No. 15-

IN THE

Supreme Court of the United States

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, *et al.*,

Petitioners,

v.

JONODEV OSCEOLA CHAUDHURI, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress, by enacting legislation permitting an Indian tribe to purchase land on the open market and to hold it in "restricted fee," created "Indian country," thereby completely divesting a state of its territorial sovereignty over that land, despite the absence of any explicit statutory language reflecting congressional intent to transfer sovereignty to the tribe?

2. Whether the Indian Commerce Clause (U.S. Const., art. I, § 8) gives Congress authority to completely divest a state of the sovereignty it had previously exercised over land for more than two centuries and transfer that sovereignty to an Indian tribe by enacting legislation permitting an Indian tribe to buy such land on the open market and to hold it in "restricted fee."

3. Whether the mere congressional designation of "restricted fee" status on tribally-owned land pursuant to the Indian Nonintercourse Act (25 U.S.C. § 177) implies an intent to transfer governmental power over that land to the tribe?

LIST OF PARTIES

The additional Petitioners not listed in the caption are:

Joel Rose and Robert Heffern, as Co-Chairpersons; G. Stanford Bratton, D. Min. Reverend, Executive Director of the Network of Religious Communities; Network of Religious Communities; National Coalition Against Gambling Expansion; Preservation Coalition of Erie County, Incorporated; Coalition Against Gambling in New York-Action, Inc.; Campaign for Buffalo-History Architecture & Culture; Sam Hoyt, Assemblyman; Maria Whyte; John McKendry; Shelley McKendry; Dominic J. Carbone; Geoffrey D. Butler; Elizabeth F. Barrett; Julie Cleary; Erin C. Davison; Alice E. Patton; Maureen C. Schaeffer; Joel A. Giambra, Individually and as Erie County Executive; Keith H. Scott, Sr., Pastor; Dora Richardson; and Josephine Rush.

The additional Respondents not listed in the caption are:

The National Indian Gaming Commission; Sally Jewell, in her official capacity as Secretary of the Interior; and The United States Department of the Interior.

In the proceedings below, Gale A. Norton was originally a party in her capacity as Secretary of the Department of the Interior, and Philip N. Hogen was originally a party in his capacity as Chairman of the National Indian Gaming Commission. Secretary Norton was replaced, successively, by Dirk Kempthorne, Ken Salazar, and Sally Jewell, each in

his or her official capacity as Secretary of the Department of the Interior; and Chairman Hogen was replaced successively by Tracie Stevens and Jonodev Osceola Chaudhuri, each in his or her official capacity as Chair of the National Indian Gaming Commission.

Pursuant to Supreme Court Rule 29.6, each corporate Petitioner states that there is no parent company or publicly held company owning 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Citizens Against Casino Gambling v. Chauduri* at 802 F.3d 267 (2d Cir. 2015) and appears at Appendix A to the Petition.

The opinions of the United States District Court for the Western District of New York, consolidated for purposes of the appeal, are as follows: (i) *Citizens Against Casino Gambling v. Kempthorne*, Appendix "F" to the Petition, reported at 471 F. Supp. 2d 295 (W.D.N.Y. 2007), *as amended*, 2007 U.S. Dist. LEXIS 29561 (W.D.N.Y. Apr. 20, 2007) ("*CACGEC I*"); (ii) *Citizens Against Casino Gambling v. Hogen*, Appendix "E" to the Petition, unpublished and available at 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. Jul. 8, 2008) ("*CACGEC II*"); and (iii) *Citizens Against Casino Gambling v. Stevens*, Appendix "B" to the Petition, reported at 945 F. Supp. 2d 391 (W.D.N.Y. 2013) ("*CACGEC III*").

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion, the subject of this Petition, on September 15, 2015 and entered its final judgment on September 15, 2015. No party filed a petition for rehearing. The Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution (commonly referred to as the Indian Commerce Clause) provides in pertinent part:

> The Congress shall have Power … To regulate Commerce … with the Indian Tribes.

The Indian Nonintercourse Act, 25 U.S.C. § 177, states: "No purchase, grant, lease, or other conveyance of lands ... from any Indian nation or tribe ... shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The Seneca Nation Settlement Act of 1990, 25 U.S.C. § 1774-1774h, *et seq*. is reprinted at App. 393a.

