1111250

IN THE SUPREME COURT OF ALABAMA

JERRY RAPE,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No.: 1111250
	)	
POARCH BAND OF CREEK INDIANS; PCI GAMING; CREEK INDIAN ENTERPRISES; CREEK CASINO MONTGOMERY; JAMES INGRAM, LORENZO TEAGUE, et al.,	)	
	)	
Appellees.	)	

****

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

BRIEF OF THE APPELLANT

OF COUNSEL: Andrew J. Moak and Matt Abbott

Attorneys for Appellant, Jerry Rape
ABBOTT LAW FIRM, L.L.C.
308 Martin Street North, Suite 200
Pell City, AL 35125
205-338-7800
205-338-7816 (fax)
E-mail: matt@abbottfirm.com
E-mail: andrew@abbottfirm.com

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, Jerry Rape, requests oral argument in the present case. Oral argument is necessary because this case presents important questions of tribal sovereignty not yet decided in Alabama, which affect the rights of citizens to seek redress for disputes that may arise with the Poarch Band of Creek Indians.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS ii

STATEMENT OF JURISDICTION iv

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

STATEMENT OF THE ISSUES 2

I. Whether the Poarch Band of Creek Indians may be subjected to the jurisdiction of the Circuit Court of Montgomery County for a disputed jackpot at its Montgomery Casino, based on recent United States Supreme Court precedent calling the legal status of the tribe and its immunity into question. . . 2

II. Whether the individual defendants/appellees may be subjected to the jurisdiction of the Circuit Court of Montgomery County for a disputed jackpot at the Poarch Band's Montgomery Casino, based on recent United States Supreme Court precedent calling the legal status of the tribe and its immunity into question. 2

STATEMENT OF THE FACTS 2

I. The Facts of This Incident 2

II. The Relevant History of the Poarch Band of Creek Indians 5

STATEMENT OF THE STANDARD OF REVIEW 10

SUMMARY OF THE ARGUMENT 11

ARGUMENT 13

I. THE TRIBAL DEFENDANTS ARE NOT IMMUNE 13

A. The Courts Increasingly Disfavor Tribal Immunity 13

B. The Poarch Band was not Properly Recognized by the Federal Government and Does Not Enjoy Tribal Immunity 20

1. Federal law grants Indian tribes any immunity they possess. 20

2. Congress has plenary power over Indian tribes. 24

3. The United States Supreme Court altered the landscape of tribal immunity in *Carcieri v. Salazar*. 27

4. The Department of the Interior acted beyond its authority when it recognized the Poarch Band of Creek Indians as an Indian tribe. 32

5. Federal regulations do not outweigh federal law in this area. 41

II. EVEN IF THE TRIBE IS IMMUNE, THE INDIVIDUAL DEFENDANTS ARE NOT IMMUNE. 45

A. The Individual Defendants Acted Outside the Scope of their Authority. 45

B. Tribal Immunity Does not Immunize Individual Members and Officers. 51

CONCLUSION 58

STATEMENT OF JURISDICTION

This appeal comes to the Supreme Court of Alabama from a grant of the Defendants' Motion to Dismiss in the Circuit Court of Montgomery County. Appellant Jerry Rape 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. Appellant Jerry Rape therefore brings this appeal before the Supreme Court of Alabama pursuant to Code of Alabama (1975) § 12-2-7 and the Constitution of Alabama of 1901 Amendment 28 6.02.

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Bittle v. Bahe, 192 P. 3d 810 (Okla. 2008). 14, 18, 19, 20

Brendale v. Confederated Tribes and Bands, 492 U.S. 408, 428 (1989). 26

Burrell v. Armijo, 456 F. 3d 1159 (10th Cir. 2006). . . 46

Carcieri v. Salazar, 555 U.S. 379 (2009). 11, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45

Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 114 (1998). 23

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). 37, 43

Cossey v. Cherokee Nation Enterprises, LLC, 212 P. 3d 447 (Okla. 2009). 14

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CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 8, cl. 3. . . . . 24, 25

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U.S. Const.Art. VI, cl. 2. 25

