the Consolidated Farm and Rural Development Act of 1961, 7 U.S.C. §§ 1921 *et seq.* (2006). *Id.* at 1207. In no uncertain terms, the Eleventh Circuit stated and followed the doctrine of tribal sovereign immunity, and held that the Poarch Band of Creek Indians is immune from suit:

> "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Thus "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived immunity." Tribal sovereign immunity, where it applies, bars actions against tribes regardless of the type of relief sought.

563 F.3d 1207-08 (internal citations omitted); *accord Sanderford v. Creek Casino Montgomery*, 2013 U.S. Dist. LEXIS 3750, at *4 (M.D. Ala. January 10, 2013) ("[Poarch Band] is a federally recognized Indian Tribe and enjoys sovereign immunity absent Congressional abrogation or waiver").

In *Furry*, the father of a woman who was killed in a motor vehicle collision after she left a casino bar visibly

intoxicated filed a wrongful death suit against the Tribe, tribal business entities and the tribal police. 685 F.3d at 1226-27. The father alleged that the Miccosukee Tribe had violated 18 U.S.C. § 1161 and Florida's dram shop law by knowingly serving excessive amounts of alcohol to his daughter. *Id.* at 1226. The Eleventh Circuit held that a wrongful death suit against the Miccosukee Tribe was barred by the doctrine of tribal sovereign immunity, and that neither 18 U.S.C. § 1161 nor the Tribe's application for a state liquor license waives that immunity. 685 F.3d 1224. And in *Contour Spa*, a company that had invested $1.5 million into a spa facility at a tribally owned casino resort—only to find out that the Bureau of Indian Affairs had not approved the lease—sued the Tribe when the Tribe threatened to, and in fact did, retake the premises. 692 F.3d 1202-03. The Eleventh Circuit rejected the arguments of Contour Spa that the Seminole Tribe's immunity was: (1) voluntarily waived by the Tribe in its removal of the case from state to federal court; (2) impliedly waived under the Indian Civil Rights Act; or (3) foreclosed under the principles of equitable estoppel. *Id.* at 1204-12. The court

dismissed the suit for lack of subject matter jurisdiction. *Id.*

Likewise, state courts of last resort have also uniformly affirmed the doctrine of tribal sovereign immunity. A few cases involving tribal casinos serve to illustrate this fact. In *Houghtaling* v. *Seminole Tribe of Florida*, 611 So.2d 1235 (1993), the Supreme Court of Florida was asked to decide whether a state statute waived the Seminole Tribe's immunity from suit for personal injuries a woman sustained from a fall while patronizing the Tribe's bingo hall. The trial court denied the Tribe's motion to dismiss for lack of subject matter jurisdiction based on tribal sovereign immunity, but the judgment was reversed on appeal. The Supreme Court of Florida held that, absent a waiver of its immunity, the "Seminole Tribe is immune from suit and that Florida courts lack subject matter jurisdiction" over the suit. *Id.* at 1239. In *Houghtaling*, the court engaged in a lengthy discussion of the legal history of the sovereign immunity of Indian tribes--such history reflecting a tradition of recognizing the retained sovereignty of tribes and, as a corollary, their immunity from suit. *Id.* at 1236-38. Then the court

considered whether the Florida statute that assumed jurisdiction over criminal and civil causes of action between Indians and other persons, pursuant to federal Public Law 83-280, 18 U.S.C. 1162 (2006), 28 U.S.C. § 1360 (2006), waived tribes' immunity. *Id.* at 1238-39. The court turned to the oft-cited rule that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 1239 (citing *Santa Clara Pueblo*, 436 U.S. at 58) (internal quotation marks omitted). Thus, under *Houghtaling*, even where a state has actively assumed jurisdiction over civil and criminal causes of action between Indians and other persons pursuant to a federal grant of jurisdiction, the state courts nonetheless lack subject matter jurisdiction over suits against Indian tribes based on the doctrine of tribal sovereign immunity.

Another highly relevant example is a case in which the New Mexico Court of Appeals considered nearly identical circumstances to the present case and affirmed the tribe's immunity from suit. *Hoffman v. Sandia Resort and Casino*, 232 P.3d 901 (N.M. Ct. App.), *cert. denied*, 240 P.3d 15 (N.M), *cert. denied*, 131 S. Ct. 227 (2010). Mr. Hoffman

had sued the Sandia Resort and Casino (Sandia) under breach of contract, prima facie tort, and violation of the Unfair Practices Act after he allegedly won a jackpot over $1.5 million on a slot machine and Sandia refused to pay out the money, claiming the machine had malfunctioned. *Id.* at 902. The district court dismissed the action based on the tribe's sovereign immunity, and the New Mexico Court of Appeals affirmed. *Id.* The court "readily dismiss[ed]" Hoffman's argument urging the court to abandon the principle of sovereign immunity as an "anachronistic legal theory" and held that it was obligated to follow precedent established by both the United States Supreme Court and the New Mexico Supreme Court, which "recognize tribal sovereign immunity as a legitimate legal doctrine of significant historical pedigree." *Id.* at 902-03.

