1130168

IN THE SUPREME COURT OF ALABAMA

AMADA HARRISON, as mother and next friend of BENJAMIN C. HARRISON,	*	
Appellant,	*	Case No: 1130168
Vs.	*	
PCI GAMING d/b/a CREEK ENTERTAINMENT CENTER, et al.,	*	
Appellees.	*	

(Appeal from Escambia County Circuit Court; CV-13-900081)

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 28(a)(1) and Rule 34(a) of the *Alabama Rules of Appellate Procedure*, the Appellant, Amada Harrison, requests oral argument. Oral argument is necessary because this case presents important questions of tribal immunity not yet decided in Alabama. The outcome of this case will have an effect on the rights of Alabama citizens to seek redress for injuries and deaths that result from the wrongful conduct of the Poarch Band of Creek Indians.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION

The trial court granted the Appellees'/Defendants' Motion to Dismiss in the Circuit Court of Escambia County on October 7, 2013. (C. 1307) The trial court made its order final as to these Defendants, pursuant to *Alabama Rules of Civil Procedure* Rule 54(b), on October 17, 2013. (C. 1314-1315) The Plaintiff/ Appellant Amada Harrison timely filed her Notice of Appeal thereafter. (C. 1316-1319) Plaintiff/Appellant seeks more than fifty thousand dollars ($50,000) in damages, which places this lawsuit outside of the exclusive jurisdictional limits of the Court of Civil Appeals under *Code of Alabama* (1975) § 12-3-10. The Supreme Court of Alabama, pursuant to *Code of Alabama* (1975) § 12-2-7, has proper jurisdiction over this appeal.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

STATEMENT OF THE CASE

This case is on appeal from the Circuit Court of Escambia County after the trial court granted a motion to dismiss for lack of subject matter jurisdiction to Defendants PCI Gaming ("PCI"); Wind Creek Casino and Hotel ("Wind Creek Casino"); Creek Indian Enterprises; and the Poarch Band of Creek Indians based on sovereign immunity. (C. 1307) The Plaintiff sued the Defendants for violation of Alabama's Dram Shop Act, along with other negligence and wantonness claims. (C. 10-16) The Complaint alleged that, while Roil Hadley was a patron at the Wind Creek Casino, the Defendants served alcoholic beverages to him, which he consumed, despite Hadley being visibly intoxicated. The Complaint further alleged that the Defendants had a policy, custom and practice of serving alcoholic beverages to visibly intoxicated individuals. (C. 10-16)

After being served alcohol in a highly intoxicated state and after consuming that alcohol at Wind Creek Casino, Roil Hadley, along with his passenger, Benjamin Harrison, got into Hadley's motor vehicle and drove away from the casino. (C. 10-16) Shortly after leaving the casino, the intoxicated Hadley lost control of his vehicle

and wrecked. (*Id.*) Benjamin Harrison ejected and was severely injured. (*Id.*) Harrison later died from his injuries. (C. 1325-1328)

Shortly after the Complaint was filed, the Defendants filed a motion to dismiss on the grounds that the trial court did not have subject matter jurisdiction. (C. 64-70, 1276-1302) The Defendants argued that they enjoyed sovereign immunity because they were a federally recognized Indian tribe. (*Id.*) After a hearing on the Defendants' motion to dismiss, the Honorable Bradley E. Byrne granted the motion on October 7, 2013. (C. 1307) On October 17, 2013, the trial court made its Order final pursuant to Rule 54(b) of the *Alabama Rules of Civil Procedure* so that this appeal could ensue. (C. 1314-1315) The Plaintiff timely filed her Notice of Appeal on November 6, 2013. (C. 1316-1319)

At the time of the filing of this Complaint, Benjamin Harrison was still alive and his mother, Amada Harrison, brought this action in her capacity as Harrison's next friend. Benjamin Harrison tragically passed away from the injuries he received in this wreck. While this appeal was pending, the Plaintiff filed a Suggestion of Death and a

Motion to Substitute Amada Harrison, as Administrator of the Estate of Benjamin Conan Harrison, as the proper party plaintiff. (C. 1325-1328)

STATEMENT OF THE ISSUES

I. BASED ON THE RECENT UNITED STATES SUPREME COURT DECISION OF CARCIERI VS. SALAZAR, 555 U.S. 379 (2009) WHICH CALLS INTO QUESTION THE LEGAL STATUS OF POARCH BAND OF CREEK INDIANS AND THE TRIBAL IMMUNITY THE DEFENDANTS NOW SEEK, MAY THE DEFENDANTS BE SUBJECTED TO THE JURISDICTION OF THE CIRCUIT COURT OF ESCAMBIA COUNTY FOR THE DEATH OF BENJAMIN HARRISON AS A RESULT OF THEIR VIOLATIONS OF ALABAMA'S DRAM SHOP ACT?

STATEMENT OF THE FACTS

I. The Facts of the Underlying Accident that Killed Benjamin Harrison.

On March 1, 2013, Benjamin C. Harrison was a passenger in a motor vehicle driven by Roil Lamar Hadley, Jr. in Escambia County, Alabama. (C. 10-16) Roil Hadley was operating a motor vehicle while highly intoxicated. Police officers initiated a high speed pursuit of Hadley's vehicle. (*Id.*) During the high speed pursuit, Roil Hadley lost control of his vehicle and wrecked. Benjamin C. Harrison was ejected and sustained serious injuries. (*Id.*) Those injuries ultimately resulted in Harrison's death. (C. 1325-1328)

In the hours leading up to the tragic accident, Roil Hadley drank alcohol at the Wind Creek Casino & Hotel in Atmore, Alabama. (C. 10-16) On February 28, 2013, and into the early morning hours of March 1, 2013, Roil Hadley was visibly intoxicated. (*Id.*) Yet, Defendants PCI, Wind Creek Casino, Creek Indian Enterprises and the Poarch Band of Creek Indians continued to serve alcoholic beverages to Hadley. (*Id.*) The Complaint alleged that the Defendants had a policy, custom, and practice of serving alcoholic beverages to visibly intoxicated persons. (*Id.*) In fact,

they have a system at their Casino where their patrons earn credits towards the purchase of alcohol. (*Id.*) Under this system, the more the patrons gamble, the more alcoholic beverages they drink and the more they drink the more they gamble. (*Id.*) After being served alcohol while intoxicated and after consuming alcohol at Wind Creek Casino, the highly intoxicated Roil Hadley left the casino and drove away. Shortly thereafter, after a high speed pursuit by police officers, Hadley lost control of his vehicle and wrecked, causing severe injuries and ultimately the death of Benjamin C. Harrison. (*Id.*)

The Plaintiffs' Complaint alleged that the Defendants violated Alabama Code § 6-5-71, commonly known as Alabama's Dram Shop Act, and those state law violations caused the injuries and death of Benjamin C. Harrison. (*Id.*) The Complaint specifically alleged that the Defendants unlawfully furnished alcoholic beverages to Roil Hadley, who was visibly intoxicated, in violation of Alabama law and that the Defendants had knowledge, or were chargeable with notice or knowledge, that Roil Hadley was visibly intoxicated. (*Id.*) Further, the Complaint alleged that the Defendants negligently and/or wantonly failed to properly

train and supervise its employees to adhere to the Alabama Beverage Control Regulations and state law. (*Id.*) As a proximate result of the Defendants' violations of Alabama state law, Benjamin C. Harrison was severely injured and killed. (*Id.*)