STATUTES

25 U.S.C. § 465. 23

25 U.S.C. § 177. 23

25 U.S.C. §§ 1321(a), 1322(a). 23

18 U.S.C. §§ 1152, 1153. 25

18 U.S.C. 1162(a). 26

25 U.S.C. § 1301. 26

25 U.S.C. §§ 461-479. . . . . 29, 39

25 U.S.C. § 465. 29

25 U.S.C. § 479. . . . . 29, 30, 32, 33, 42, 43

25 U.S.C. § 2701, *et. seq*. 24

86 Stat. 783 (1972). 38, 39, 43, 44

5 U.S.C. § 301. . . . . 42, 43, 44

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25 C.F.R. § 83. . . . . 22, 26, 27, 28

25 C.F.R. § 83.1 (2008). 31, 32, 33, 40, 42, 43, 45

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STATEMENT OF THE CASE

This case is an appeal to the Supreme Court of Alabama arising from the granting of the Defendants' Motion to Dismiss in the Circuit Court of Montgomery County. (C. 166).

On November 16, Jerry Rape simultaneously filed complaints in the Circuit Court of Montgomery County and the Tribal Court of the Poarch Band of Creek Indians, alleging that the Poarch Band and individual Defendants/Appellees denied him a jackpot he had won at their casino. (C. 6-36) Additionally, on November 16, 2011, Jerry Rape filed a motion to stay the action in the Circuit Court of Montgomery County until such time that he exhausted his remedies in the Tribal Court of the Poarch Band of Creek Indians. (C. 37).

On January 20, 2012 the Poarch Band filed a motion to dismiss Mr. Rape's lawsuit in the Circuit Court of Montgomery County on grounds that that Court did not have subject matter jurisdiction over the case. The Poarch Band argued that they enjoyed sovereign immunity from Mr. Rape's lawsuit. After a hearing on the Defendants' Motion to

Dismiss, Hon. Eugene W. Reese granted the motion on May 2, 2012. (C. 166). Mr. Rape now appeals that decision.

STATEMENT OF THE ISSUES

I. Whether the Poarch Band of Creek Indians may be subjected to the jurisdiction of the Circuit Court of Montgomery County for a disputed jackpot at its Montgomery Casino, based on recent United States Supreme Court precedent calling the legal status of the tribe and its immunity into question.

II. Whether the individual defendants/appellees may be subjected to the jurisdiction of the Circuit Court of Montgomery County for a disputed jackpot at the Poarch Band's Montgomery Casino, based on recent United States Supreme Court precedent calling the legal status of the tribe and its immunity into question.

STATEMENT OF THE FACTS

I. The Facts of This Incident

On November 19, 2010, Appellant Jerry Rape and his wife patronized Creek Casino Montgomery as casino invitees; they arrived at the casino during the evening of November 19th and engaged in the variety of casino games offered by the facility. (C. 11). At approximately 8:00 P.M. on November

19th, Rape inserted five dollars ($5.00) into the bill acceptor of an electronic bingo machine at player station 57185 601607 at the casino. (C. 11-12). The machine that is the subject of this dispute is a Gold Series progressive electronic bingo machine, manufactured and sold by Rocket Gaming Systems (a wholly-owned, unincorporated "economic enterprise" of the Miami Tribe of Ohio. (C. 12).

After Mr. Rape inserted the sum of five dollars ($5.00) in the Gold Series machine, he began placing bets in twenty-five cent ($0.25) increments. (C. 12). After a bet was made, Mr. Rape was instructed to look to the wheel display for additional wager multiplier possibilities. (C. 12).

During the second (2nd) spin bet, the machine indicated a winning jackpot in the approximate amount of $459,000.00, and immediately thereafter, the machine indicated a payout multiplier of approximately $918,000.00, followed by an indication of a second payout multiplier of approximately $1,377,015.30. (C. 13). Several noises, lights and sirens were activated when the machine displayed the payout amount, after which the screen displayed a prompt/instruction to "call an attendant to verify

winnings." (C. 13). Mr. Rape was quickly approached and congratulated by casino employees and patrons, including one casino employee who told him "don't let them cheat you out of it." (C. 13).

The machine printed a ticket in the approximate amount of $1,377,015.30, but representatives of the Poarch Band took possession of the ticket and refused to return it to Mr. Rape. (C. 13). Mr. Rape was then taken by casino and/or tribal officials into a back room, where they discussed how Mr. Rape's winnings would be paid and engaged him in a conversation concerning a structured payout of the winnings over a period of twenty (20) to thirty (30) years. (C. 13). The Poarch Band representatives then advised Mr. Rape that he needed to wait outside the conference room while they "called PCI" to confirm his winnings. (C. 13-14).

