No. 12-376

IN THE

Supreme Court of the United States

JOHN V. FURRY, as Personal Representative
Of the Estate and Survivors of Tatiana H. Furry,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA; MICCOSUKEE TRIBE OF INDIANS OF FLORIDA d/b/a MICCOSUKEE RESORT AND GAMING; MICCOSUKEE CORPORATION; MICCOSUKEE INDIAN BINGO; MICCOSUKEE INDIAN BINGO AND GAMING; MICCOSUKEE RESORT AND GAMING; MICCOSUKEE ENTERPRISES; and the MICCOSUKEE POLICE DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"The fundamental starting point for the resolution of this appeal is that '[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). The questions presented are:

1. Whether Congress definitively stated in the language of the statute an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act when it enacted 18 U.S.C. § 1161.
2. Whether the act of applying for and obtaining a state liquor license is an express and unmistaken waiver of the Miccosukee Tribe's immunity from suit.

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The Miccosukee Tribe of Indians of Florida (hereinafter, "the Miccosukee Tribe" respectfully opposes the Petitioner's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case issued on June 29, 2012, reproduced in the appendix to the petition ("Pet. App.") at 1a-26a, and reported in *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2012). The opinion of the district court is reproduced in Pet. App. at 27a-40a, and reported in *Furry v. Miccosukee Tribe of Indians of Florida*, No. 10 Civ. 24524, 2011 WL 2747666 (S. D. Fla. July 13, 2011).

INTRODUCTION

Petitioner has not presented any compelling reasons for this Court to grant Petitioner's writ of certiorari. Sup. Ct. R. 10. Although this case presents a scenario whereby a United States court of appeals has decided an important issue of federal law in a way that conflicts with a decision by a state court of last resort, there are several reasons why the Court should deny the petition for writ of certiorari. First, the judgment of the court of appeals correctly followed the precedent from this Court

when it decided the questions before it. Second, the Supreme Court of Oklahoma incorrectly applied binding precedent from this Court. Third, the wide majority of state courts have correctly decided the questions presented in this case. Finally, Petitioner mistakenly argues that the questions presented remain unanswered. The Eleventh Circuit's determination that the Miccosukee Tribe and its agencies, departments and enterprises are entitled to immunity from suit from private dram shop actions is plainly correct, because it strictly followed the precedents of this Court and other federal courts and accurately applied the established jurisprudence of the doctrine of tribal sovereign immunity.

STATEMENT OF THE CASE

The Miccosukee Tribe is a federally-recognized and federally protected Indian Tribe. The Tribe is a sovereign nation exercising powers of self governance under a Tribal constitution approved by the Secretary of the Interior, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* The Tribe's Members reside and work within the Florida Everglades on Indian land in the Miccosukee Reserved Area on the Everglades National Park

and on perpetually-leased Indian lands and Federal Reservation Lands.

The Petitioner, as personal representative of the estate of his daughter Tatiana Furry, sued the Miccosukee Tribe as well as the Miccosukee Resort and Gaming, Miccosukee Indian Bingo, Miccosukee Corporation, Miccosukee Enterprises and the Miccosukee Police Department alleging a violation of Florida's dram shop law. Fla. Stat. § 768.125 (2011).

This is an appeal of a judgment by the Eleventh Circuit Court of Appeals affirming a final order by the District Court for the Southern District of Florida, where the Judge granted the Miccosukee Tribe's Motion to Dismiss because the Miccosukee Tribe enjoyed immunity from suit as a result of the absence of waiver or abrogation of said immunity.

A. The Decision of the District Court

Petitioner, the Plaintiff below, on December 17, 2010, filed his Complaint alleging violations of the Florida dram shop act and 18 U.S.C. §1161. Petitioner invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 2201, 18 U.S.C. § 1161, and 25 U.S.C. § 2701 and supplemental jurisdiction under 28 U.S.C. § 1367. Complaint at ¶¶ 2, 6-8. The thrust of Petitioner's argument to defeat the Miccosukee

Tribe's immunity from suit in the district court, as well as before the court of appeals, was twofold: the Miccosukee Tribe waived its immunity when it applied and obtained a liquor license from the State of Florida and that even if a waiver is not found, Congress abrogated the Miccosukee Tribe's immunity when it enacted 18 U.S.C. § 1161. The district court did not agree with either of the two arguments. Instead, it found, relying on precedent from this Court and from the Eleventh Circuit, that "because neither Congress nor Defendants have waived Defendants' sovereign immunity, Plaintiff's suit must be dismissed." Pet. App. at 31a.