II. The Relevant History of the Poarch Band of Creek Indians.

At the trial court, the Defendants asserted that the Poarch Band of Creek Indians (also referred to as "the Poarch Band") was a "federally recognized Indian tribe;" however, when Congress passed the Indian Reorganization Act (also referred to as "the IRA") in 1934, the Poarch Band was not recognized by the federal government as an Indian tribe. *See Defendants' Motion to Dismiss,* (C. 65, 1277); *see also Letter from Secretary of Interior John Collier to Chairman, Committee on Indian Affairs, Elmer Thomas, March 18, 1937, List of Indian Tribes Under the Indian Reorganization Act,* (C. 140-149). Evidence concerning the Poarch Band's tribal relations with the United States government in 1934, and even in the 150 years prior to 1934, is difficult to discern from the available historical evidence.

Perhaps the best source of existing historical evidence is the Poarch Band's own 1983 submission to the United States Department of the Interior in support of its application for federal recognition. This submission contains, among other things, a detailed official history of the Poarch Band. *See Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of the Poarch Band of Creeks of Alabama, December 29, 1983* (C. 150-279). A review of the Poarch Band's own submitted history indicates that the Poarch Band had "no formal political organization...in the nineteenth century, nor in much of the 20th century, in the sense of an established, named leadership position or regular body such as a council." (C. 237) In fact, no tribal council of any sort was established by the Poarch Band until 1950, and the Poarch Band did not select a tribal chief until that year or begin to enroll an overall tribal membership, either. *See Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of the Poarch Band of Creeks of Alabama, December 29, 1983,* (C. 242-243). Although created and established in the 1950's, the Poarch Band's tribal council initially did not have community

legitimacy as a governing body, and it was not until twenty years later, in the 1970's, that the council gradually began to be seen by the community as a legitimate governing organization. (C. 245) In 1950, the entity now known as the "Poarch Band of Creek Indians" was known as the "Perdido Band of Friendly Creek Indians of Alabama and Northwest Florida," and in 1951, the name of that organization was changed to the "Creek Nation East of the Mississippi;" the tribal council did not begin to identify themselves as the "Poarch Band of Creek Indians" until much later, in 1978. (C. 242-245)

During the 1970's, and prior to the Poarch Band's application for recognition, there existed a variety of organizations of Creek claimants in Florida, Alabama and Georgia, including the "Principal Creek Nation East of the Mississippi," and all of these organizations were viewed by the Poarch Band, to an extent, as rivals for tribal legitimacy. (C. 244) In an effort to distinguish themselves for the purposes of federal recognition, the Poarch Band stated to the Department of the Interior that they were a separate and distinct entity from other Creek Indians, yet

they simultaneously acknowledged that they had no specific tribal membership criteria until 1979. (C. 245, 247-256)

Until the post-war period of the 1950's, there is scant evidence in the Poarch Band's official history of any true tribal political organization or political leadership amongst the group now identified as the "Poarch Band of Creek Indians." (C. 237) The official Poarch Band history contains evidence of only sporadic contact with the federal government by individuals identified as predecessors of the Poarch Band of Creek Indians from the beginning of the 19th Century and well into the 20th Century; although there have been certain isolated junctures where the group presented a unified front to a governmental body, the Poarch Band acknowledged to the federal government that participation by individuals at those junctures was varied and did not always include everyone without exception. (C. 150-279)

The Poarch Band took great care to identify themselves in their official history with the "friendly Creeks" who sided with the United States in the Creek War of 1813-1814, rather than the hostile Creeks who fought the United States during the Creek War. (C. 170-177) At the conclusion of the Creek War, the Creek signatories signed the Treaty of Fort

Jackson under protest, and the treaty contained a provision that would allow land grants to individual Creeks who sided with the United States during the war. (C. 151) The Treaty of Fort Jackson was not executed between the entity described in this lawsuit as the "Poarch Band of Creek Indians," made no grant of land to the "Poarch Band of Creek Indians" and did not establish a government-to-government relationship between the "Poarch Band of Creek Indians" and the federal government, but rather allowed certain ancestors of the present group to obtain land grants near Tensaw, Alabama. (C. 173-177)

In 1815, eleven of the Tensaw Creeks wrote a letter to then- President James Madison to protest what they perceived as unfairness in the land grant process under the Treaty of Fort Jackson, as well as what they described as usurpation of Creek land. (C. 175-176) Evidence of group contact with the federal government on behalf of Creeks in Alabama remains elusive and sporadic in the years following the conclusion of the Creek War. Congress passed some number of "acts of relief" to provide renumeration for losses sustained by individuals during the Creek War; the first of these was passed in 1816. (C. 177) In 1832, a

group memorial was sent to Congress by Creeks acting through the Alabama Legislature. *See* Exhibit 2 at 28. During the Civil War, men of the Poarch Band managed to achieve a near-consensus of participation in military units, though their participation was in Confederate units, not U.S. units. (C. 187-189)

In 1911, the federal government filed a lawsuit against the "Head of Perdido Indian lands" for infringement on timber rights. (C. 199-200) The Bureau of Indian Affairs sent a representative, S. H. Thompson, to the community in 1934 to visit, based on Thompson's reported interest in "a group of Indians [who] lives about nine miles out of Atmore." (C. 202)

On May 15, 1975, the "Council of the Creek Nation East of the Mississippi"[-] signified its intent to apply for recognition of its existence as an Indian tribe and requested that the Department of the Interior accept the conveyance of a tract of land in trust "under the authority vested in the Department by 25 U.S.C. § 465" of the Indian Reorganization Act of 1934. (C. 282-290) When it elected to apply for federal recognition as an Indian tribe, the

[-] The designation of this Indian group as the "Poarch Band of Creek Indians" was not in use until 1978. (C. 245)

Poarch Band tacitly acknowledged its prior lack of federal recognition, because it applied for (and eventually obtained) recognition under 25 C.F.R. Part 83, which only applies to Indian groups that are not recognized or otherwise acknowledged by the federal government at the time of application. *See* 25 C.F.R. § 83.7 (2011).