Mr. Rape was made to wait through the entire night and into the early morning of November 20, 2010, with no information provided to him by any casino or tribal official, while numerous tribal individuals came and went to discuss Mr. Rape's jackpot, inspect, barricade and shut down the machine in question and continue with various

closed door meetings that did not include Mr. Rape. (C. 14).

Finally, at approximately 9:00 P.M. on November 20, 2010, Mr. Rape was taken into a small room in the rear of the casino by casino and/or tribal officials, where he was told, in a threatening and intimidating manner, that the machine in question "malfunctioned," and that he did not win the jackpot of $1,377,015.30. (C. 14). Mr. Rape was given a copy of an "incident report," and left the casino empty-handed approximately twenty-four (24) hours after winning the jackpot. (C. 14).

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

The Defendants/Appellees assert that the Poarch Band of Creek Indians (also referred to as "the Poarch Band") is 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. 70); *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. 134-143). 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 the existing 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, which 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,* http://64.38.12.138/adc20/Pbc%5CV001%5CD007.PDF. A review of the Poarch Band's 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." *Id.* at 43. 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,* http://64.38.12.138/adc20/Pbc%5CV001%5CD007.PDF at 48-49. 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. *See Id.* at 51. 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. *See Proposed Finding,* at 48-51.

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. *See Proposed Finding* at 50. 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. *See Id.* at 51, 63.

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." *See Id.* at 43. 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." *See Proposed Finding,* at 66.

The official history of the Poarch Band's activities prior to 1950 reflects that they were a group with the character of "basically a 'social isolate,' in which kinship sentiments are the primary day-to-day social element." *See Proposed Finding,* at 43. The history states that "[t]his of course is characteristic even of recognized Indian tribes with long experience dealing as a strongly defined legal unit with outsiders," in contrast to the Poarch Band, which did not, according to the official history, display a cohesive legal unit with respect to outsiders. *See Id.*

The Department of the Interior granted the Poarch Band's application for recognition on June 4, 1984. *See Final Determination for Federal Acknowledgement of the Poarch Band of Creeks,* 49 Fed. Reg. 24083 (June 4, 1984). In 1985, merely one year after achieving federal recognition, the Poarch Band opened its first casino, and later opened the casino at which the incident in this case occurred, known when opened as the "Tallapoosa Center" in Montgomery, Alabama, which the Poarch Band states is

situated on land held in trust.[1] *See* Lanier Scott Isom, *Rolling the Dice*, Thicket Magazine, Jan/Feb 2009, at 52, http://www.lanierisom.com/site/wp-content/themes/simplex/pdfs/CasinoFeature.pdf; *see also Defendants' Motion to Dismiss*, (C. 68).

STATEMENT OF THE STANDARD OF 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). In *Newman* the court stated,

"A ruling on a motion to dismiss is reviewed without a presumption of correctness. *Nance v. Matthews*, 622 So.2d 297, 299 (Ala.1993). This Court must accept the allegations of the complaint as true. *Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C.*, 828 So.2d 285, 288 (Ala.2002). 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. *Nance*, 622 So.2d at 299." '

Newman v. Savas 878 So.2d 1147 at 1148-49.

See also Ex parte Alabama Dep't of Transp., 978 So.2d 17, 21 (Ala.2007).

[1] As of 2009, 90% of the 1,300 jobs provided by Poarch Band enterprises in Alabama were held by non-Indians, according to statistics quoted in the cited magazine article. *See* Lanier Scott Isom, *Rolling the Dice*, Thicket, Jan/Feb 2009, at 52, http://www.lanierisom.com/site/wp-content/themes/simplex/pdfs/CasinoFeature.pdf

SUMMARY OF THE ARGUMENT

Hon. Eugene W. Reese granted the Defendants/Appellees' motion to dismiss Appellant Jerry Rape's lawsuit in the Circuit Court of Montgomery County on May 5, 2012. In their Motion to Dismiss, the Defendants/Appellees argued that the Poarch Band of Creek Indians enjoys sovereign immunity from Mr. Rape's lawsuit; and therefore, the Circuit Court of Montgomery County lacked subject matter jurisdiction over the case. However, due to the recent trends in the law and the United States Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) in particular, the status of the Poarch Band's sovereign immunity has been brought into question.