The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701-2721, is reprinted at App. 403a.

INTRODUCTION

This case affords the Court an opportunity to provide a much-needed clarification to a profoundly important constitutional issue regarding the extent, if any, to which Congress, in the exercise of its power under the Indian Commerce Clause of the Constitution (Art. 1, § 8, cl. 3), can enact legislation completely divesting a state of the sovereign jurisdiction it had theretofore exercised over land within its borders. In recent decades, federal courts have been confronted with a growing number of cases raising thorny jurisdictional conflicts that inevitably arise as Native Americans have become increasingly active in efforts to not only reacquire their land, but also their sovereignty over such land. *See, e.g.*, *Michigan v. Bay Mills Indian Community,* 572 U.S. _____, 134 S.Ct. 2024 (2014); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (Congress may not invoke the Indian Commerce Clause to abrogate a state's sovereign immunity). These Native American claims continue to collide with the interests of states and their citizens concerned about the disruptive effect that would ensue from the loss of sovereignty and the resulting inability to regulate the use of land they had governed from the moment they entered the Union.

In this case, the U.S. Second Circuit Court of Appeals held that in enacting the Seneca Nation Settlement Act (25 U.S.C. § 1774 *et seq.*) ("SNSA"), Congress intended to: (a) create "Indian country" and eliminate in its entirety the uninterrupted

sovereignty New York State had exercised for the past 200 years over a 9½ acre parcel of land in the heart of downtown Buffalo, New York, the State's second largest city with an overwhelmingly non-Indian population; and (b) transfer that sovereignty to the Seneca Nation of Indians ("SNI"). As a result the Second Circuit concluded that the land was now "Indian land" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), because the Tribe could now exercise "governmental power" over the land, thereby enabling it to open a casino on the site despite New York's constitutional and statutory prohibitions against such gambling.

The court said that Congress had the power to transfer such sovereignty under the "plenary" authority given to it under the Indian Commerce Clause "which vests exclusive legislative authority over Indian affairs in the federal government … *vis-à-vis* the states [and] allows tribal sovereignty to prevail in Indian country [leaving] no room for state regulation."[1] App. 28a. The Second Circuit further held that this was indeed what Congress had intended in enacting SNSA. The Second Circuit said the 9½ acre Buffalo Parcel had become a "dependent Indian community" which is one of three categories of land that make up "Indian country." 18 U.S.C. § 1151. App. 29a. It inferred this intent from two provisions

[1] The "plenary" nature of Congress' power may not be as absolute as the term implies. *See, e.g.*, G. Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015); R. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201 (2007).

in SNSA. The first was the appropriation of a sum of money for the Tribe which it could use for a multitude of purposes, including the acquisition of land in a vast area of western New York (including, but not limited to, the City of Buffalo), without specifying its exact location. The second was that any land so acquired would be eligible for so-called "restricted fee" status, *i.e.,* it could not be sold without the Federal Government's approval. The Second Circuit concluded that these two provisions were a sufficient manifestation of congressional intent to effectuate a complete divestiture of New York's sovereignty over any land the Tribe might decide to buy despite the absence of any explicit expression of an intent to transfer "sovereignty," a word that appears nowhere in the statute.

Petitioners contend that Congress had no such intention, and if it had, it would have been required to make such a seismic event unequivocally clear. "Congress does not hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). They argue that the Second Circuit violated the rule of "constitutional avoidance," a fundamental canon of statutory interpretation that instructs courts to avoid imparting to a statute an interpretation that would raise serious constitutional questions. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *see Adoptive Couple v. Baby Girl*, 570 U.S. _____; 133 S.Ct. 2552, 2569-70 (2013) (Thomas, J., concurring) (urging "limited construction of the Indian Commerce Clause" to avoid constitutional issues). The Second Circuit's misreading of the statute that resulted from its failure to adhere to the

constitutional avoidance rule has resulted in a decision that threatens the sovereignty of all states whenever Congress provides money to a tribe to acquire land.