The Department of the Interior granted the Poarch Band's application for recognition on June 4, 1984. (C. 290) In 1985, merely one year after achieving federal recognition, the Poarch Band opened its first casino in Escambia County. Originally known as the "Creek Bingo Palace," the casino has expanded to become a resort and is now known as "Wind Creek Casino and Hotel" (C. 291)

III. Relevant Administrative History.

The Department of the Interior's claimed authority to accept land into trust for the Poarch Band is derived from Section 465 of the Indian Reorganization Act of 1934. (*See* 25 U.S.C. § 465; C. 282-284). IRA Section 465 authorizes the Secretary of the Interior to acquire land "for the purpose of providing land for Indians." 25 U.S.C. § 465. The Indian Reorganization Act defines the term "Indian" as "all persons of Indian descent who are members of any

recognized Indian tribe *now* under federal jurisdiction." 25 U.S.C. § 479 (emphasis added). In a recent decision, the United States Supreme Court construed the relevant provisions of the IRA to mean that the Department of the Interior is only empowered to take land into trust for Indian tribes that were "under federal jurisdiction *at the time of the statute's enactment*" in 1934, essentially holding that the term "now" meant 1934, not the present day. The Supreme Court reversed the First Circuit Court of Appeals' opinion that held that the Department of the Interior was entitled to take land into trust for any tribe under present-day federal jurisdiction. *See Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009); 25 U.S.C. § 465, 479. As a consequence of the Supreme Court's interpretation of the IRA, the Department of the Interior is only empowered to take land into trust for the Poarch Band if the Poarch Band was "under federal jurisdiction" in 1934. As noted above and argued fully below, the federal government had no relationship with the Poarch Band as an entity in 1934, but dealt only with individual members of the group.

STATEMENT OF STANDARD REVIEW

The standard of review in an appeal of a dismissal for lack of subject matter jurisdiction is set out in *Newman v. Savas*, 878 So.2d 1147 (Ala.2003).

> "A ruling on a motion to dismiss is reviewed without a presumption of correctness. This Court must accept the allegations of the complaint as true. Furthermore, in reviewing a ruling on motion to dismiss, we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail.

Newman v. Savas 878 So.2d 1147 at 1148-49 (internal citations omitted). *See also Ex parte Alabama Dep't of Transp.*, 978 So.2d 17, 21 (Ala.2007).

SUMMARY OF THE ARGUMENT

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). Just as in *Rape*, this case is controlled by the United States Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). The decisive question is whether or not the Poarch Band is entitled to the protection of tribal immunity. Because the Poarch Band does not satisfy the definitions of "Indian" and "tribe" as provided by the Indian Reorganization Act of 1934, they are not entitled to the protections of immunity afforded to properly-recognized Indian tribes. When the Supreme Court determined that the Narragansett tribe was not a "recognized tribe now under federal jurisdiction," finding that "now" meant 1934, it necessarily found that, in order for a tribe to meet the IRA's definition of a tribe, it had to be both "recognized" and "under federal jurisdiction" at the time of the enactment of the IRA in 1934.

The Poarch Band, like the Narragansetts, was not a "recognized Indian tribe" under federal jurisdiction in

1934. The Poarch Band, recognized under the same regulatory provisions that the Narragansetts were recognized under, is situated identically to the Narragansett tribe, and does not meet the IRA's narrow definition of what comprises an Indian tribe. Because the keystone of all rights claimed by an Indian tribe, including immunity and lack of subject matter jurisdiction, is dependent upon valid federal recognition, and because the Defendants were is not a validly recognized Indian tribe, the protections of the IRA don't apply to it. The state court has subject matter jurisdiction over the Plaintiff's claims because the IRA had no authority under *Carcieri* to take land into trust for the Defendants. Thus, the underlying action did not occur on Indian lands.

At the trial court level, the Defendants claimed that the "Recognition Act" governed the recognition of the tribe. But the Act was passed a decade after the recognition of the Poarch Band by the federal government, and more than a decade after the Department of the Interior promulgated 25 C.F.R. Part 83, the scheme under which the Poarch Band was recognized. Thus, the Defendants' reliance on this Act is misplaced because the Department of Interior

never had the authority to recognize the tribe or take land into trust for the tribe. See *Carcieri, supra*. See also *Big Lagoon Rancheria v. California,* 741 F. 3d 1032 (9th Cir. 2014).

Because the only proper avenue for the Defendants to establish their tribal immunity and the trial court's lack of subject matter jurisdiction is through the mechanisms of the IRA, specifically 25 U.S.C. § 465, and not 25 C.F.R. Part 83, and because *Carcieri* holds that Department of Interior had no authority to recognize a tribe or take land into trust for a tribe that was recognized after 1934, the Defendants cannot establish its sovereign authority over the territory where the matters made the subject of the Plaintiff's complaint occurred. *See City of Sherill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005).

Because the land where the events forming the basis of this lawsuit occurred was not properly taken into trust for the Defendants since the Poarch Band of Creek Indians does not meet the definition of "indian" and "tribe" under the Indian Reorganization Act of 1934, the events forming the basis of this lawsuit did not occur on "indian lands," and

thus, the tribe does not enjoy sovereign immunity from the state court action and the state court does not lack subject matter jurisdiction. Accordingly, the Circuit Court of Escambia County has jurisdiction over this lawsuit and its dismissal for lack of subject matter jurisdiction was improperly granted.

ARGUMENT

I. THE TRIBAL DEFENDANTS ARE NOT IMMUNE.

A. The Courts Increasingly Disfavor Tribal Immunity.

Not only do Courts increasingly disfavor tribal immunity, but state and federal courts nationwide, including the United States Supreme Court, demonstrate less and less deference to the doctrine of tribal immunity every year, in response to ongoing challenges to that immunity and persuasive arguments against it. *See, e.g., Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S. Ct. 1267 (1972) ("Generalizations on this subject have become particularly treacherous"); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 118 S. Ct. 1700 (1999) ("There are reasons to doubt the wisdom of perpetuating the doctrine"); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 111 S.

Ct. 905 (1991) ("The doctrine of sovereign immunity is founded upon an anachronistic fiction."); *A-1 Contractors v. Strate*, 76 F. 3d 930 (8th Cir., 2000) ("The authority is quite clear that the kind of sovereignty the American Indian tribes retain is a *limited* sovereignty, and thus the exercise of authority over nonmembers of the tribe is 'necessarily inconsistent with a tribe's dependent status'") (emphasis not added, citation omitted).

Rather than chaining itself to a rigid and inflexible rule regarding tribal sovereignty, the U.S. Supreme Court, noting that "[g]eneralizations on this subject have become particularly treacherous," now states that the "conceptual clarity" erroneously urged by the Defendants has necessarily "given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270 (1973) *(citing McClanahan v. State Tax Comm. of Arizona*, 411 U.S. 164, 93 S. Ct. 1257 (U.S. 1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 70-73, 82 S. Ct. 562, 568-569 (U.S.

1962)). "The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S. Ct. 1267, 1270 (1973) *(citations omitted)*.

Seen in this light, the skepticism of the United States Supreme Court towards tribal immunity is growing. Justice Kennedy, writing for the majority in *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, stated as follows:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. (citations omitted). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule.

523 U.S. 751, 758, 118 S. Ct. 1700, 1704-1705 (1998). Justice Stevens went further. In a concurring opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* he stated:

> The doctrine of sovereign immunity is founded upon an anachronistic fiction. In my opinion all Governments-federal, state, and tribal-should generally be accountable for their illegal conduct.

