

1111250

IN THE SUPREME COURT OF ALABAMA

JERRY RAPE,)
)
 Appellant,)
)
 v.)
)
 POARCH BAND OF CREEK INDIANS;)
 PCI GAMING; CREEK INDIAN)
 ENTERPRISES; CREEK CASINO)
 MONTGOMERY; JAMES INGRAM,)
 LORENZO TEAGUE, et al.,)
)
 Appellees.)

Case No.: 1111250

(Appeal from Montgomery County Circuit Court; CV-11-901485)

REPLY BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

The case before the Court is controlled by the U.S. Supreme Court's decision in Carcieri v. Salazar, 555 U.S. 379 (2009), and the decisive question in this case 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 U.S. 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 is valid federal recognition, and the Poarch Band is not a validly-recognized Indian tribe, the protections of the IRA don't apply to it.

The Poarch Band presents no case that construes Carcieri and also finds that they remain entitled to tribal immunity. The Poarch Band presents no holding in any case that contradicts the central holding of Carcieri. The Poarch Band claims that the "Recognition Act" governs the recognition of the tribe in this case, though it 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. The Poarch Band presents large volumes of facts and evidence for the first time on appeal, which are not part of the record on appeal and were not considered by the trial court.

In sum, because the only proper avenue for the Poarch Band to establish its sovereign authority over territory it claims to be free from the jurisdiction of the State of

Alabama is through the mechanisms of the IRA, specifically 25 U.S.C. § 465, and not 25 C.F.R. Part 83, the Poarch Band cannot establish its sovereign authority over the territory where the matters made the subject of the Appellant's complaint occurred. See City of Sherill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 221 (2005). The trial court's order dismissing the Appellant's lawsuit is due to be reversed.

ARGUMENT

I. Carcieri Controls This Case, And Neither The Poarch Band Nor The Individual Defendants Are Immune.

A. The Decisive Question In This Case Is The Application Of Immunity To The Poarch Band.

The question of whether the Poarch Band of Creek Indians possesses tribal immunity is of singular importance in this case. The Appellees attempt to frame the immunity question around (1) the general applicability and vitality of the doctrine of tribal immunity, (2) whether the Tribe waived its right to tribal immunity in this case and (3) whether Congress abrogated the Tribe's immunity in this case. These issues, as framed by the Appellees, assume what this Court cannot: that the Tribe enjoys immunity in

the first place. After all, an entity cannot waive a right that it does not possess.

The Appellant asks this Court to instead answer the primary question and decide whether the Poarch Band is entitled to immunity by determining whether the tribe is an Indian tribe as contemplated by the definitions of "Indian" and "tribe" in the Indian Reorganization Act of 1934. The Appellant argues to the Court that the Poarch Band does not meet the criteria of those definitions.

B. Carcieri Directly Impacts Tribal Immunity In This Case.

The Poarch Band's argument in opposition to the Carcieri challenge raised by the Appellant in this case is that the Carcieri case does not affect tribal immunity. See Brief of the Appellees, 28. On the contrary, Carcieri's broadest impact is to the right of tribal immunity claimed by tribes situated similarly to the Poarch Band, and the case is ultimately more important for how it defines "Indian" and "tribe" than for the specific dispute the U.S. Supreme Court addressed in the case.¹

¹ As of April 29, 2013, a Google search of the phrase "Carcieri Fix," the legislative solution sought and rejected by Congress, returned 36,200 results. See Google Search "Carcieri Fix", available at <http://www.google.com/>

The Carcieri case wasn't explicitly about immunity only because immunity wasn't the issue addressed in the case, but the holding of Carcieri is much broader than the facts of that case; the Carcieri case dealt initially with the question of whether the U.S. Department of the Interior possessed the legal authority to accept land in trust pursuant to a provision of the 1934 Indian Reorganization Act ("IRA") for a Rhode Island Indian tribe, the Narragansetts. See Carcieri v. Salazar, 555 U.S. 379 (2009). The U.S. Supreme Court drilled deeper than the original controversy between the parties, and the case stands far more for its interpretations of the definitions of "Indian," "tribe" and "now" in the IRA of 1934 than for its resolution of the dispute itself. Carcieri, 555 U.S. 379, 387-388.