In holding that the Buffalo Parcel was Indian country, the court badly misconstrued the term "dependent Indian community," which the Court interpreted for the first and only time in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998). Whatever else it might be, the 9½ acre site of a non-residential gambling casino in the middle of New York's second-largest city, overwhelmingly populated by non-Indians, is not a "dependent Indian community."

The Second Circuit's stunning conclusion that SNSA completely divested New York of sovereignty over the land, despite the lack of any statement of such congressional intent, and without the State's explicit consent, raises serious questions of profound constitutional dimension. A statute that seeks to achieve a result as monumental as the unilateral divestiture of a state's sovereignty must do so explicitly, yet the word "sovereignty" appears nowhere in SNSA, as the Second Circuit conceded. App. 39a. The decision undermines the bedrock principle of dual and co-equal sovereignty between the states and the Federal Government, a fundamental part of our Nation's "constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). It encroaches on state sovereignty and erodes federalism.

The ruling conflicts with more than 150 years of this Court's precedents recognizing the power of Congress to create new Indian territory only on land that is not already part of a state or where the state expressly cedes sovereignty. It misconstrues both IGRA and SNSA by allowing an Indian tribe to exercise governmental power over land it acquired on the open market within an existing state without any showing that Congress confronted and decided whether the tribe would – or even could – acquire jurisdiction, and thus the right to exercise governmental power, over the land. This opens the door to future unilateral usurpations of territorial sovereignty, ostensibly through Congress's so-called "plenary" authority under the Indian Commerce Clause, over land within any state's borders. This stretches the Indian Commerce Clause beyond the breaking point.

Certiorari is warranted. If allowed to stand, the Second Circuit's ruling will upset the delicate balance between state and tribal sovereignty, not just in New York, but throughout the Nation. Due to the broad language of the Indian Nonintercourse Act, 25 U.S.C. § 177, this will open the floodgates to claims by other Indian tribes that they also may exercise governmental power over land they hold in restricted fee. It will only exacerbate the confusing and disruptive problems of alternating "checkerboard" jurisdiction that this Court sought to avoid in its landmark decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 205, 214, 219 (2005) (holding that an Indian tribe could not rekindle "embers of sovereignty that long ago had grown cold" by

reacquiring on open market title to land that had been part of its former reservation).

These issues, while arising here in the discrete context of a specific Indian settlement act, have broad implications for other Indian tribes located in many states throughout the Nation. The Second Circuit's expansive interpretation of the Indian Commerce Clause provides tribes with a roadmap to circumvent state law not just on their reservations, but also on off-reservation land under the sovereign control of a state for more than a century and in some cases since the Nation was founded.

STATEMENT OF THE CASE

A. Background

In 1988, after this Court decided *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Congress enacted IGRA to provide a statutory basis for the federal regulation of gambling on "Indian land" as defined in IGRA. The statute specifies when, where and under what circumstances Indian tribes may engage in gambling on Indian land. Outside Indian land, state law, not IGRA, applies.

IGRA divides gambling into three classes, of which the most closely regulated is Class III, including "casino games, slot machines, and horse racing." *See* 25 U.S.C. § 2703(8). Class III gambling can occur only on "Indian lands within the tribe's jurisdiction." *See id.* at § 2710(d)(1). IGRA defines "Indian lands" as all lands either "held in trust by the United States for the benefit of any Indian tribe or individual" or "held by any Indian tribe or individual

subject to restriction by the United States against alienation" and over which "an Indian tribe exercises governmental power." *See id.* at § 2703(4). Even on Indian lands, IGRA prohibits gambling "on lands acquired by the Secretary of the Department of Interior ("DOI") in trust for the benefit of an Indian tribe after October 17, 1988," the date of IGRA's enactment. *Id.* at § 2719(a). This prohibition against gambling on after-acquired lands is subject to several exceptions, including one for such lands "taken into trust as part of . . . a settlement of a land claim." *Id.* at § 2719(b)(1)(B)(i).

In 1990, two years after IGRA's enactment, Congress passed SNSA to resolve a long-simmering crisis in and around the City of Salamanca, about 65 miles southwest of Buffalo. *Id.* at § 1774(b). At that time, the situation was about to reach its boiling point because of the then-impending expiration on February 19, 1991, of 99-year leases on land the SNI owned and had leased to non-Indians in and around the City of Salamanca, in the southwestern corner of New York State. *See id.* at § 1774(a)(4). SNSA settled the dispute by ratifying an agreement between the City of Salamanca and the SNI calling for the negotiation of new leases with terms of 40 years, with the right to renew for 40 more years based on fair market value. App. 193a.