Both federal and state courts across the United States increasingly disfavor tribal sovereign immunity. In analyzing whether a tribe has immunity from a state court lawsuit, the United States Supreme Court has moved away from a bright line rule on tribal sovereignty. Instead, the Court looks at whether state jurisdiction would interfere with the tribe's right to self-governance. *See e.g. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267 (1972) and *White Mountain Apache Tribe v. Bracker*

448 U.S. 136, 100 S. Ct. 2578 (1980). In this case, exercising state court jurisdiction would not limit the tribe's right to self-governance, and tribal sovereignty is thus not applicable.

Additionally, due to precedent set in the *Carcieri* decision mentioned above, the Poarch Band has not been properly recognized by the Department of the Interior, because it was not a federally recognized tribe in 1934. Thus, the tribe does not enjoy sovereign immunity.

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 this 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.

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); *Bittle v. Bahe*, 192 P. 3d 810 (Okla. 2008) ("We are confident that the application of the doctrine of tribal immunity in this case would indeed make the Tribe a 'super citizen' that can trade in heavily-regulated alcoholic beverages, free from all but self-imposed regulation"); *Cossey v. Cherokee Nation Enterprises, LLC*, 212 P. 3d 447 (Okla. 2009) (holding that a state trial court had jurisdiction over a case brought by a non-Indian customer at an Indian casino, as the customer was a business invitee at the casino who had not entered into a consensual relationship with the tribe, and whose presence did not have a direct impact on the tribe's political integrity).

The Poarch Band relies on a bright-line rule to support their assertion of immunity, which they assert was established "with clarity," as follows: "state courts have no jurisdiction over a claim by a non-Indian against an Indian when the claim arises in Indian Country." *See Defendants' Motion to Dismiss, (C. 68) (citing Williams v. Lee*, 358 U.S. 217 (U.S. 1959)). Although perhaps a decisive argument in 1959, the law has evolved

significantly in intervening years to the present point, where such a simple rule is no longer of singular authority on the question of tribal immunity.

While federal law reserves an Indian tribe's right to self-government, more recent United States Supreme Court cases have established a "trend…away from the idea of inherent Indian sovereign as a bar to state jurisdiction and toward reliance on federal preemption." *Rice v. Rehner*, 463 U.S. 713, 719, 103 S. Ct. 3291, 3295 (1983). Preemption and sovereignty are different concepts, and in applying a preemption analysis, the Supreme Court employs the tradition of Indian sovereignty merely as a "backdrop" that informs its analysis. *See Id.* at *718-720,* 3295 - 3296. The role of tribal sovereignty in the larger process of preemption analysis "varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.'" *Id.; White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 100 S. Ct. 2578, 2584 (1980). The *Bracker* Court stated further that the Court's "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of

the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S. Ct. 2578, 2584 (1980). Accordingly, when a court does not find a tradition of sovereign immunity, or if a court determines that "the balance of state, federal and tribal interest so requires," a court's preemption analysis may lend less weight to notions of tribal sovereignty. *Rice v. Rehner*, 463 U.S. 713 at 720, 103 S. Ct. at 3296.

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 Poarch Band in this case 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. (citation omitted). 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).

State courts are taking notice of the erosion of U.S. Supreme Court deference to tribal immunity, and are taking action. The Oklahoma Supreme Court recently stated that "[i]n settling the tension between the right of the quasi-sovereign Indian tribes to govern their members in Indian country and the right of the sovereign states to govern all residents within their borders where Congress has not expressly authorized the state action, the tradition of tribal sovereignty is a backdrop for preemption analysis but not the determinative factor." *Bittle v. Bahe*, 192 P. 3d 810, 817 (2008) (*citing McClanahan v. State Tax Comm'n*

of Arizona, 411 U.S. 164, 93 S.Ct. 1257 (1973)). The *Bittle* Court further stated:

> [T]he doctrine of tribal sovereign immunity tests the state action for interference with the right of the self-governance but is not an absolute rule. *Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)*. In preemption analysis, the federal/tribal interests and the state interests are balanced within the specific context of the controversy to determine if federal law operates to preempt state law. *White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)*. The tribal interests are confined to the Indian tribe's internal affairs and tribal self-government consistent with the tribe's dependent status because an Indian tribe's retained inherent sovereign power is no greater than the tribe's dependent status and does not extend to activities involving non-members absent express congressional delegation of power. *Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)*.
>
> 192 P.3d 810, 817 (2008).