The Carcieri case began innocuously enough, as a dispute concerning the Narragansett Indians' refusal to

search?client=safari&rls=en&q=carcieri+fix&ie=UTF-8&oe=UTF-8 (last visited April 29, 2013). Tribes such as the Poarch Band did not seek a legislative "Carcieri Fix" because they are unconcerned about that case's effect on their tribal immunity and other interests. The "Carcieri Fix" is front-and-center nationally for similarly-situated Indian tribes precisely because of its enormous perceived impact on tribal sovereignty.

submit to the requirements of local building codes, while this case began as a dispute between the Poarch Band and the Appellant as to a prize that the Appellant won in a Poarch Band facility and which the Poarch Band refused to pay. See Carcieri, 555 U.S. at 385; (C. 10-25). The Carcieri Court ultimately ruled that the Department of the Interior acted beyond its authority when it took land into trust for the Narragansetts, specifically finding that the Narragansetts were not an Indian tribe as contemplated by the definitions of "Indian" and "tribe" in the IRA of 1934. See Carcieri, 555 U.S. at 396.

The implications of that holding could scarcely impact the interests of the Poarch Band more. The reasoning behind Carcieri is what is important about Carcieri, because it applies to a whole slew of rights that are claimed by Indian tribes situated similarly to the Poarch Band. If the Poarch Band does not fit the definitions of "Indian" and "tribe" contained within the IRA of 1934, then the Poarch Band is not a validly-recognized Indian tribe under that act, and cannot properly take advantage of the right to convey land in trust to the Department of the Interior, codified in § 5 of the IRA. The act of taking

land into trust in conformity with § 5 of the IRA, once again, has enormous consequences. First, 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 most importantly to the Poarch Band's interests in this case, tribal trust land becomes a haven from state civil and criminal jurisdiction. See 25 U.S.C. §§ 1321(a), 1322(a).

The linchpin to all of the rights claimed by an Indian tribe is valid federal recognition, and when the U.S. Supreme Court determined that the Narragansetts were not a "recognized Indian tribe now under Federal jurisdiction," they necessarily found that, in order for a tribe to meet the IRA's definition of a tribe, the tribe had to be both "recognized" and "under federal jurisdiction" at the time of the enactment of the IRA in 1934. Carcieri, 555 U.S. 379, 388. The Poarch Band was not a "recognized Indian tribe" under federal jurisdiction in 1934, and does not

meet the IRA's narrow definition of what comprises an Indian tribe. If a tribe does not meet the basic definition of an Indian tribe set out by Congress and the U.S. Supreme Court, then not only is it not entitled to define its lands as "Indian Country," it may not claim the protection of tribal immunity, because it does not meet the U.S. Supreme Court's limited definition of an "Indian tribe" in the first place. This is the reason that Carcieri matters to the question of tribal immunity.

The Poarch Band argues that it was recognized by the federal government, pursuant to 25 C.F.R. Part 83. See Brief of the Appellees, 31. This argument, taken alone, is of little consequence; the Narragansett tribe was also recognized under this regulation, and the U.S. Supreme Court had little trouble finding that the Department of the Interior acted beyond its authority under the law when it took land into trust for that tribe, because despite the broader definition of "Indian tribe" contained in 25 C.F.R. Part 83, tribes that seek the protections afforded by the IRA must meet the IRA's definition of an "Indian tribe." See City of Sherill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 221 (2005); See also 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).

The Poarch Band was recognized under the same federal regulations as the Narragansetts, and as went the Narragansetts, so goes the Poarch Band. Furthermore, as the Poarch Band itself does not possess immunity due to its failure to meet the parameters of the definitions of "Indian" and "tribe" laid out by the Carcieri Court, then the individual defendants to this lawsuit similarly must lose the protections they claim. See, e.g. United States v. Antoine, 318 F. 3d 919 (9th Cir. 2003).

In retort, the Poarch Band cites the holding of Kiowa Tribe v. Mfg. Techs., Inc. in support of the "continuing vitality of tribal sovereign immunity," pointing out with derision the lengthy "policy discussion" from that case as cited by the Appellant; of course, the "policy discussion" from the Kiowa Tribe Court in 1998 foreshadowed and is now considerably bolstered by the Court's 2009 holding in Carcieri.

The Poarch Band cites to post-Carcieri federal opinions finding that the Poarch Band had tribal immunity; none of those cases, however, contained a Carcieri challenge and are thus not useful in analyzing the present case. The Poarch Band then argues that the U.S. Supreme Court case of Williams v. Lee, 358 U.S. 217 (1959) is “dispositive” of the present case, though the Williams case was decided 50 years before Carcieri and is also of little help deciding the merits of a Carcieri-based challenge.

The Poarch Band argues that Justice Breyer noted in concurrence to the main opinion in Carcieri that a tribe might have been under federal jurisdiction in 1934 without being formally recognized. Carcieri, 555 U.S. 379, 396; See also Brief of the Appellees, 50. Justice Breyer’s concurrence is not the law, and even if it was, the Poarch Band would have needed to cite at least some facts supporting this contention in the trial court, which they did not do.