And the doctrine remains robust, with most state courts that have considered the doctrine holding that sovereign immunity protects a tribe, its entities, and it officers from suit absent an express waiver by Congress or the tribe itself. The underlying facts or causes of action in a state court case have done little to change the result. For example, the New Mexico Supreme Court held that a tribe was

immune from a tort suit brought by a casino patron. *Gallegos* v. *Pueblo of Tesuque*, 46 P.3d 668 (N.M.), *cert. dismissed* 123 S. Ct. 32 (2002). New York's highest court held that a tribal fund was entitled to the tribe's sovereign immunity, and that the "sue and be sued" clause in the fund's charter did not waive that immunity. *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund*, 658 N.E.2d 989, 992 (N.Y. 1995) ("That Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns is part of this Nation's long-standing tradition."). The Oregon Supreme Court upheld tribal sovereign immunity when it held that the president of a tribal corporation did not validly waive immunity. *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 639 (Or. 1998) ("little question that the Coquille Tribe generally possesses the immunity from claims" asserted). In addition, the highest courts in Connecticut, Iowa, Minnesota, Montana, and Washington have dismissed cases on the basis of tribal sovereign immunity. *Beecher v. Mohegan Tribe of Indians*, 918 A.2d 880, 884 (Conn. 2007); *Meier v. Sac & Fox Indian Tribe of Mississippi*, 476 N.W.2d 61 (Iowa 1991); *Gavle v. Little Six*, 555 N.W.2d 284, 292 (Minn.), *cert.*

denied, 118 S. Ct. 2075 (1998); *Thompson v. Crow Tribe of Indians*, 962 P.2d 577, 580 (Mont. 1998); *Wright v. Colville Tribal Enterprises Corp.*, 147 P.3d 1275 (Wash. 2006), *cert. dismissed*, 127 S. Ct. 2161 (2007). Tribal sovereign immunity is still alive and well in state courts.

This context demonstrates the solidity of the doctrine and the courts' continued commitment to it.

B. The Doctrine of Tribal Sovereign Immunity and the Doctrine of Indian Pre-emption are Separate and Distinct Doctrines.

Throughout his argument, Plaintiff confuses the doctrine of tribal sovereign immunity with the doctrine of Indian preemption. Plaintiff makes this mistake by incorrectly conflating the use of the term "sovereignty" in the line of Indian preemption cases with the rule for tribal sovereign immunity, which leads him to ask this Court to reach a conclusion inconsistent with the law. Tribal sovereign immunity and the Indian preemption doctrine may ultimately bar legal claims against a tribe, but each doctrine is applied by a court to resolve distinctly different questions.

As explained in full above, tribal sovereign immunity applies when an Indian tribe is sued, and it prevents suit based on the tribe's status as a sovereign government, absent a waiver by Congress or the tribe. *See, e.g., Santa Clara Pueblo*, 436 U.S at 58 (1978); *Kiowa*, 523 U.S. at 760. By contrast, Indian preemption has nothing to do with whether a tribe is immune from suit in federal or state court. Instead, Indian preemption analysis probes whether state interests are irreconcilable with federal interests and, thus, prohibit the application of state law in Indian country regardless of whether applied to a tribal government or an individual. The doctrine of Indian preemption has been applied to determine, for example, whether a state has authority to tax activities occurring on Indian lands, or to tax activities of a tribe outside its reservation, or whether such state authority is preempted by federal law. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (federal law preempted taxation of individual Indian's wages earned within reservation); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (applying preemption analysis to determine extent of state authority to tax tribal activities outside its

reservation); *Rice v. Rehner*, 463 U.S. 713 (1983) (applying preemption analysis to determine state authority over Indian trader selling alcoholic beverages on a reservation).

Preemption analysis is slightly different in Indian law cases because tribal sovereignty concepts raise a presumption favoring preemption of state law, whereas there is a presumption against preemption in other contexts. *Cohen's Handbook* at §6.03[2][a]. Accordingly, state courts lack civil jurisdiction over tribal defendants for claims arising on a reservation unless the tribe has consented to the state's jurisdiction. *Williams v. Lee*, 358 U.S. 217 (1959); *Kennerly v. Dist. Ct. of Ninth Jud. Dist. of Montana*, 400 U.S. 423 (1971); 25 U.S.C. § 1322(a). Therefore, unless the State of Alabama has assumed jurisdiction and the Poarch Band of Creek Indians consented to it, the state lacks civil jurisdiction over exactly the type of claims in this case.

The cases Plaintiff cites for his contention that sovereign immunity is a dying doctrine come from a line of Indian preemption cases discussing state authority over

Indians. The famous case of *Worchester v. Georgia*, 31 U.S. 515, 561 (1832), originally announced the principle that state law "can have no force" in Indian territory. Later, the Court in *Williams v. Lee* held that, absent congressional action, a state may not infringe upon the "right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. The Supreme Court has since developed a more tempered balancing test whereby "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). It is under this test that the Indian *sovereignty* doctrine from *Worchester* and *Williams* becomes "a backdrop" to the court's analysis of federal statutes and treaties in preemption analysis. *McClanahan*, 411 U.S. at 172. Sovereign immunity remains intact.