Under SNSA, the United States and the State of New York appropriated a total of $60 million ($35 million from the United States and $25 million from New York). 25 U.S.C. § 1774d(a)-(c). SNSA allowed the SNI to spend the appropriated sum however it chose, including, at its discretion, the acquisition of

land anywhere within a vast expanse of western New York that had once been part of the tribe's aboriginal territory long before the Nation was formed. This included, but by no means was limited to, the City of Buffalo. A miscellaneous provision in SNSA exempted the settlement funds, and any income derived from them, from state or local taxation and protected them from levy, execution, forfeiture, garnishment, lien, encumbrance or seizure. *Id.* at § 1774f(a). If the SNI used SNSA funds to acquire land within its "aboriginal area" or within or near its former reservation lands, SNSA imposed a corresponding tax exemption and protection from forfeiture of the land. *Id.* at § 1774f(c). State and local governments were given a period of 30 days after notification to comment on the impact of the removal of such lands from real property tax rolls. *Id.* Unless the Secretary determined within 30 days after the comment period that the lands should not be subject to the Indian Nonintercourse Act, that Act would apply, and the SNI would hold the land in "restricted fee status." *Id.* The Indian Nonintercourse Act, 25 U.S.C. § 177, restricts and invalidates any "purchase, grant, lease, or other conveyance of land" from an Indian nation or tribe unless "made by treaty or convention entered into pursuant to the Constitution." The restriction on the power to transfer fee title (full ownership rights) is what gives the land its "restricted fee status."

SNSA was a relatively non-controversial measure, which passed easily in both chambers by voice vote. SNSA made no mention of the transfer of "sovereignty" over any such land from the State to the

SNI. In fact, the term "sovereignty" appears nowhere in the statute.

On November 25, 2002, the SNI submitted a proposed Class III gaming ordinance to the Chairman of the National Indian Gaming Commission ("NIGC"), who must approve any such ordinance as a prerequisite to gambling. 25 U.S.C. § 2710(d)(1)(A)(iii). The next day, November 26, 2002, NIGC Chairman Hogen approved the ordinance "for gaming only on Indian lands, as defined in the IGRA, over which the Nation has jurisdiction." App. 346a. At the time of the approval, the SNI had not yet purchased any land in Buffalo.

Three years later, in 2005, the SNI purchased on the open market 9½ acres of land in downtown Buffalo (the "Buffalo Parcel"). The SNI notified New York State, Erie County and the City of Buffalo officials that they had 30 days to comment on the removal of the land from the tax rolls. On November 7, 2005, after the 30 days expired, the land passed into "restricted fee" pursuant to 25 U.S.C. § 1774f(c).

B. Proceedings Below

Thereafter, Petitioners, a coalition of individuals who resided near the Buffalo Parcel and organizations who opposed gambling in the area, brought a series of three actions to challenge the determinations of the NIGC permitting the SNI to conduct gambling operations on the Buffalo Parcel. They argued that: (i) the SNI lacked jurisdiction over the Buffalo Parcel, and therefore, the land did not meet IGRA's definition of Indian lands; (ii) if it did,

the land was subject to IGRA's prohibition against gambling on lands acquired after 1988; and (iii) SNSA did not settle a land claim, so the settlement of a land claim exception to the after-acquired lands prohibition did not apply.

Petitioners prevailed in the first two actions. In the first case, the federal district court issued a decision, dated January 12, 2007, vacating and remanding the NIGC's approval of the SNI's ordinance because the NIGC had failed to make the necessary threshold determination that the site was "Indian land" as the ordinance was not site-specific. *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295 (W.D.N.Y. 2007) (*"CACGEC I"*). App. 325a.