The Poarch Band states that “[f]ederal recognition is governed not by the IRA, but by a different statute, the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454 (108 Stat. 4791), codified at 25 U.S.C. §§ 479a et

seq. (the 'Recognition Act') and regulations promulgated by the Secretary at 25 C.F.R. Part 83." Brief of the Appellees, 29. The "Recognition Act" was passed a decade after the Poarch Band sought and obtained recognition under 25 C.F.R. Part 83, and could not possibly govern the legitimacy of the Poarch Band's recognition in 1984. See Brief of the Appellant, 27; See also Brief of the Appellees, 30.

The reality that the Poarch Band does not confront is that the only proper avenue for the tribe to establish its sovereign authority over territory it claims to be free from the jurisdiction of the State of Alabama is through the mechanisms of the IRA, specifically 25 U.S.C. § 465, and not 25 C.F.R. Part 83, as argued by the Poarch Band. See City of Sherill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 221 (2005). After Oneida Indian Nation, it is absolutely clear that this statutory section is the Poarch Band's *only potential source of protection from state jurisdiction*, and after Carcieri, it is even clearer that the Poarch Band is not entitled to the protections afforded by the IRA. See Id.

For these reasons, the time has come for a finding that the "anachronistic fiction" of tribal immunity, as Justice Stevens describes it, is abrogated with regard to tribes that do not conform to the limited definitions of "Indian" and "tribe" contained in the IRA. Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 514 (1991). The dismissal of this case is thus due to be reversed.

II. A Finding That The Poarch Band Is Not Immune Is Necessarily A Finding That The Trial Court Has Subject Matter Jurisdiction Over This Case.

A. The Question Of Subject Matter Jurisdiction May Be Raised At Any Time, Even Without Initiation By A Party.

The Poarch Band expends five solid pages of its brief to this Court arguing vigorously that the Appellant waived any argument on appeal as to the subject matter jurisdiction of the trial court over this case. For a variety of reasons, this argument is meritless. First, a lack of subject matter jurisdiction "may not be waived by the parties" to a case on appeal. Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983). Second, because of the magnitude of jurisdictional matters, appellate courts in Alabama must "take notice of them at any time." Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987). Third, even if the Appellant had

not raised the issue in his opening brief (which he clearly did, and which is discussed below in more detail), an appellate court has a well-settled duty to consider the question of lack of subject matter jurisdiction anyway, even *ex mero motu*. Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983).

The Appellant cannot waive that which cannot be waived, cannot forfeit that which cannot be forfeited, and cannot "sandbag" another party with a legal issue that all parties to lawsuits in Alabama are well aware to *always* be at issue, in every case, at every moment.

B. The Appellant And Appellant's Amicus Each Addressed The Question Of Subject Matter Jurisdiction To This Court.

In this case, the Court does not have to raise the issue of subject matter jurisdiction *ex mero motu*, however, because the Appellant and Appellant's *amicus*, the State of Alabama, each directly raised the issue in their briefs. The Appellant argued in his opening brief as follows:

Likewise, the land where the events forming the basis of this lawsuit occurred were not properly taken into trust for the Poarch Band, because the Poarch Band does not meet the definitions of "Indian" and "tribe" under the Indian Reorganization Act of 1934. Thus, the events forming the basis of this lawsuit did not occur on "Indian lands," and the tribe does not enjoy sovereign immunity from the state court action.

Therefore, the Circuit Court of Montgomery County has jurisdiction over this lawsuit, and its dismissal for lack of subject matter jurisdiction was improperly granted.

Brief of the Appellant, 12 (emphasis added).

The Poarch Band's strenuous arguments notwithstanding, the Appellant plainly argued the issue of subject matter jurisdiction, stating, in essence, that the grounds on which the Poarch Band possesses no protection from the doctrine of tribal immunity in this case are the same grounds on which this Court may find that the state has subject matter jurisdiction over the claims asserted by the Appellant.

Furthermore, each issue stated by the Appellant in his "Statement of the Issues" raised the issue of subject matter jurisdiction. Brief of the Appellant, 2. The Appellant later argued that "[b]ecause 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." Brief of the Appellant, 45.

Punctuating those arguments, the State of Alabama then spent nearly the first half of its amicus brief focusing squarely on the issue of subject matter jurisdiction, pointing out, just as the Appellant did, that "[t]he upshot

of Carcieri 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." Amicus Brief of the State of Alabama, 10.