Although Plaintiff cites *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008), in support of his position, the case is not an example of proper tribal sovereign immunity analysis. In

rejecting the case, the United States Court of Appeals for the Eleventh Circuit wrote, " . . .[W]e find [the Oklahoma Supreme Court's analysis] unpersuasive and inconsistent with precedents from this Court and the United States Supreme Court . . ." *Furry*, 685 F.3d at 1234 n.7 (11th Cir. 2012). *Bittle* was rejected because it engaged in precisely the type of confused analysis that Plaintiff encourages this Court to adopt that blurs the well-established rule of sovereign immunity on the one hand and Indian preemption analysis on the other. The Eleventh Circuit recognized this error and this court should likewise avoid the confused analysis that Plaintiff urges. Even the Oklahoma Supreme Court, in a decision after *Bittle*, recognized the import of the doctrine and applied it to dismiss a suit against a tribe. *See Dilliner v. Seneca-Cayuga Tribe*, 255 P.3d 516 (Okla. 2011).

C. Sovereign immunity does not have a diminished application when it is held by a tribe rather than a state, and states do not have the authority to limit a tribe's sovereign immunity.

The repeated affirmation of tribal sovereign immunity by courts and Congress demonstrates a deliberate recognition of an attribute held by tribes as sovereign

nations. Sovereign immunity is a fundamental aspect of any government's sovereignty. The reasoning behind tribal sovereign immunity is essentially the same as the reasons the federal government, States, and foreign governments have sovereign immunity: it avoids interference with governmental functions and a government's control of its instrumentalities, funds and property. *See* Schlosser, *supra*, at 309. Moreover, in the tribal context, sovereign immunity furthers the federal policy of self-determination, cultural autonomy and economic development. *See* Seielstad, *supra*, at 736-40, 763, 767-68.

The Alabama Attorney General's attempt to distinguish tribal sovereign immunity from state sovereign immunity as a basis for this Court to reshape the doctrine is unpersuasive. The U.S. Supreme Court has said that state sovereign immunity does not derive from the Eleventh Amendment, but is a fundamental aspect of sovereignty that states enjoyed before ratification of the Constitution. *Alden v. Me.*, 527 U.S. 706, 713 (1999). The Court has made a similar observation regarding tribal sovereign immunity:

> As separate powers pre-existing the Constitution, tribes have historically been regarded as

> unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority . . . . Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.

Santa Clara Pueblo, 436 U.S. at 58. Accordingly, tribal sovereign immunity is federal law and is not subject to diminution by the states. *Kiowa*, 523 U.S. at 756.

CONCLUSION

For the above-stated reasons, the trial court was correct in dismissing Plaintiff's lawsuit based on the straight-forward application of well-established law and should be affirmed.

Respectfully submitted,

/s/ Richard Guest
Attorney
/s/ Joel West Williams
Attorney
Admitted Pro Hac Vice, #2010P42P
Native American Rights Fund
1514 P Street, NW, Suite D
Washington, DC 20005
(202) 785-4166
(202) 822-0068 (fax)
richardg@narf.org

/s/ R. Bernard Harwood, Jr.
R. Bernard Harwood, Jr. (HAR032)
ROSEN HARWOOD, P.A.

2200 Jack Warner Parkway
Suite 200
Tuscaloosa, AL 35401
Telephone: (205) 344-5000
Facsimile: (205) 758-8358
Email: bharwood@rosenharwood.com

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on this 17th day of April, 2013, to the following by e-mail as noted:

Andrew J. Moak
Matt Abbott
Abbott Law Firm, LLC
308 Martin Street North, Suite 200
Pell City, AL 35125
(205) 338-7800
(205) 338-7816 (fax)
E-mail: matt@abbottfirm.com
E-mail: andrew@abbottfirm.com

Luther Strange
John C. Neiman, Jr.
Andrew L. Brasher
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
Telephone: (334) 242-7447
Facsimile: (334) 242-4891
Email: lstrange@ago.state.al.us
Email: jneiman@ago.state.al.us
Email: abrasher@ago.state.al.us

Bryan M. Taylor
2005 Cobbs Ford Road
Suite 403
Prattville, AL 36066
Telephone: (334) 595-9650
Facsimile: (334) 610-3290
Email: Bryan@bryantaylorlaw.com

Ed R. Haden
BALCH & BINGHAM LLP
Post Office Box 306
Birmingham, AL 35201-0306
Telephone: (205) 251-8100
Facsimile: (205) 226-8799
Email: ehaden@balch.com

Kelly F. Pate, Esq.
Robin G. Laurie, Esq.
J. Eric Getty, Esq.
Balch & Bingham, LLP
P.O. Box 78
Montgomery, AL 36101
(334) 269-3130; (334) 834-6500
(866) 501-9985; (334) 269-3115 (fax)
E-mail: kpate@balch.com
E-mail: rlaurie@balch.com
E-mail: egetty@balch.com

/s/ Richard Guest
Attorney
Native American Rights Fund