After the remand, the SNI adopted an amended ordinance specifying the Buffalo Parcel, and on July 2, 2007, the NIGC approved the amended ordinance. Although the Chairman found that IGRA's after-acquired land prohibition applied to restricted fee land, he opined that the land nevertheless met the "settlement of a land claim" exception because the Tribe acquired the property with proceeds from SNSA and thus could operate a Class III gambling casino there. The following day, July 3, 2007, the SNI rolled in slot machines and opened a gambling operation on the Buffalo Parcel. The gambling has continued ever since.

In Petitioners' second action challenging the amended ordinance approval, the federal district court again vacated the NIGC's approval of the ordinance. *Citizens Against Casino Gambling in Erie*

County v. Hogen 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. Jul. 8, 2008) ("*CACGEC II*"). After concluding that the Buffalo Parcel met IGRA's definition of "Indian lands," the court held, as had the Chairman of the NIGC, that IGRA's Section 20 prohibition against gambling on after-acquired lands applied to both trust and restricted fee land, because the contrary argument was "clearly at odds with section 20's purpose." App. 297a. The district court also concluded that the "settlement of a land claim" exception did not apply, because SNSA did not settle any claim, let alone a land claim. App. 317a.

That should have resolved the issue, but it did not. The SNI continued to gamble on the Buffalo Parcel, and the NIGC failed to take any action to bring the gambling to an end. On July 14, 2008, plaintiffs moved to compel compliance with the court's order. App. 140a. In its opposition to the motion, the Government disclosed, for the first time, that on May 20, 2008, while the litigation in *CACGEC II* was pending, and without advising the district court, the U.S. Department of the Interior ("DOI") had published final regulations reversing its former position on the applicability of the after-acquired land prohibition to restricted fee land. Earlier proposed regulations had stated that the prohibition applied to both trust and restricted fee land. DOI included its "about face" in an introductory preamble (not in the regulations themselves) after noting that it had received a comment that the proposed regulations should clarify the applicability of the after-acquired land prohibition to restricted fee lands. The agency declined to adopt the change, the preamble stated, because "section

2719(a) refers only to lands acquired in trust after October 17, 1988." 73 Fed. Reg. 29354 (May 20, 2008). The preamble continued: "[t]he omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA." *Id.* at 29355. The DOI did not disclose that the comment it had rejected was from the NIGC, the agency charged with interpreting and administering IGRA or that it had rejected the NIGC's comment at the behest of the SNI, which stood to benefit from the change.

By order dated August 26, 2008 (App. 137a), the district court chastised the Government for what it termed an "egregious" tactic of first publishing a proposed rule in 2000, which lay dormant, amending it years later in 2006, but arguing against its applicability in the litigation when the plaintiffs sought to rely on it, and then amending it again to change its meaning in 2008 while summary judgment motions were pending, all without giving any indication that a final rule was imminent. App. 157a. The court directed NIGC "to comply forthwith" with Congress's mandate to provide written notice to the SNI of IGRA violations, and with NIGC regulations. App. 163a.

On the morning of January 20, 2009, just before the Inauguration of President Obama and the resulting change in Administrations, the NIGC Chairman adopted a DOI opinion issued just two days earlier stating that IGRA's after-acquired land prohibition does not apply to "restricted fee" land but only to "trust" land, repudiating the position previously articulated by then Secretary of the

Interior Gale Norton in 2002. App. 62a. NIGC's Chairman used this as the basis for "reversing" his own determination (that he had previously said was "the only sensible interpretation") on the applicability of the after-acquired land prohibition to restricted fee land. Based on that opinion, he approved yet a third ordinance adopted by the Tribe that was virtually identical to the one the district court had invalidated in *CACGEC II* only five months earlier. *Id.*

In the third case, Petitioners challenged the third iteration of the ordinance. *Citizens Against Casino Gambling in Erie County v. Stevens*, 941 F.Supp.2d 391 (W.D.N.Y. 2013) ("*CACGEC III*"). The district court reversed its own prior holding in *CACGEC II* and upheld the Chairman's approval of the third ordinance. Given that DOI's regulations now provided that the after-acquired lands prohibitions in IGRA (25 U.S.C. § 2719) did not apply to restricted fee land, the court determined that the after-acquired land prohibition did not apply to the Buffalo Parcel which was, therefore, "gambling-eligible" after all. *See* App. 83a. Since the prohibition no longer applied, the court decided it was unnecessary to readdress the question whether the land was subject to the "settlement of a land claim" exception to the prohibition. App. 95a.