C. If The Poarch Band Is Not Immune, This Case Is Necessarily Subject To The Jurisdiction Of Alabama Courts.

The Poarch Band argued in its Motion to Dismiss in the trial court that the concept of immunity is "wholly distinct" from the concept of jurisdiction. (C. 70). The Poarch Band argued this point again in its brief before this Court. See Brief of the Appellees, 32-58.

While the distinction advanced by the Poarch Band may be conceptually true, realistically, the concepts of immunity and jurisdiction are intertwined and routinely conflated by courts attempting to determine whether an Indian tribe may be haled into a state court. See, e.g. Cossey v. Cherokee Nation Enterprises, LLC, 212 P. 3d 447 (Okla. 2009); See also Bittle v. Bahe, 192 P. 3d 810, 817 (2008). Essentially, 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.

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.

III. The Appellees' Statement Of Facts And Argument Are Packed With Evidence And Arguments Raised For The First Time On Appeal, Which The Court Should Disregard.

The Poarch Band argues, on one hand, that the Appellant "forfeited" his argument that the trial court has subject matter jurisdiction over the claims asserted by making no argument concerning jurisdiction (when he clearly did), while simultaneously proliferating significant evidence and arguments on appeal that earned no mention whatsoever in the trial court. It is well-settled that appellate courts

cannot consider an issue asserted for the first time on appeal, and the reason for this bright-line rule is obvious: it has not been properly preserved or presented. See Porter v. Colonial Life & Acc. Ins. Co. Porter v. Colonial Life & Acc. Ins. Co., 828 So. 2d 907, 908 (Ala. 2002). The application of this rule eliminates large swaths of the Poarch Band's brief from this Court's consideration.²

A. The Poarch Band Presented No Facts To The Trial Court, And The Facts Presented In The Brief Of Appellees Are Not Contained In The Record On Appeal.

The Poarch Band, in a strained effort to inject facts into this appeal that it made no effort to properly preserve for appeal in the trial court, encourages the Court to take "judicial notice" of a vast quantity of historical facts and documents introduced, for the first time, on appeal.

In support of that effort, the Poarch Band cites a pair of cases from more than a century ago, in which judicial

²It is no saving grace to the Poarch Band that an Appellee may, generally speaking, make arguments on appeal that it did not make in the trial court; at the very least, the arguments made by the Poarch Band should be supportable by facts and evidence in the record on appeal.

notice of a treaty and the division of a Protestant denomination were taken. See Brief of the Appellee, 4. This case is entirely different, and the Poarch Band is not entitled in this case to "judicial notice" of disputed facts that it did not place at issue in the trial court below.

The cases cited by the Poarch Band do not entitle the Poarch Band to create a record on appeal where none exists. The Court could take judicial notice of, for instance, the boiling point of water, the atomic number of the element Argon, or of certain clearly established historical events, such as the date on which the Declaration of Independence was signed.

The Poarch Band wants something different; it invites the Court to allow it to present a competing set of facts to oppose this appeal that it elected not to present to the trial court, which the trial court did not consider and which purport, belatedly, to contradict the facts presented by the Appellant to the trial court. The partially-cited cases presented by the Poarch Band only entitle them to ask for judicial notice of facts "of which no well-informed man could be ignorant," not a set of obscure and disputed facts

raised for the first time on appeal. Malone v. La Croix, 41 So. 724, 725 (Ala. 1905).

As the Poarch Band did not choose to present their alternate universe of historical fact for the consideration of the trial court, this Court should not consider these facts to be a legitimate part of the record on appeal. The facts presented to the trial court by the Appellant are the only facts that are a part of the Record on Appeal at all, and went entirely unchallenged in the trial court. These facts were presented directly from the Poarch Band's own official history and are all this Court should consider on appeal.

B. The Poarch Band Made No Argument To The Trial Court That The Appellant's Challenge Must Be Brought Under The APA.

1. The Court Should Disregard The Appellees' Belated Attack On Standing.

The Poarch Band argues, first, that "[a]ny challenge the [sic] Secretary's actions under the Recognition Act and the regulations, must be brought under the federal Administrative Procedure Act." Brief of the Appellees, 31. This is no more than an argument that the Appellant does not have standing to bring this action, but the Poarch Band did not make any argument in the trial court as to

standing, only as to immunity and jurisdiction of the state trial court.

The Poarch Band again invites the Court to do what it should not; consider an argument made for the first time on appeal, which the trial court did not consider, because it was not asked to. See Porter v. Colonial Life & Acc. Ins. Co., 828 So. 2d 907, 908 (Ala. 2002). This issue was not properly preserved for appeal.

2. This Case Does Not Impact The Administrative Procedures Act.

Even if the issue had been properly preserved for appeal, this case does not impact the Administrative Procedures Act. This case revolves purely around the question of whether the Poarch Band and the individual defendants may be haled into Alabama state court to answer the Appellant's Complaint.