498 U.S. 505, 514, 111 S. Ct. 905, 912 (1991). (internal citations omitted).

B. <u>The Poarch Band Was Not Properly Recognized By the Federal Government and Does Not Enjoy Tribal Immunity.</u>

1. Federal law grants Indian tribes any immunity they possess.

It is a common refrain for Indian tribes to argue that the source of Indian tribal immunity is historical, based on original and natural rights that vested in the various tribes long before the founding of the United States. (C. 65) This argument that originated in the United States Supreme Court case of *Worcester v. Georgia,* decided in 1832, is based on a legal theory that has since been subsumed by the passage of time and the concurring shift in the legal landscape with respect to tribal immunity, and was likely abrogated by the United States Supreme Court in

Nevada v. Hicks, in which Justice Scalia, writing for a unanimous Court, stated that "[t]hough tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that ''the laws of [a State] can have no force'' within reservation boundaries." *Nevada v. Hicks,* 533 U.S. 353, 361, 121 S. Ct. 2304, 2311 (2001) *(citing White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S. Ct. 2578 (1980)).

In essence, the Defendants rely upon the doctrine of original, natural rights of the Poarch Band, a formulation that has been rejected by the modern Court, as the basis for their contention that the Poarch Band is entitled to tribal immunity from this lawsuit. In the post-19th Century legal landscape that governs the Poarch Band, the claimed tribal immunity of the Poarch Band is grounded not in original, natural or historical rights, but in several discrete federal statutes and regulations.

The first, and perhaps most critical, of these areas is regulatory in nature, and may be found in the Code of Federal Regulations, at 25 C.F.R. Part 83, which is the federal regulation purporting to create a regulatory

framework for the recognition by the federal government of previously-unrecognized Indian tribes. *See* 25 C.F.R. § 83 (2008). This regulatory framework is critical because, when the Poarch Band of Creek Indians obtained federal recognition in 1984, it was under 25 C.F.R. Part 83. (C. 290)

For Indian tribes, federal recognition, not original or natural right, is the mechanism that qualifies Indian tribes for federal protection of their tribal immunity, among other things. *See Cohen's Handbook of Federal Indian Law* § 3.02[3] (2005). Even for individual Indians, in order to be considered an "Indian," one must be a member of a federally recognized Indian tribe. See, *e.g. United States v. Antoine,* 318 F. 3d 919 (9th Cir. 2003). Inarguably, in order for an Indian tribe's federal recognition to be valid, the process under which that recognition was obtained must be legally enforceable and within the power of the agency granting recognition.

The question of the validity of an Indian tribe's recognition is *the* major question, from which flows all of the remainder of the rights that may be claimed by an Indian tribe. Once an Indian tribe gains valid federal

recognition, the Indian Reorganization Act of 1934 presently allows the U.S. Department of the Interior to accept land into trust, "for the purpose of providing land for Indians." 25 U.S.C. § 465. The ability of the Department of the Interior to take land into trust for Indian tribes has enormous consequences. For instance, once taken into trust, the land becomes exempt from state and local taxes. *See Cass County, Minnesota v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 114 (1998). The land also becomes exempt from local zoning and regulatory requirements. *See* 25 C.F.R. § 1.4(a) (2008). Indian trust land may not be condemned or alienated without either Congressional approval or tribal consent. *See* 25 U.S.C. § 177. Furthermore, and perhaps most essentially, tribal trust land becomes a haven from state civil and criminal jurisdiction. *See* 25 U.S.C. §§ 1321(a), 1322(a). This list comprises many of the most important rights that create an Indian tribe's modern, rather than historical, right to self-determination, and each of these rights flow from the land-into-trust scheme ordained by Congress in the Indian Reorganization Act. *See Examining Executive Branch Authority to Acquire Trust Lands for Indian Tribes: Hearing*

Before the Senate Committee on Indian Affairs, 111th Cong. 15 (2009) (statement of Hon. Edward P. Lazarus). (C. 292-298) Finally, it cannot be ignored that federal recognition and the land-into-trust scheme of the Indian Reorganization Act, § 479, confer upon Indian tribes the right to engage in casino-style gambling. *See* 25 U.S.C. § 2701, *et. seq.*

It is, therefore, very clear that each of the questions that bear on an Indian tribe's claim of immunity find their answers in federal regulations and federal law, not abstract concepts of natural rights. And in this arena, Congress possesses ultimate authority.

2. Congress has plenary power over Indian tribes.

Congress derives its plenary power over the affairs of Indian tribes from the U.S. Constitution, most obviously from the Indian Commerce Clause. U.S. Const. Art. I, § 8, cl. 3 ("[The Congress shall have Power] To regulate Commerce...with the Indian tribes"). This is not the only Constitutional source of Congressional authority over Indian affairs; both the Necessary and Proper Clause and the Supremacy Clause further enhance Congressional power in this arena. U.S. Const. Art. I, § 8, cl. 18, Art. VI, cl. 2. The broad authority of Congress to legislate and

regulate Indian affairs is recognized by the U.S. Supreme Court, which has allowed Congress to impose federal law on Indian tribes with or without tribal consent, stating that "Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *United States v. Lara,* 541 U.S. 193, 200-202 (2004).

Congress has exercised its plenary power over Indians in numerous ways, including its power to determine tribal membership, even where the Congressional definition of tribal membership may vary from the tribe's own definition of its membership. *See Delaware Tribal Business Commission v. Weeks,* 430 U.S. 73, 82-87, 97 S. Ct. 911, 918-920 (1977). Congress may extend federal criminal jurisdiction into Indian territory. *See* 18 U.S.C. §§ 1152, 1153. Congress may extend state jurisdiction into Indian country. *See, e.g.* 18 U.S.C. 1162(a). When it passed the Indian Civil Rights Act of 1968, Congress imposed the bulk of the U.S. Constitution's Bill of Rights on Indian tribes. *See* 25 U.S.C. § 1301. Congress may diminish the size of an Indian reservation, may allow state taxation of commerce with

Indian tribes, may allow state taxation of Indian-owned 'fee land' on reservations and may impose zoning restrictions on such 'fee land.'" *See Hagen v. Utah,* 510 U.S. 399, 420 (1994); *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 458 (1995); *County of Yakima v. Confederated Tribes and Bands,* 502 U.S. 251, 270 (1992); *Brendale v. Confederated Tribes and Bands,* 492 U.S. 408, 428 (1989).

As a result of its plenary power, it is Congress, not the Indian tribes nor federal agencies, that ultimately governs the legal rights and obligations of Indian tribes within the borders of the United States. Although the U.S. Department of the Interior has utilized 25 C.F.R. Part 83 since its passage for the purpose of providing federal recognition (and the privileges associated with federal recognition) to previously-unrecognized Indian tribes, this regulatory scheme has now been thrown into turmoil by the United States Supreme Court. *See Carcieri v. Salazar,* 555 U.S. 379 (2009).