The United States Court of Appeals for the Second Circuit affirmed the district court's ruling in *CACGEC III*. *Citizens Against Casino Gambling in Erie County v. Chadhuri*, 802 F.3d 267 (2d Cir. 2015). App. 1a. The appellate court opined that New York would "not have jurisdiction if [the Buffalo Parcel] … [is] 'Indian country.'" App. 29a. Recognizing that

IGRA requires a tribe to have jurisdiction over its land, the court conducted an analysis to determine whether the Buffalo Parcel fit the characteristics of a "dependent Indian community," a category of Indian country. As such, the court held that "tribal sovereignty prevailed … leaving no room for state regulation." App. 28a. It concluded that by establishing a process for lands acquired with SNSA funds to attain restricted fee status, Congress had demonstrated its intent – despite the lack of any clear statement to this effect – to set aside the Buffalo Parcel under federal superintendence. App. 34a. As a result, the court ruled that the SNI "has jurisdiction over this land, and New York has therefore been divested of its jurisdiction." App. 36a. The Second Circuit also concluded that the property qualified as "Indian lands" over which an Indian tribe exercises governmental power, because the tribe policed the land, fenced it, posted signs and enacted ordinances and resolutions applying SNI law. App. 42a. Finally, the court held that the after-acquired land prohibition applies only to "lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe," not -- as here -- to "lands held in restricted fee by a tribe." App. 43a.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Opinion Conflicts with the Requirement that Any Statute's Abrogation of Sovereignty Must Be Clearly Stated

The Second Circuit concluded that Congress shifted sovereignty over land from a State to an

Indian tribe without making its intention to do so unmistakably clear in the statutory language, without inviting comment from area stakeholders on the loss of sovereignty, and without mentioning it in the Congressional hearings held prior to the statute's enactment. Assuming that Congress could effect a transfer of sovereign jurisdiction, it would never have done so in such an obscure, oblique manner, via voice vote on a non-controversial bill that did not identify with any specificity the land, if any, the Tribe might choose to purchase. This Court's review is necessary to correct the appellate court's grave error.

Under our Constitution, the federal government possesses only limited and delegated powers; the rest are reserved to the states respectively, or to the people. U.S. Const. amend. X. This system of dual sovereignty is fundamental to the constitutional framework. This Court has repeatedly instructed, "[i]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers," *Bond v. United States*, --- U.S. ---, 134 S. Ct. 2077, 2089 (2014) (citing authorities), by making their "intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). In "traditionally sensitive areas" affecting the federal-state balance, "the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond*, --- U.S. at ---, 134 S. Ct. at 2089 (and cases cited therein); *Gregory*, 501 U.S. at 461.

In numerous contexts, this Court has recognized that an abrogation of sovereignty must be express. For example, in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), the Court held that a federal "apology resolution" with respect to the involvement of the United States in the overthrow of the native Hawaiian government could not be interpreted to divest the State of Hawaii of its sovereign authority over land that the United States had ceded to Hawaii upon its admission to the Union. Among the grounds for the Court's decision, the apology resolution revealed "no indication – much less a "clear and manifest" one – that Congress intended *sub silentio* to "cloud" the absolute fee title the United States had transferred to Hawaii upon statehood in 1959. In other cases involving traditionally sensitive areas, the Court has similarly required a clear statement of congressional intent to abrogate attributes of state sovereignty. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (to abrogate a state's sovereign immunity, Congress cannot act implicitly, but must make its intention unmistakably clear in the language of the statute); *see also FAA v. Cooper*, --- U.S. ---, 132 S. Ct. 1441 (2012) ("waiver of sovereign immunity must be 'unequivocally expressed' in statutory text"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (when Congress "radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit") (quoting Frankfurter, F., *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947). This approach is rooted in the respect for the

states as independent sovereigns in the federal system.

SNSA does not contain any clear or manifest statement transferring jurisdiction to the SNI. Congress did not use any explicit cession language, such as "cede, sell, relinquish, or convey," *cf. South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), reflecting the intent to affect sovereignty over any land the SNI might purchase with SNSA funds. In fact, the statute is silent on the question of jurisdiction, governmental power and even gambling.