The district court entered an Order dismissing Petitioner's Complaint and granting the Miccosukee Tribe's Motion to Dismiss after the issues were fully briefed. Pet. App. 27a-40a. The district court held that the Miccosukee Tribe had not waived its immunity by applying and obtaining a state liquor license. *Id.* at 39a. The court further held that Congress had not abrogated the Miccosukee Tribe's immunity from suit to permit private lawsuits that result from violations of state dram shop acts when it enacted 18 U.S.C. § 1161. *Id.*

B. The Eleventh Circuit Affirms the judgment of the District Court

The court relying on this Court's decisions in *Kiowa Tribe of Okla., 523 U.S. 751*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and *Rice v. Rehner*, 463 U.S. 713 (1983) as well as many of its own precedent, found that § 1161 hardly evinced an "unmistakably clear intention to subject Indian tribes to private tort suits." Pet. App. at 17a. Moreover, it concluded that the Miccosukee Tribe had not waived its tribal sovereign immunity when it applied and obtained a liquor license from the State of Florida because such an action was not a clear and unmistaken expression by the Miccosukee Tribe that it was relinquishing its rights to be immune from suit. Pet. App. at 21a.

REASONS FOR DENYING THE PETITION

Petitioner seeks a complete upheaval of the longstanding and well settled doctrine of tribal sovereign immunity, despite this Court's clear statement in *Kiowa Tribe of Okla.* that the Court would not usurp Congress' authoritative role in matters of federal Indian law. *Kiowa Tribe of Okla.*, 523 U.S. at 759. Petitioner, relying on this Court's statement in *Kiowa Tribe of Okla.* regarding its reservations about the origins of the doctrine and the wisdom of the doctrine's current breath, has repeatedly tried and failed to make a successful policy argument

for the judicial modification of the well established doctrine of tribal sovereign immunity. Such an argument, however, fails again for a simple reason and should not be the basis to grant review in this case. This Court in *Kiowa Tribe of Okla.* demonstrated that it was explicitly aware of the pros and cons of the doctrine when it refused to abrogate tribal sovereign immunity. *Id.* at 758. Such a change of federal Indian law must come from Congress after adequate legislation of the issues and their consequences. Therefore, there are no compelling reasons that require this Court to revisit a question it has already answered before.

Nonetheless, Petitioner argues that this Court should grant its Petition because "this case presents an important but unanswered question about the continued need for and availability of the doctrine of tribal sovereign immunity." Pet. at 6. This Court answered this question in *Kiowa Tribe of Okla.*. Petitioner does not provide this Court with any information showing there are new circumstances or issues to take into account that require revisiting and reversing decades of legal principles in *Kiowa Tribe of Okla.*. Indeed, this Court in *Kiowa Tribe of Okla.* responded to Petitioner's argument of injustice and clearly stated that it was left to Congress to address it. *See Kiowa Tribe of Okla.*, 523 U.S. at 758.

Next, Petitioner argues that this Court should grant review because "this case presents an important but unanswered question of tribal sovereign immunity in the context of Title 18 U.S.C. § 1161." Pet. at 8. Petitioner, however, admits that § 1161 "on the other, allows for no remedy when an Indian tribe fails to comply with those liquor laws." Pet. at 8. It is difficult to see how the question remains unanswered when this Court in *Kiowa Tribe of Okla.* said that "there is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe of Okla.*, 523 U.S. at 755.