In the Appellant's view, for the purposes of this lawsuit, the Department of the Interior may enter into a land transaction with any organization it wishes, and the precise nature of the transaction is not of any interest to the Plaintiff in this case. However, if the organization in whose name land is held in trust by the federal government seeks to access the benefits of the land,

including immunity from lawsuit and state jurisdiction, that organization must meet the definition of an "Indian tribe." See Supra, 4-5; See also Brief of the Appellant, 20-45.

The Poarch Band was recognized by the federal government under a regulation that contains a definition of "Indian tribe" that conflicts directly with the IRA's more restrictive definition of that term, and the very act of tribal recognition for the Poarch Band is thus invalid. See Brief of the Appellant, 43-45. Furthermore, even if the recognition of the Poarch Band was valid, the group does not meet the IRA definitions of "Indian" and "tribe," and the Department of the Interior never had the authority to confer the myriad benefits of the IRA's land-into-trust provision on the Poarch Band. See Id. Regardless of the intent of the Department of the Interior when it took the land into trust, in order for the Poarch Band to validly obtain the benefits of the land, including immunity, they must meet the definition of an "Indian tribe." See Id.

C. The Poarch Band Made No Argument To The Trial Court That The Appellant's Challenge Must Be Brought In Federal Court.

The Poarch Band additionally argues that the Appellant's lawsuit should have been brought in federal court. See Brief of the Appellant, 31. This argument is also new on appeal and was not considered by the trial court, and thus was not properly preserved for appeal. See Porter v. Colonial Life & Acc. Ins. Co., 828 So. 2d 907, 908 (Ala. 2002).

The Poarch Band was free to attempt a removal of this case to federal court if it felt that federal court was the appropriate forum, but it did not. The Poarch Band was free to argue to the trial court that this lawsuit should be dismissed because it properly belonged in federal court, but it did not. The Poarch Band could have litigated this issue thoroughly prior to this appeal, but chose not to exercise its right to do so; accordingly, this Court is not the proper forum in which to litigate this issue.

D. The Poarch Band Made No Argument To The Trial Court That The Secretary of the Interior Is An Indispensable Party.

The Poarch Band further argues that the Appellant should have named the Secretary of the Interior as a party to his lawsuit. See Brief of the Appellant, 31. This argument is also new on appeal and was not considered by

the trial court, and thus was not properly preserved for appeal. See Porter v. Colonial Life & Acc. Ins. Co., 828 So. 2d 907, 908 (Ala. 2002). Like each of the other arguments raised by the Appellees for the first time on appeal, this argument should be disregarded by the Court, as the Poarch Band was free to litigate this issue in the trial court if it chose to do so.

E. The Letter Presented By The Tribe Is Not Part Of The Record On Appeal.

The Poarch Band's attachment of a letter purportedly written by Attorney General Strange to an attorney not involved in the present case, which it did not introduce into the record in the trial court and which is not part of the record on appeal, was completely inappropriate. The letter, and the argument generated by the Poarch Band from the letter, should be ignored by this Court. See Porter v. Colonial Life & Acc. Ins. Co., 828 So. 2d 907, 908 (Ala. 2002).

CONCLUSION

The Poarch Band invokes the spirit of Marbury v. Madison and implores this Court in its conclusion to "say what the law is;" in their argument, however, the Appellees ask the Court to say what the law *used to be*, not what it

is presently in this post-Carcieri world. It is easy enough to say what the law once was, and the Poarch Band proved equal to that task. In 2013, after Carcieri, the law demands no other conclusion except that the Poarch Band is not entitled to tribal immunity or a haven from jurisdiction in the state courts of Alabama.

There is, additionally, a gulf between the sparseness of the Poarch Band's arguments before the trial court and the relative bulk of their appellate brief to this Court, and the fact that the Poarch Band felt compelled to attach large quantities of evidence, cite large volumes of facts and present multiple arguments with no support whatsoever in the record on appeal only underscores that the factual and legal issues critical to this case need to be fleshed out in the trial court. Furthermore, its actions are stark evidence that the Poarch Band did not meet its burden of proof in the trial court to support a dismissal of this case in the first place. The trial court's dismissal of this lawsuit is due to be reversed.

CERTIFICATE OF SERVICE

I hereby certify that I have on this date electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Additionally, I hereby certify that I have on this date served the foregoing by sending a true and correct copy of the same via the United States Mail, first-class postage prepaid and addressed to them at the address listed above.

DATED: This the 30th day of April, 2013.

s/Andrew J. Moak
OF COUNSEL