3. The United States Supreme Court altered the landscape of tribal immunity in Carcieri v. Salazar.

On February 24, 2009, the U.S. Supreme Court held that the U.S. Department of the Interior did not possess the legal authority to accept land in trust pursuant to a provision of the 1934 Indian Reorganization Act for a Rhode Island Indian Tribe, the Narragansett Indian tribe. *Carcieri v. Salazar,* 555 U.S. 379 (2009). Like the Poarch Band of Creek Indians, the Narragansett tribe had a history in Rhode Island that predated the founding of the United States; however, also like the Poarch Band, the Narragansett tribe did not obtain federal recognition until its petition under the Department of Interior's "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe" was approved. *See Carcieri,* 555 U.S. 379, 383-384; *see also C. 285-290.* The recognition of the Narragansett and the recognition of the Poarch Band occurred within eighteen months of each other, and each tribe's federal recognition was granted through the same regulatory instrument, commonly referred to as "Part 83" recognition. *Id.*

After their recognition as an Indian tribe in 1984, the Narragansett applied to the Department of the Interior to take 31 acres of land into trust, and the Interior Department accepted the land into trust for the tribe. *Carcieri*, 555 U.S. at 385. The dispute that eventually led to the U.S. Supreme Court decision in *Carcieri* began when the Narragansett tribe planned to construct housing on the 31 acre tract, but refused to comply with local regulations concerning housing construction, arguing that the trust acquisition made the tract into Indian Country and rendered local building codes inapplicable. *Carcieri at* 385; *see also Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F. 3d 908, 911-912 (1st Cir. 1996).

The central issue in *Carcieri* became the definitions of the terms "Indian," "tribe" and "now" in the Indian Reorganization Act of 1934, a law designed to encourage tribal enterprises to enter the wider commercial world on equal footing with other businesses and which formed the cornerstone of modern U.S. Indian policy, leading the nation away from "assimilation" and towards federal recognition of tribes to exist as self-governing entities. *Carcieri* at 387-388; *see also Mescalero Apache Tribe v.*

Jones, 411 U.S. 145, 157, 93 S. Ct. 1267, 1275 (1973); *see also* 25 U.S.C. §§ 461-479; *see also Cohen's Handbook of Federal Indian Law* §§ 1.04, 1.05 (2005). The IRA was the manifestation of Congress' exercise of its plenary power to alter U.S. Indian policy by recognizing Indian tribes as entities, and any discussion of federal recognition of Indian tribes must commence with the IRA.

Again, under IRA § 465, the Department of the Interior is authorized to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. The word "Indian" is defined in part by the IRA as "all persons of Indian descent who are members of any recognized Indian tribe *now* under federal jurisdiction." 25 U.S.C. § 479 (emphasis added). The word "tribe" is defined in the same statutory section to mean "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.*

The U.S. Supreme Court, relying on the rules of statutory construction, examined the question of whether the Department of the Interior validly took land into trust for the Narragansett by looking first to determine whether the statutory language provided that the Narragansett were

members of a "recognized Indian tribe now under federal jurisdiction." *Carcieri,* 555 U.S. at 387-388. In order to answer that question, the Court construed the definitions of "Indian" and "tribe" together and found that the Department of the Interior could only take land into trust for tribes that were "under federal jurisdiction" in 1934, holding that "the term 'now under Federal jurisdiction' in [IRA] § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri* at 397. The Court then applied this logic to the Narragansett tribe, finding that the tribe was not under federal jurisdiction in 1934. *Id.* Consequently, the Supreme Court reversed the First Circuit Court of Appeals and ruled that the Department of the Interior acted beyond its authority when it took land into trust for the Narragansett, as the Narragansett were not an Indian tribe contemplated by the definitions of "Indian" and "tribe" in the Indian Reorganization Act of 1934.[2] *Carcieri* at 396.

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[2] Both the Attorney General of Alabama and the State of Alabama (acting through the Council of State Governments) filed lengthy Amicus briefs in support of Rhode Island's position and against the positions of the Narragansett tribe and the Secretary of the Interior in *Carcieri;* these

The United States Supreme Court narrowly confined the Congressional definitions of "Indian" and "tribe" in *Carcieri,* and although the Narragansetts' status as a tribe was also defined separately by the Department of the Interior under "Part 83" of the Code of Federal Regulations at the time of its recognition, the *Carcieri* Court construed the Congressional definition of "Indian tribe" in a way that not only directly conflicts with the regulatory definition of "Indian Tribe," but also restricts its scope significantly. *Id.* at 397; *see also* 25 C.F.R. § 83.1 (definitions) (2008). As a result, the *Carcieri* decision affects the legal status of every Indian tribe that obtained its recognition by Part 83 administrative process after the passage of the Indian Reorganization Act of 1934, a class of Indian groups that includes the Poarch Band of Creek Indians.

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briefs are believed to accurately reflect this State's position on the issues in *Carcieri,* and the position of this state's Attorney General was ultimately vindicated by the U.S. Supreme Court in *Carcieri. See* 2008 WL 2511781; *see also* 2008 WL 3895180. The State of Alabama filed an amicus brief also in *Rape v. Poarch Band of Creek Indians, supra,* the case referred to earlier in the "Summary of Argument" is currently pending before this Court on the exact same legal issue posed here. The State of Alabama's position is consistent in both cases that *Carcieri* is controlling. (C. 299-335).

4. The Department of the Interior acted beyond its authority when it recognized the Poarch Band of Creek Indians as an Indian tribe.

For the purpose of recognizing previously-unrecognized Indian tribes, the Department of the Interior defines the term "Indian tribe" or "tribe" as "any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior *presently acknowledges* to exist as an Indian tribe." 25 C.F.R. § 83.1 (2008) (emphasis added). At first blush, the definition of "tribe" in the Indian Reorganization Act of 1934 is similar: "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. However, the *Carcieri* Court stated unambiguously that the definition of "tribe" could only be read in concert with the definition of "Indian," and that the definition of "tribe" was limited by the temporal restrictions that apply to the definition of "Indian." *See Carcieri,* 555 U.S. 379, 393. Therefore, if a tribe was not "under the federal jurisdiction of the United States when the IRA was enacted in 1934," it did not become entitled to the benefits of the IRA. *See Carcieri,* 555 U.S. 379, 395.

There is a clear conflict between the Congressional intent established in *Carcieri* to define Indian tribes as only those Indian groups under federal jurisdiction *"now,"* meaning 1934, and the Secretary of the Interior's intent to define Indian tribes as those Indian groups that the Secretary *"presently acknowledges"* to exist. *See* 25 C.F.R. § 83.1 (2008); *see also* 25 U.S.C. § 479. In other words, the Department of the Interior's promulgated regulations conflict with Congress concerning the definitions of "Indian" and "tribe," in an area of law where it is not disputed that Congress, not the Department of the Interior, possesses plenary power. *See Id.; see also supra,* 21-26. Because the IRA represents Congress' exercise of its plenary power to alter U.S. Indian policy by recognizing Indian tribes as entities, it is impermissible for the Department of the Interior to usurp Congressional authority to define "Indian" and "tribe" more broadly than Congress. *See supra,* 21-26; *see also Carcieri,* 555 U.S. at 387-388; *see also Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 157-158, 93 S. Ct. 1267, 1275 (1973); *see also* 25 U.S.C. §§ 461-479; *see also Cohen's Handbook of Federal Indian Law* §§ 1.04, 1.05 (2005).

In *Carcieri,* no party disagreed that the question of the Secretary of the Interior's authority to take the Narragansetts' tract of land into trust turned on whether the Narragansetts were members of a "recognized Indian Tribe now under Federal jurisdiction," with "now" meaning 1934, not the present. 555 U.S. 379, 388. Therefore, when the majority of the Supreme Court answered that question in the negative, they 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. *See Id.*

The Supreme Court framed the question very specifically, and the requirements of recognition and federal jurisdiction are plainly written into the Court's opinion.[3] The Narragansett Indians were "recognized" by the Department of the Interior under 25 C.F.R. § 83, but a majority of the United States Supreme Court found that they were not a "recognized tribe." *Carcieri* at 388, 395.