In *Bittle*, the plaintiff sued an Indian tribe in state court after an intoxicated individual who had been drinking at an Indian casino crossed the center line while driving and hit her vehicle head-on, causing personal injuries. *See* 192 P. 3d at 813. The plaintiff alleged dram shop liability on the part of the Indian tribe, and the Indian tribe predictably asserted immunity over that claim; the Oklahoma Supreme Court refused to equivocate on the question and, in a victory for state court jurisdiction,

overruled the Indian immunity defense and allowed the plaintiff to pursue her lawsuit in state court. *See Bittle v. Bahe*, 192 P. 3d 810, 819 (Okla. 2008). In doing so, they stated that "[w]e are confident that application of the doctrine of tribal sovereign immunity in this case would indeed make the Tribe a **'super citizen'** that can trade in heavily-regulated alcoholic beverages, free from all but self-imposed regulation." *Id.* (emphasis added).

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

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. *See, e.g. Defendants' Motion to Dismiss,* (C. 71). *(citing Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida,* 166 F. 3d 1126, 1130 (11th Cir. 1999)). 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/Appellees 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.[2] 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.

[2] The Defendants omitted citation to the case of *Worcester v. State of Georgia* from their Motion to Dismiss.

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. *See Final Determination for Federal Acknowledgement of the Poarch Band of Creeks,* 49 Fed. Reg. 24083 (June 4, 1984).

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,* 111-th Cong. 15 (2009) (statement of Hon. Edward P. Lazarus). 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, Congress, and neither Indian tribes nor federal agencies, ultimately governs both 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* 25 C.F.R. § 83 (promulgated as 25 C.F.R. § 54, August 24, 1978); *see also 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. *See 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 Final Determination for Federal Acknowledgement of the Poarch Band of Creeks*, 49 Fed. Reg. 24083 (June 4, 1984); *see also Final Determination for*

Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (February 10, 1983); *see also* 25 C.F.R. § 83 (2008). 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. *See* 48 Fed. Reg. 6177 (February 10, 1983).

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. *See Carcieri*, 555 U.S. 379, 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. *See Carcieri*, 555 U.S. 379, 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. *See Carcieri*, 555 U.S. 379, 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*, 555 U.S. 379, 397. The Court then applied this logic to the Narragansett tribe, finding that the tribe was not under federal jurisdiction in 1934. *See Id.* Consequently, they 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.[3] *Carcieri*, 555 U.S. 379, 396.

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. *See Carcieri*, 555 U.S. 379, 397; *see also* 25 C.F.R. § 83.1 (definitions) (2008). As a result, the *Carcieri* decision affects the legal status of every Indian

[3] 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 Narragansett position and the position of the Secretary of the Interior in *Carcieri*; these 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.

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.

4. The Department of the Interior acted beyond its suthority 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 U.S. 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.[4] The Narragansett Indians were "recognized" by the

[4] The opinion of the majority, which included Justices Roberts, Thomas, Scalia, Kennedy, Breyer and Alito, was written by Justice Thomas. Justices

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." *See Carcieri* 555 U.S. 379, 388, 395. 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. *See Carcieri* 555 U.S. 379, 379, 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. *See 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

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Ginsburg and Souter concurred in part and dissented in part. *See Carcieri*, 555 U.S. 379, 380.

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. *See Carcieri v. Salazar* 555 U.S. 379, 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. *See Carcieri* 555 U.S. 379, 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 ultimate effect of the *Carcieri* decision on the Poarch Band 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 conflicts with Congressional definitions of those terms, as interpreted in *Carcieri*. See *supra,* 21-26. Where Congress, exercising their 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); *see also supra,* 21-26. 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. *See Carcieri, Carcieri v. Salazar* 555 U.S. 379, 383-384; *see also Final Determination for Federal Acknowledgement of the Poarch Band of Creeks,* 49 Fed. Reg. 24083 (June 4, 1984); *see also Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 6177 (February 10, 1983); *see also* 25 C.F.R. § 83 (2008).

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 the 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* 25 C.F.R. § 83.1 (2008); *see also supra*, 21-26.

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. EVEN IF THE TRIBE IS IMMUNE, THE INDIVIDUAL DEFENDANTS ARE NOT IMMUNE.