The mere imposition of restrictions on alienation under 25 U.S.C. § 177 is not an express, or even implied, statement of intent to abrogate state sovereignty. Historically, 25 U.S.C. § 177 was a vehicle for protecting Indian land ownership, by certain claims based upon state law, such as adverse possession, statutes of limitations, or laches, which may have the effect of transferring title to Indian property to non-Indian claimants. "The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent." *FPC v. Tuscarora Indian Natio*n, 362 U.S. 99, 119 (1960). It is not a vehicle for transferring jurisdiction. When Congress said the SNI could hold land in "restricted" fee status, it did not say the tribe could own their land "without restrictions" imposed by state law.

Congress knew how to use the words "jurisdiction" and "governmental power" when it wanted to refer to those characteristics. Two years earlier, in IGRA, Congress had defined gambling-eligible "Indian lands" (whether trust or restricted fee) in terms of both tribal jurisdiction, 25 U.S.C. § 2710(d), and governmental power, *id.* at § 2703(4)(B). In SNSA, however, Congress referred only to "restricted fee status," without any reference to jurisdiction or governmental power. The lack of a clear statement expressing such intent creates the presumption Congress had no such intent at all. *See Carcieri v. Salazar*, 555 U.S. 379, 393 (2009) (courts presume Congress says what it means and means what it says).

There are other indicia in SNSA, aside from its resounding silence on the subject, that Congress had no intent to confer sovereignty upon the SNI. For example, the opportunity of state and local governments to comment upon an acquisition of land with SNSA funds is limited to the effect of removing the lands from the real property tax rolls. A loss of sovereignty would mean, in addition, the loss of state authority to regulate local zoning, environmental impacts, and public health and safety, as well as gambling. If Congress had intended state and local municipalities to cede not just property taxes but also regulatory jurisdiction, it surely would have asked for comment on that, as it did in the Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, 25 U.S.C. § 1778d(a) (authorizing Secretary to convey lands into trust status, unless local municipality objects within 60 days), and the Mohegan Nation

(Connecticut) Land Claims Settlement Act, 25 U.S.C. § 1775c(b)(1)(B) (requiring consultation with town on impact of removal from taxation, problems concerning jurisdiction and potential land use conflicts). The limited opportunity for municipal comment is textual evidence that Congress intended similar limitations on the effect of the restricted fee designation. *Cf. Tarrant Regional Water Dist. v. Herrmann*, --- U.S. ---, 133 S. Ct. 2120, 2133 (2012) ("States rarely relinquish their sovereign powers," so "the better understanding is that there would be a clear indication of such devolution, not inscrutable silence").

So too, SNSA's legislative history does not mention sovereignty, jurisdiction, governmental power, or even gambling. In testifying before Congress prior to SNSA's enactment, SNI witnesses gave no hint, even when pressed, of the possibility of gambling on land to be purchased with SNSA funds. S. Rep. No. 101-511, at 15, 17-18 (1990); H.R. Rep. No. 101-832, at 36 (1990). If Congress had intended any such effect, it would have been highly controversial, provoked extensive debate, prompted a recorded (not voice) vote, and may well have met a resounding defeat. Yet the legislative history contains not a single word on the issue. The lack of any reference to governmental power or even gambling in SNSA, or even its legislative history, is strong evidence that Congress never intended to grant the SNI governmental power over its restricted fee lands or thereby to create off-reservation "Indian lands" within the meaning of IGRA. Congress does not "hide

elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

Under the Admissions Clause (U.S. Const. art. IV, § 3) and the Equal Footing Doctrine, the territorial sovereignty of a state cannot be diminished without the consent of the state's legislature. *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984). That consent cannot be implied or tacit. *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 538-539 (1885). The Second Circuit's decision cannot be reconciled with these precedents.

B. The Second Circuit's Court Ruling Disregards the Canon of Constitutional Avoidance

Closely related to the clear statement rule with respect to the abrogation of sovereignty is the "well-established principle" that the courts should not "decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984); *see Adoptive Couple v. Baby Girl*, 570 U.S. ---, 133 S.Ct. 2552 (2013) (Thomas, J., concurring) (urging "limited construction" of Indian Commerce Clause and concurring in majority's statutory construction to avoid reaching constitutional issues); *Hawaii*, 556 U.S. at 176 (applying canon of constitutional avoidance, based on reasonable presumption that Congress did not intend statutory construction which raises "grave constitutional concern").