Finally, Petitioner asserts that there is conflict among state courts regarding the effect of § 1161 and as a result this Court should grant review. Pet. at 9. The decision of the court below does not conflict with an opinion of this Court or any other federal court. Petitioner does not dispute this point. Instead, Petitioner points to the only state court decision *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008), that has found a waiver of tribal sovereign immunity implied in the text of § 1161. *Bittle* is an anomaly and a clear instance of misunderstanding, incorrect interpretation, and erroneous application of the doctrine of tribal sovereign immunity as established by this Court. As will be explained below, there are no compelling reasons for this Court to grant review

of the well reasoned decision of the Eleventh Circuit Court of Appeals. Consequently, the Petition should be denied.

A. *Kiowa Tribe of Oklahoma* Reiterated Well Settled Federal Indian Law

This Court has long recognized that Indian tribes, as a matter of federal law, are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.*, 523 U.S. at 754; *Santa Clara Pueblo*, 436 U.S. at 58-59; *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172 (1977). This immunity, this Court has held, extends even to off-reservation commercial activities involving non-members. *Kiowa Tribe of Okla.*, 523 U.S. at 755.

This doctrine is settled law. *See Santa Clara Pueblo,* 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers."); *Turner v. United States,* 248 U.S. 354, 358 (1919); *United States v. U.S. Fid. & Guar. Co.,* 309 U.S. 506, 512-513 (1940); *Puyallup Tribe,* 433 U.S. at 172-173). It is subject to eradication or diminution only by Congress or the tribes themselves. *See e.g. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,* 476 U.S. 877, 890 (1986);

Santa Clara Pueblo, 436 U.S. at 58; *U.S. Fid. & Guar. Co.,* 309 U.S. at 512. Although the application of the doctrine may lead to unjust results on occasion, restricting its scope lies with Congress, not the Courts. *See Kiowa Tribe of Okla.,* 523 U.S. at 758.

In *Kiowa Tribe of Okla.* the Court stated:

> Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. Congress 'has occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with such tribal immunity or to limit it.' It has not yet done so.

523 U.S. at 758. This Court recognized the difficulties of modifying the doctrine, acknowledging that Congress is in the best position to evaluate all of the interests involved including the governmental relations between the federal, state, and tribal governments. *See id.*

Sovereign immunity is crucial to protecting a sovereign's economic interests and

the ability to make decisions. *See e.g. Fed. Mar. Comm'n v. South Carolina Ports Auth.,* 535 U.S. 743 (2002)(discussing the functions of states' sovereign immunity), *citing Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993). Just as important, however, is that the doctrine serves the purpose of according a sovereign the respect it is due. *See id.* The rationale for immunity becomes even more compelling when viewed against the background of Native American rights and the history of subjugation with which many Indian tribes have been forced to contend. Petitioners accurately note that a tribe's immunity from suit may prevent some litigants from having an avenue to seek redress, yet they neglect to explain why a Tribe's immunity from suit is in any way more unjust than the individual States' immunity from suit, nor do they show any appreciation for the practical effects of divesting Indian tribes of a vital aspect of their sovereign powers.

B. *Rice v. Rehner* Did Not Involve, Much Less Alter, The Law On Tribal Sovereign Immunity From Suit

Despite Petitioner's continued reliance on *Rehner,* it did not alter the doctrine of tribal sovereign immunity. There is no Congressional

enactment that expressly abrogates an Indian tribe's immunity from liability for damages in a private law suit under a state dram-shop statute. *Rehner* was a regulation case that did not involve an Indian tribe as a party. As a result, sovereign immunity was not at issue. Because *Rehner* did not involve a claim against a tribal defendant, nor was it a tort claim under a state dram shop law, it would take a profound leap of judicial interpretation to assert that this Court's holding in *Rehner* lends support to Petitioner's argument that Congress abrogated the immunity from suit of Indian tribes when it decriminalized the possession, sale, and other alcohol related offenses.