A. The Individual Defendants Acted Outside the Scope of their Authority.

Allegations of wrongdoing against tribal officials that relate to conduct exceeding or falling outside the bounds

of their authority invoke an exception to the question of tribal immunity. *See Burrell v. Armijo*, 456 F. 3d 1159 (10th Cir. 2006). In that case, the Court stated as follows:

> An Indian tribe's 'sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him.' *Tenneco Oil Co. v. Sac & Fox Tribe of Indians,* 725 F. 2d 572, 576, n. 1 (10th Cir. 1984) (McKay, J., concurring). Thus, '[w]hen a complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked.' *Id.* at 574; *see also Burlington N.R. Co. v. Blackfeet Tribe,* 924 F. 2d 899, 902 (9th Cir. 1991) (stating that a tribe's immunity extends to officials 'acting in their representative capacity and within the scope of their valid authority').
>
> Accepting the allegations in the Burrells' complaint as true, we conclude that they have sufficiently pled that the individual tribal officials acted outside of their official authority, and thus, are not entitled to sovereign immunity.
>
> *Burrell v. Armijo*, 456 F. 3d at 1174.

The invocation of this exception to tribal officers' immunity for conduct that exceeds or falls outside the scope of their authority is acknowledged by most of the courts that have addressed the issue; for example, in

Narragansett Indian Tribe v. Rhode Island, 439 F. 3d 16 (1st Cir. 2006), the court noted that tribal sovereign immunity may extend to tribal officers, but only when such officers are acting within the legitimate scope of their official capacities:

> We add, moreover, that even if the Tribe was entitled to the protection of sovereign immunity in this case - which it is not - that protection would not cover the tribal members involved in the operation of the smoke shop. The general rule is that tribal sovereign immunity does not protect individual members of an Indian tribe. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171-172, 97 S. Ct. 26216, 53 L. Ed. 2d 667 (1977). At its most expansive, tribal sovereign immunity may extend to tribal **officers**, but only when such officers are acting within the legitimate scope of their official capacity. *See Tamiami Partners v. Miccosukee Tribe of Indians*, 177 F. 3d 1212, 1225 & n. 16 (11th Cir. 1999) (Tamiami III) (collecting cases); *but cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (holding that '[a]s an officer of the [Indian tribe], petitioner…is not protected by the tribe's immunity from suit').
>
> Whatever the scope of a tribal officer's official capacity, it does not encompass activities that range beyond the authority that a tribe may bestow. *See Tamiami III*, 177 F. 3d at 1225; *Tamiami II*, 63 F. 3d at 1045, 1050-51.

Narragansett Indian Tribe v. Rhode Island, 449 F. 3d at 30 (emphasis in original).

In *Bassett v. Mashantucket Pequot Tribe*, 204 F. 3d 343 (2nd Cir. 2000), the plaintiff and her entertainment company sued the Pequot Tribe, its museum and two of the tribe's representatives for copyright infringement and various state common law torts, and the appeals court vacated the district court's dismissal of the plaintiff's claims for damages against the two tribal representatives, finding that the plaintiff alleged facts to support a finding that the representatives acted beyond the scope of the authority the tribe could bestow on them. 204 F. 3d at 359.

The Defendants/Appellees misstate that the "material factual allegations" related to individual Defendants Ingram and Teague are limited to the following: "in their capacities as casino employees they 'took possession of the ticket, and refused to return it to [Mr. Rape];' and they 'advised [Mr. Rape] that he needed to wait outside the conference room while Defendants ''called PCI'' to confirm [Mr. Rape's] winnings." *See Defendants' Motion to Dismiss*, (C. 72). These statements only gloss the surface of [Mr. Rape's] allegations against the individual Defendants. Following his jackpot, Mr. Rape was approached by one or

the other of the individual Defendants (or fictitious parties Defendant) and told "don't let them cheat you out of it." (C. 13). These same individuals, including Ingram and Teague, engaged the Mr. Rape in a conversation concerning a structured payout of his winnings. *See Id.* These individuals, including Ingram and Teague, took part in numerous closed door meetings, inspected, barricaded and shut down the machine on which Mr. Rape won his jackpot. *See* (C. 13). These individuals, including Ingram and Teague, threatened and intimidated Mr. Rape, advised him that the machine "malfunctioned," denied Mr. Rape his winnings, gave him an "incident report" and sent him on his way. *Id.*

The Defendants/Appellees state further that "[n]othing in [Mr. Rape's] complaint suggests that Ingram and/or Teague acted beyond their authority as casino employees; indeed, they did not." *Defendants' Motion to Dismiss,* (C.73). Mr. Rape alleges that the Defendants/Appellees, including the individual Defendants/Appellees, induced him to play their machines, that the Mr. Rape won a jackpot, and that the individual Defendants/Appellees then denied Mr. Rape his winnings by wrongfully, intentionally,

recklessly and/or deceitfully claiming a machine "malfunction," among other things. *See Complaint,* (C. 11-13). The Defendants'/Appellees' self-serving affidavits that state that they acted only in the line of their duties as casino employees should be disregarded by the Court, because only discovery can determine the true answer to such questions. *See Affidavit of James Ingram; see also Affidavit of Lorenzo Teague* (C. 78-81).