[3] The opinion of the majority, which included Justices Roberts, Thomas, Scalia, Kennedy, Breyer and Alito, was written by Justice Thomas. Justices Ginsburg and Souter concurred in part and dissented in part. *Carcieri* at 380.

Furthermore, the Court found that the Narragansetts were not under "federal jurisdiction" in 1934, despite their long history as an Indian group in Rhode Island. *Id.* at 395. Only Justices Souter and Ginsburg, concurring in part and dissenting in part, found that the concepts of "recognition" and "jurisdiction" may be "given separate content," but these concepts were treated as one by the majority. *Id.* at 400. As a result, the legitimacy of the recognition process codified in federal regulations at 25 C.F.R. § 83 is now doubtful, because the validity of the definition of "Indian tribe" codified in that regulation is doubtful.

The position of the Secretary of the Interior at the Supreme Court level was that the Department of the Interior's authority to take land into trust inured to the benefit of tribes under federal jurisdiction at the time the land was taken into trust, and that the term "now" meant "the time of the statute's application," a construction that the majority rejected. *Id.* at 381, 391, 395. Although it grounded its opinion in the principles of statutory construction, the Supreme Court did not decide *Carcieri* in a vacuum, and it considered this argument

carefully before rejecting it. *Id.* at 390. In fact, the Court looked to the history of the Indian Reorganization Act itself and found that, in 1936, Commissioner of Indian Affairs John Collier believed that the *Carcieri* Court's eventual interpretation of the word "now" was precisely the result that Congress intended, leading Justice Breyer to state in concurrence that "the very Department [of the Interior] official who suggested the phrase to Congress during the relevant legislative hearings subsequently explained its meaning in terms that the Court now adopts." *See Id. at* 390, 397. Justice Breyer then stated as follows:

> I also concede that the Court owes the Interior Department the kind of interpretive respect that reflects an agency's greater knowledge of the circumstances in which a statute was enacted. (citation omitted). Yet because the Department then favored the Court's present interpretation, (citation omitted) that respect cannot help the Department here.

Carcieri v. Salazar 555 U.S. 379, 396.

The *Carcieri* Court's express reliance on John Collier's 1936 reading of Congress' intent behind its use of the word "now," rather than on the inapposite interpretation that the Secretary of the Interior argued to the Court in 2009, has consequences that transcend the dispute over statutory construction decided in *Carcieri*.

In *Carcieri,* the Department of the Interior argued that the Secretary of the Interior was entitled to deference in his interpretation of the scope of the word "now" in the IRA; that argument was based on precedent that established that if the meaning of the text of a statute is ambiguous, Congress, because it created the ambiguity, intended to delegate authority to the executive agency responsible for implementing the statute to resolve the ambiguity by imposing its own reasonable interpretation of the text. *See Carcieri,* 555 U.S. 379; *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). But Justice Breyer stated that the Department of the Interior was not entitled to *Chevron* deference as to its present interpretation of the term "now" in the IRA, precisely because the agency's involvement in the passage of the law and the law's legislative history indicated that Congress had already resolved the interpretative difficulty, and to Congress, "now" meant 1934. *See Carcieri,* 555 U.S. 379, 396. In fact, the majority noted that John Collier was a principal author of the IRA and was responsible for inserting "now under Federal jurisdiction" into the law. *See Carcieri,* 555 U.S. 379, 390, fn. 5.

Therefore, although the Court did not "defer" to Collier's interpretation of the statute, it agreed with it. For the purposes of the IRA, "now" means 1934, unless Congress acts to amend the statute.

There is no evidence that Congress intended, after the passage of the IRA, for the Department of the Interior to create a regulatory scheme for the purpose of recognizing large numbers of new, previously-unrecognized Indian tribes; in fact, it is significant to note that it was thirty-eight years after the passage of the IRA before Congress acted to create a single new tribe. *See* 86 Stat. 783 (1972) (recognizing the "Payson Community of Yavapai-Apache Indians" as a "tribe of Indians within the purview of the Act of June 18, 1934).

With the IRA, Congress essentially announced its intent to recognize Indian tribes rather than continue to attempt to assimilate individual Indians, and chose to define the tribes it recognized by drawing a line at tribes under federal jurisdiction in 1934; as a result of that action, the Department of the Interior is not empowered to define the essential terms of the IRA more broadly than Congress. *See supra*, 21-26; *see also Carcieri*, 555 U.S. 379, 387¬388;

see also Mescalero Apache Tribe v. Jones, 411, U.S. 145, 157-158, 93 S. Ct. 1267, 1275 (1973); *see also* 25 U.S.C. §§ 461-479; *see also Cohen's Handbook of Federal Indian Law* §§ 1.04, 1.05 (2005).

The *Carcieri* decision was recently discussed in a Ninth Circuit Court of Appeals decision. On January 21, 2014, the Ninth Circuit Court of Appeals issued *Big Lagoon Rancheria v. State of California,* 741 F. 3d 1032 (9th Cir. 2014), holding that land taken into trust for an Indian tribe that was not recognized in 1934 does not constitute "Indian lands" upon which gaming may be conducted, even if those lands were taken into trust prior to the expiration of the six year statute of limitations to challenge the federal agency action.

In *Big Lagoon*, the Bureau of Indian Affairs accepted 11 acres of land into trust for the tribe approximately 20 years ago in 1994. *Id.* at 1034. The Ninth Circuit panel interpreted *Carcieri* consistent with the Plaintiffs' position in the instant action that "the BIA lacks authority to acquire land in trust for tribes that were not under federal jurisdiction in 1934". *Id.* at 1035. The Court reasoned:

> We find it in the well-worn rule that 'administrative actions taken in violation of statutory authorization or requirement are of no effect.' *City of Santa Clara v. Andrus*, 572 F.2d 660, 677 (9th Cir. 1978) (citing, *inter alia*, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917)). Other courts have used different language, see, e.g., *Employers Ins. of Wassau v. Browner*, 52 F.3d 656, 665 (7th Cir.1995) (unauthorized agency action may be 'disregard[ed]… as void, a nullity'), but the upshot is the same: The law treats an unauthorized agency action as if it never existed. . . .

Id. at 1042. The Court reemphasized that "[o]nce again, under *Carcieri*, the federal government's authority to acquire land for Indians is limited to acquisitions for tribes that 'were under the federal jurisdiction of the United States when the IRA was enacted in 1934.' *Id.* at 1044 (quoting *Carcieri* at 395). The Ninth Circuit concluded that *Big Lagoon* was not included in a list of the 258 tribes compiled shortly after the IRA was enacted. *Id.* at 1044(citing *Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) (holding that a tribe's absence from BIA's list of recognized tribal entities "is dispositive")).