The facts of *Rehner* further show that the Court's holding did not alter the law on tribal sovereign immunity. In *Rehner*, an individual Indian trader brought a declaratory judgment action against the Director of the California Department of Alcoholic Beverage Control to determine whether the state could require him to obtain a liquor license in order to sell alcohol on Indian lands. The narrow question addressed by this Court was "whether the State of California may require a federally-licensed Indian trader, who operates a general store on an Indian reservation, to obtain a state liquor license in order to sell liquor for off-premises consumption." *Rehner*, 463 U.S. at 715. There was no

conclusion reached by this Court that there was an express, clear, and unmistaken abrogation by Congress, nor could there have been. Governmental regulation by a state is not the same as providing the private remedy to sue otherwise immune Indian tribes to individuals for money damages. This Court made this distinction clear when it stated:

> Our cases allowing states to apply their substantive laws to tribal activities are not to the contrary…. To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe is no longer enjoys immunity from suit…. There is a difference between the right to demand compliance with state laws and the means available to enforce them.

Kiowa Tribe of Okla., 523 U.S. at 755. Despite Petitioner's assertion to the contrary, the question of whether private citizens can seek relief against a tribe that fails to follow state law when Congress or the tribe have not consented to the suit has clearly been answered in the negative.

C. *Bittle v. Bahe* was decided in complete disregard of this Court's precedent

Several state appellate courts have decided the precise issue presented in this case. Most state courts have reached the same conclusion reached by the federal courts below, namely that § 1161 does not authorize private suits sounding in tort for a violation of state dram shop statutes "because neither the text of the statute nor this Court's decision in *Rehner* come close to demonstrating that Congress has clearly authorized privates suits against an Indian tribe based on violations of a state's liquor laws." Pet. App. at 19a. The only case that concluded that § 1161 authorizes the kind of suit pursued by Petitioner was the Oklahoma Supreme Court in *Bittle*.

Judge Kauger dissenting in *Bittle*, noted that a review of the decisions issued by the Oklahoma Supreme Court points to a consistent result in cases regarding tribal sovereign immunity, misperception of the issue of tribal sovereign immunity. *Bittle,* 192 P.3d at 837 (J. Kauger dissenting). Out of five attempts to resolve issues relating to and involving tribal sovereign immunity, only one was resolved correctly. *Id.* (citing to the five cases dealing with tribal sovereign immunity where this Court has vacated the judgment of the Oklahoma Supreme

Court in four different occasions.) Because *Bittle* was decided in complete contradiction to this Court's precedent, the conflict it presents should be disregarded. A lone decision by a state court that incorrectly and differently resolves the same issue resolved by several other state courts and two federal courts should not satisfy the compelling standard that this Court requires in order to exercise its discretionary review.

In addition, tribal sovereign immunity is a matter of federal law and is not subject to diminution by the states. *Kiowa Tribe of Okla.*, 523 U.S. at 755-56. Consequently, this Court should not grant review based solely on the conflicting decision of a state court that has consistently misperceived and misapplied the binding precedent of this Court and the guidance of other federal courts in matters of federal law.

D. There Are No Compelling Reasons For Overruling Tribal Sovereign Immunity

Petitioner requests that this Court overrule decades of legal precedent. However, *stare decisis* requires compelling reasons for overruling an existing precedent. Even in cases of constitutional issues, this Court has required that there be special justifications for departing from precedent. *See e.g. Dickerson v. United States*, 530 U.S. 428, 443 (2000); *United States v.*

IBM, 517 U.S. 843, 856 (1996). In *Randall v. Sorrell*, 548 U.S. 230 (2006), this Court recognized the "fundamental importance" of *stare decisis* as a basic legal principle commanding respect for a court's earlier decisions and the rules of law they embody. *Stare decisis* avoids instability and the unfairness that accompanies disruption of settled legal expectations. Congress has not taken action despite this Court's clear invitation to do so if it considers that it should. This Court should not undermine its own judgment to respect Congress' role in engaging in a careful evaluation of the pros and cons of the doctrine of tribal sovereign immunity by granting review of this Petition.

CONCLUSION

The petition should be denied because the decision of the court below merely demonstrates the application of black letter law. Moreover, there are no compelling reasons for this Court to grant review of the well reasoned decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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October 26, 2012.