In other words, Mr. Rape alleges that the individual Defendants/Appellees illicitly failed to pay a legitimate jackpot; such conduct is certainly beyond the scope or outside the boundaries of the authority of a casino employee. *See Complaint* (C. 6-32). A casino employee is empowered to manage a casino, not to defraud the casino's customers. The claims against the individual Defendants/Appellees in their official capacities should not be dismissed by the Court, because legitimate questions exist as to whether, at the time of the incident forming the basis of this lawsuit, the individual Defendants/Appellees acted beyond the scope of the authority granted to them by the tribe.

B. Tribal Immunity Does not Immunize Individual Members and Officers.

Mr. Rape sues the individual Defendants/Appellees, Ingram and Teague, in both their official and their individual capacities, and it is worth noting at the outset that, although Ingram and Teague each submitted affidavits to their Motion to Dismiss, these individuals' status as tribal members or as non-Indians is not contained in those affidavits and remains unknown. *See Affidavit of James Ingram; see also Affidavit of Lorenzo Teague* (C. 78-81). Furthermore, although Ingram states in classic self-serving fashion that "[w]ith regard to Mr. Rape, to the extent I acted at all, I acted in my capacity as Gaming Floor Manager for Creek Casino Montgomery," and although Teague states in similar fashion that "[w]ith regard to Mr. Rape, to the extent I acted at all, I acted in my capacity as Gaming Attendant for Creek Casino Montgomery," these statements are clearly not dispositive of the issues in this case, and the analysis to determine whether and to what extent tribal immunity extends to such individuals begins instead with two United States Supreme Court cases.

See Complaint, (C. 5-6); *see also Affidavit of Lorenzo Teague, Affidavit of James Ingram* (C. 78-81).

In *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165 (1977), the Court examined the question of whether a state court may exercise jurisdiction over a recognized Indian tribe and/or its members, and with respect to the Indian tribe's individual members, held as follows:

> [W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible. The doctrine of sovereign immunity which was applied in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894 does not immunize the individual members of the tribe.
>
> *Puyllup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. at 171-172.

The Supreme Court emphasized this point once again in the same opinion, stating that "[T]he successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual [tribal members] over whom it properly obtained personal jurisdiction." *Id.* at 173.

The following year, the Supreme Court decided *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), holding as follows with regard to the individual tribal governor named in the plaintiff's complaint:

> As an officer of the Pueblo, petitioner Lucario Padillo is not protected by the tribe's immunity from suit. *See Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. at 171-172, 97 S. Ct. at 2620-2621; *cf. Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).
>
> *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59, 98 S. Ct. at 1677.

From the declarations of these two cases, many lower courts have attempted to determine whether and to what extent tribal officers and/or officials are immune from lawsuits in state and federal courts. In *Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F. 3d 1288 (10th Cir. 2008), the Tenth Circuit Court of Appeals explained the purpose and extent of immunity for tribal officials:

> It is clear that a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials; 'the interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself.' *Nero v. Cherokee Nation of*

Oklahoma, 892 F. 2d 1457, 1462 (10th Cir. 1989) (citation and quotation marks omitted). Accordingly, a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities. *Fletcher v. United States*, 116 F. 3d 1315, 1324 (10th Cir. 1997). The general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual-capacity suits **arising out of** actions they took in their official capacities, as the district court held. *cf. Russ v. Uppah*, 972 F. 2d 300, 303 (10th Cir. 1992) ('[S]tate officials may…be sued in their individual capacities for actions performed in the course of their official duties and are personally liable for damages awarded.'). Rather, it means that tribal officials are immunized from suits brought against them **because of** their official capacities - that is, because the powers they possess in these capacities enable them to grant the plaintiffs relief on behalf of the tribe.