Likewise, Defendant Poarch Band of Creek Indians was not included on the list of tribes recognized by the United States in 1934, because the Poarch Band was not recognized

until 1984. The ultimate effect of the *Carcieri* and *Big Lagoon* decisions on the Defendants is that the creation of the Poarch Band as an Indian tribe by the Department of the Interior was made outside the scope of that agency's authority; in other words, the Secretary of the Interior did not have the power to utilize 25 C.F.R. Part 83 to define the terms "Indian" and "tribe" in a way that conflicted with Congressional definitions of those terms, as interpreted in *Carcieri* and *Big Lagoon*. Where Congress, exercising its plenary authority under the U.S. Constitution, extended the hand of the federal government only to Indian tribes that were recognized and under federal jurisdiction as of 1934, the Department of the Interior had no authority to subsequently define "Indian tribe" to extend the hand of the federal government to an Indian group "that the Secretary of the Interior *presently acknowledges* to exist as an Indian tribe." 25 C.F.R. § 83.1 (2008) (emphasis added. Congressional authority to define what comprises an Indian tribe includes only "recognized Indian tribes now under federal jurisdiction." *Carcieri v. Salazar,* 555 U.S. 379, 387-388 (2009).

The United States Supreme Court narrowly construed the Congressional definitions of "Indian" and "tribe" in *Carcieri,* and although the Narragansetts' status as a tribe was also defined separately by the Department of the Interior under "Part 83" of the Code of Federal Regulations at the time of its recognition, the Narragansett Indians were held by the Supreme Court to be neither a recognized Indian tribe nor a tribe under federal jurisdiction in 1934. *Id.* at 388.

The Poarch Band of Creek Indians is situated identically to the Narragansett tribe; neither tribe was federally recognized at the time of the passage of the IRA in 1934 and both tribes obtained their federal recognition under 25 C.F.R. § 83, within eighteen months of each other. *Carcieri v. Salazar* 555 U.S. 379, 383-384; (C. 285-290).

5. Federal regulations do not outweigh federal law in this area.

At the end of the analysis, the question of whether the Poarch Band was validly recognized by the Department of the Interior is a question of precedential value of a regulation promulgated by an executive agency, where that regulation conflicts with other federal law.

The precedential value of a federal regulation may be analyzed in two different ways, one of which looks to the regulation to determine whether it harmonizes with the plain language, origin and purpose of the statute forming its basis. *See National Muffler Dealers Association, Inc. v. U.S.*, 440 U.S. 472, 477 (1979). The statutes that ostensibly underpin 25 C.F.R. Part 83 do not contain any language whatsoever that authorize the Department of the Interior to promulgate standards for the recognition of Indian tribes that define "Indian" and "tribe" to mean Indian groups that the Secretary of the Interior "presently acknowledges" to exist; in fact, the statutes underpinning 25 C.F.R. Part 83 do not authorize the executive recognition of Indian tribes at all. *See* 5 U.S.C. § 301; 25 U.S.C. § 9; 25 U.S.C. § 2; *see also* 25 C.F.R. § 83.1 (2008). The Congressional definitions of "Indian" and "tribe," on the other hand, are significantly more restrictive than the Interior Department's definitions of the same terms, and this Court should determine that the Congressional definitions of the terms "Indian" and "tribe" that do exist in the IRA invalidate the broader definitions of those terms promulgated by the Department of the

Interior in 25 C.F.R. Part 83, especially in light of the fact that the statutes that supposedly granted power to the Interior Department to promulgate Part 83 do not mention the recognition of Indian tribes at all, and in light of Congress' plenary authority in this area of the law. *See* 25 U.S.C. § 479; *see also* 25 C.F.R. § 83.1 (2008); *see also supra,* 21-26.

The other way that a federal regulation may be examined for precedential value is pursuant to a *Chevron* analysis that would afford deference to the interpretation of the promulgating agency unless that interpretation was "arbitrary, capricious, or manifestly contrary to the statute;" however, as discussed herein, in Justice Breyer's concurrence in *Carcieri,* he stated that the Department of the Interior was not entitled to *Chevron* deference as to its present interpretation of the term "now" in the IRA, because the agency's involvement in the passage of the law and the law's legislative history indicated that Congress had already resolved the interpretative difficulty, and to Congress, "now" meant 1934. *See Carcieri,* 555 U.S. 379, 396; *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., et. al.,* 467 U.S. 837 (2008).

On the other hand, the agency's purported reliance on 5 U.S.C. § 301, 25 U.S.C. § 9 and 25 U.S.C. § 2 as authority for a sweeping regulation creating a structure for the recognition of Indian tribes is not entitled to *Chevron* deference either, on the grounds that the regulation has only the vaguest of connections to those statutes at all, and their use as justification for such a broad mandate was both capricious and contrary to the statutes themselves, in the face of Congress' plenary power over the regulation of Indians and its reluctance to act to recognize additional Indian tribes after the passage of the IRA. *See supra,* 21¬26; *see also* 86 Stat. 783 (1972) (recognizing the "Payson Community of Yavapai-Apache Indians" as a "tribe of Indians within the purview of the Act of June 18, 1934); *see also* 5 U.S.C. § 301, 25 U.S.C. § 9, 25 U.S.C. § 2.

Until the *Carcieri* Court dealt with the construction of "Indian," "tribe" and "now" in the IRA, holding that "now" meant 1934, the discussion of the validity of the Department of the Interior's interpretation of "now" as meaning "the time of the statute's application," which the majority rejected, was academic only. *See Carcieri v. Salazar* 555 U.S. 379, 381, 391, 395. However, now that this

question has been dealt with by the U.S. Supreme Court, and the Department of the Interior's definition of "Indian" and "tribe" are in conflict with the Congressional definitions of those terms, this Court should hold that the application of 25 C.F.R. Part 83 to recognize the Poarch Band of Creek Indians was invalid, because the more restrictive IRA definitions of "Indian" and "tribe" control the question of whether the Poarch Band of Creek Indians is actually a federally recognized Indian tribe. *See Carcieri v. Salazar* 555 U.S. 379, 381, 391, 395; *see also, Big Lagoon, supra.*

The Poarch Band was not federally recognized in 1934, was not under federal jurisdiction in 1934 and does not meet the definitions of "Indian" or "tribe" in the IRA. Therefore, because the Department of the Interior was without authority to define "Indian" or "tribe" more broadly than Congress, their promulgation of 25 C.F.R. § 83 was without statutory authority, and their recognition of the Poarch Band was invalid. Because immunity flows from valid federal recognition, the Poarch Band is not entitled to tribal immunity and is subject to lawsuits in state courts in Alabama.

II. THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION OVER THIS CASE BECAUSE THE POARCH BAND OF CREEK INDIANS WAS NEVER PROPERLY RECOGNIZED AS A TRIBE AND BECAUSE THE DEPARTMENT OF INTERIOR NEVER HAD THE AUTHORITY TO TAKE LANDS INTO TRUST FOR THE DEFENDANTS.