Where a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, we ask whether the sovereign "is the real, substantial party in interest." *Frazier v. Simmons*, 254 F. 3d 1247, 1253 (10th Cir. 2001) (quotation marks and citations omitted). "[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (quotation marks and citations omitted). Where, however, the plaintiffs' suit seeks money from the officer 'in his individual capacity for unconstitutional or wrongful conduct

> fairly attributable to the officer himself,' sovereign immunity does not bar the suit 'so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.' *Alden v. Maine*, 527 U.S. 706, 757, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).
>
> *Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F. 3d 1288, 1296, 1297 (footnote omitted).

The Eleventh Circuit has acknowledged that a tribal officer's dismissal based on tribal immunity would be premature, as tribal immunity does not impair the authority of a state court to adjudicate the rights of individual defendants over whom it has personal jurisdiction. *Tamiami Partners, Ltd. V. Miccosukee Tribe of Indians of Florida*, 63 F. 3d 1030, 1051 (11th Cir. 1995) ("Tamiami II"), In *Tamiami II*, the Eleventh Circuit Court of Appeals affirmed a district court's ruling on a motion to dismiss that individual tribal officials were not shielded by their tribe's sovereign immunity:

> Having determined that we have jurisdiction to hear the tribal officers' appeal, we consider the district court's refusal to dismiss them from this suit. The district court rejected the tribal officers' claim of immunity under the doctrine of *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*. That doctrine, as the district court properly concluded, applies in suits brought

> against tribal authorities in their official capacities. *Santa Clara Pueblo, 436 U.S. at 59, 98 S. Ct. at 1677; see also Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 173, 97 S. Ct. 2616, 2621, 53 L. Ed. 2d 667 (1977)* ('[T]he [tribe's] successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction.'); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F. 2d 458, 460 (8th Cir. 1993) ('*Ex Parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity.'); *United States v. James*, 980 F. 2d 1314, 1319 (9th Cir. 1992) ('Tribal immunity does not extend to individual members of the tribe.'), *cert. denied*, 510 U.S. 838, 114 S. Ct. 119, 126 L. Ed. 2d 84 (1993). Accordingly, we affirm the district court's ruling that the individual defendants are not shielded by the Tribe's sovereign immunity.
>
> *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F. 3d 1030, 1050-1051 (11th Cir. 1995).

There are two theories upon which Mr. Rape relies in support of his position that his claims against the Ingram and Teague should not be dismissed on tribal immunity grounds, the first of which is that Ingram and Teague acted beyond the scope of their authority in this case and the second of which is expressed herein, *supra*, in *Native*

American Distributing v. Seneca-Cayuga Tobacco Company, 546 F. 3d 1288 (10th Cir. 2008).

The Defendants/Appellees argue that "[t]he 'individual' designation, however, changes nothing about the outcome – Ingram and Teague are immune," a position that clearly conflicts with both the U.S. Supreme Court and the 11th Circuit Court of Appeals on this precise issue. *See Defendants' Motion to Dismiss*, (C. 73), fn. 2; *see also Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 171-172 (1977); *see also Tamiami II*, 63 F. 3d 1030, 1051 (11th Cir. 1995). According to those courts, claims for monetary damages against tribal officials in their individual capacities for wrongful conduct fairly attributable to the individuals themselves are not barred by tribal immunity, so long as it is clear that the Plaintiff seeks monetary damages from the individuals personally. This theory applies to each of Mr. Rape's tort claims against Ingram and Teague, and the Defendants' Motion to Dismiss as to the individual Defendants, Ingram and Teague, is due to be denied.

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, merely their desire to treat their business patrons with impunity, if Mr. Rape's allegations are true, a desire from which they should not be immune from lawsuit. 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 23rd day of January, 2013.

Respectfully submitted,

s/Andrew J. Moak
ANDREW J. MOAK (MOA-001)
MATT ABBOTT (ABB-007)
Attorneys for Appellant
JERRY RAPE

OF COUNSEL:

ABBOTT LAW FIRM, L.L.C.
308 Martin Street North, Suite 200
Pell City, AL 35125
205-338-7800
205-338-7816 (fax)
E-mail: matt@abbottfirm.com
E-mail: andrew@abbottfirm.com

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:

Representing Defendants POARCH BAND OF CREEK INDIANS; PCI GAMING; CREEK INDIAN ENTERPRISES; CREEK CASINO MONTGOMERY; JAMES INGRAM; and LORENZO TEAGUE:

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

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 23rd day of January, 2013.

s/Andrew J. Moak
OF COUNSEL