Although this dispute arose from activities that occurred on land owned by the Poarch Band of Creek Indians, that land was part of the State of Alabama at the time of the State's founding. In light of the decision of *Carcieri v. Salazar*, 555 U.S. 379 (2009) and *Big Lagoon Rancheria v. California*, 741 F. 3d 1032 (9th Cir. 2014), the federal government had the power to remove that land from the State of Alabama's jurisdiction only if the Poarch Band was "under federal jurisdiction" in 1934, when the applicable federal statute was enacted. The Poarch Band 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. Accordingly, on this record, the trial court had subject-matter jurisdiction.

The Defendants' argument at the trial court level against subject-matter jurisdiction in this case was premised on the notion that the federal government had taken the land at issue into trust and thus converted it

into what the federal code refers to as "Indian Lands." Federal law prohibits state and local governments from affecting much of what happens on "Indian Lands" that the federal government has taken into "trust" for the benefit of a tribe or an individual Indian. See 25 U.S.C. § 465. Such a trust designation can have serious effects on the surrounding community and the State's citizens. A tribal government, which can be established only on Indian Lands, is not constrained by the Bill of Rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). The land becomes exempt from local zoning and regulatory requirements. See 25 C.F.R. § 1.4(a). A State's civil and criminal laws are generally not enforceable on Indian Lands. See 25 U.S.C. § 1321(a), 1322(a).

But here, the Defendants did not establish that the property on which the alleged incident occurred was properly recognized "Indian Lands." Although, the United States recognized the Poarch Band of Creek Indians in June of 1984, and the Secretary of the Interior purported to take certain lands into trust on the Tribe's behalf, including the property at issue here, in the years since 1984 unless the Poarch Band was "under federal

jurisdiction" as of 1934, the Secretary had no authority under federal law to take the Poarch Band's landholdings into trust, and its actions were null and void. See *Carcieri, supra* and *Big Lagoon Rancheria, supra.*

The U.S. Supreme Court held as much in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the State of Rhode Island challenged the Secretary's decision to accept land into trust on behalf of an Indian tribe that the federal government first recognized in 1983. See *Carcieri*, 555 U.S. at 395 (citing 48 Fed. Reg. 6177 (Feb. 10, 1983)). The U.S. Supreme Court held that the Secretary had no authority to take the land into trust because the tribe was admittedly not "under federal jurisdiction" when Congress passed the Indian Reorganization Act in 1934:

> We agree with petitioners and hold that, for purposes of § 479 [of the Indian Reorganization Act], the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934.

Carcieri, 555 U.S. at 382; cf. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199,

2212 (2012) (litigants may challenge Secretary's trust decisions as violating *Carcieri*).

Carcieri was a critical decision. The State of Alabama filed an amicus brief in *Carcieri*, which argued for the result that the United States Supreme Court ultimately reached. The State explained that the Secretary's decision to take land into trust can "change the entire character of a state, particularly when the Secretary uses it in coordination with modern Tribes." *Brief of the States of Alabama et al.*, 2008 WL 2445505, at *2 (June 13, 2008). The State explained that many modern tribes, unlike those recognized by the federal government before 1934, "have developed substantial wealth, through Indian gaming or otherwise, and are located in populated areas and existing communities." *Id.* By imposing a temporal limitation on the Secretary's power to take land into trust, *Carcieri* limited the ability of tribes to remove whole swaths of territory from State jurisdiction. Unsurprisingly, modern Tribes like the Poarch Band have lobbied Congress to "fix" *Carcieri* and retroactively validate the Secretary's prior *ultra vires* decisions to take land into trust; at the urging of Alabama officials, Congress has refused to do so. (C. 333-335 -

Letter from Luther Strange to Alabama Congressional Delegation (Oct. 30, 2012).

The upshot of *Carcieri*, and now *Big Lagoon Rancheria*, is that the Poarch Band should be treated just like any other landowner for the purposes of state-court subject-matter jurisdiction, unless it was "under federal jurisdiction" in 1934. The Poarch Band has never established in any administrative or judicial forum that it was "recognized" and "under federal jurisdiction" in 1934. And there is no evidence in the record here that the Poarch Band's lands at issue here were properly recognized "Indian Lands." To the contrary, it is undisputed that the United States recognized the Poarch Band of Creek Indians as a tribe in June of 1984 -- 50 years too late for the Secretary to be able to take land into trust on the tribe's behalf. See 49 Fed. Reg. 24083 (June 11, 1984). That fact by itself "rais[es] the serious issue of whether the Secretary ha[d] any authority, absent Congressional action, to take lands into trust for [the] tribe." *KG Urban Enter., LLC v. Patrick*, 693 F.3d 1, 11 (1st Cir. 2012).

The trial court had subject matter jurisdiction. The Complaint alleges that the incident occurred in Escambia

County, which is obviously within the jurisdiction of the State of Alabama.

Furthermore, if this Court determines that the Poarch Band is not entitled to tribal immunity, then the Court has jurisdiction of the claims contained in the Complaint, as a function of the reasons that the Poarch Band is not immune pursuant to *Carcieri* and *Big Lagoon Rancheria*. Regardless, however, of whether the Court determines that the Poarch Band is not entitled to immunity because this lawsuit does not infringe upon its self-governance rights, or because the Department of the Interior did not properly recognize the Poarch Band as an Indian tribe, or because the Department of the Interior was not entitled to take the Poarch Band's land into trust and confer freedom from state jurisdiction upon it, the result is the same: the land on which the alleged torts occurred is not "Indian Country" and falls within the jurisdiction of the state courts of Alabama.

CONCLUSION

"It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights of a trading corporation, and the ability to sue,

and yet be itself immune from suit, and be able to contract with others...confident that no redress may be had against it as a matter of right." *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority,* 395 F. Supp. 23, 29 (D. Minn. 1974) (quoting *Federal Sugar Refining Co. v. United States Sugar Equalization Board,* 268 F. 575, 587 (S.D.N.Y. 1920). In Alabama, as in most other states, there is an "informational imbalance" between Indians and non-Indians, created "when a non-Indian party does not know that the tribal business with which it is dealing is protected by sovereign immunity. The tribal business is given an unfair concealed advantage over its lenders, insurers, customers, and potential business partners. It can breach its contract at will, and sometimes reap a large windfall from the hapless victim." *Brian C. Lake, The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone,* 1 Columbia Business Law Review 87, 99-104 (1996).

As a matter of public policy, the claimed tribal immunity of the Poarch Band is indefensible in Alabama in the 21st Century. As a matter of law, this Court is entitled to find, based on ample precedent, that this lawsuit does

not affect the Poarch Band's rights to self-governance. The Court is also entitled, based on equally ample precedent, to find that the Poarch Band was not properly recognized as an Indian tribe by the Department of the Interior, and is thus not entitled to the tribal immunity it claims. Alternatively, the Court may find that the land on which this incident occurred was not properly taken into trust for the Poarch Band because they do not meet the definitions of "Indian" and "tribe" in the Indian Reorganization Act of 1934. Regardless of how it finds that the Poarch Band is not immune from lawsuit, this Court's jurisdiction extends to the land where this incident occurred. The trial court's dismissal of this lawsuit is due to be reversed.

Dated this the 25th day of March, 2014.

Respectfully submitted,

s/ R. Graham Esdale, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that I have today, March 25, 2014, electronically filed the foregoing with the Clerk of the Court using the AlaFile system which will send notification of such filing to the following:

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