The proposition that Congress can shift jurisdiction from a state to an Indian tribe without an

express cession of jurisdiction by the state raises serious constitutional issues. In our federalist system, "the states possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Nothing is so central to sovereignty as the matter here at issue: governmental power over land, exclusively non-Indian at the time of acquisition, within the geographic borders of the state. The failure of the Second Circuit to adhere to the rule of constitutional avoidance caused a head-on collision between two powerful and competing constitutional principles – the plenary power of Congress under the Indian Commerce Clause versus the inviolability of state sovereignty under our federal system.

The constitutional question lurking beneath the appellate court's ruling is whether Congress would be within its powers under the Indian Commerce Clause to displace a state's territorial jurisdiction and reallocate it to an Indian tribe. To say that Congress has plenary authority to regulate "commerce" with the Indians is one thing, but to say Congress can unilaterally dismantle a state's territorial integrity is quite another. *See Adoptive Couple*, 570 U.S. at ---, 133 S. Ct. at 2569-70 (2013) (Thomas J., concurring) (urging "limited construction" of Indian Commerce Clause). This is a recurring question of importance not only to New York and its citizens, but also to a host of other states, where Congress has enacted land claim settlement acts and other statutes affecting the rights of Indian tribes to

land. *See, e.g., Carcieri v. Salazar*, 555 U.S. 379 (2009). The question assumes heightened significance where, as under SNSA, the statute does not contain language suggesting that Congress intended to alter the state's historic sovereignty over its land.

This Court's review is necessary to give SNSA a construction consistent with its plain language and constitutional principles, neither of which would displace a state's territorial jurisdiction.

C. The Second Circuit's Ruling Contradicts This Court's Definitive Ruling on What Constitutes a "Dependent Indian Community"

The appellate court's holding that Congress through SNSA set aside the Buffalo Parcel for the SNI's use and subjected it to federal superintendence, thereby creating a "dependent Indian community," deviated from the Court's holding and analysis in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

In *Venetie*, this Court held that the term "dependent Indian community" refers to a "limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must have been set aside by the Federal government for the use of the Indians as Indian land; second, they must be under federal superintendence." 522 U.S. at 527. In the cases upon which the Court relied, Congress had set aside specific land for the purpose of the long-term settlement of an Indian community. *See United States v. McGowan,* 302 U.S.

535, 537 (1938) (in creating the Reno Indian colony, Congress intended "to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement"); *United States v. Pelican*, 232 U.S. 442, 449 (1914) (allotted lands retained "a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation"); *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (Congress had confirmed the land grants from the King of Spain to the Pueblo Indians and the adjacent reservation "for the use and occupancy of the Indians"); *Donnelly v. United States,* 228 U.S. 243, 255 (1913) (Congress set the lands aside as reservations "which shall be of suitable extent for the accommodation of the Indians of said state" (quoting Act of April 8, 1864, § 2, 13 Stat. at L. 39, chap. 48)).

By contrast, in SNSA Congress did not "set aside" any specific lands where Indians lived, but instead authorized the payment of money, which the SNI could hold or invest in its discretion. If the SNI used SNSA funds to acquire land within its "aboriginal area," state and local governments would have a period of 30 days after notification to comment on the impact of the removal of such lands from real property tax rolls. 25 U.S.C. § 1774f(c). Assuming Congress used the term "aboriginal area" in its common sense, *see McBoyle v. United States*, 283 U.S. 25, 26 (1931), in 1797, this may have encompassed as much as 4,250,000 acres in western New York (*see Banner v. United States*, 238 F.3d 1348, 1350 n.1 (Fed. Cir. 2001)), or about 12% of New York's total land mass of 34,915,840 acres. *See Seneca Nation of*

Indians v. New York, 206 F. Supp. 2d 448, 458 (W.D.N.Y. 2002), *aff'd*, 382 F.3d 245 (2004) (describing the vast area of aboriginal SNI land). Unless the Secretary determined otherwise within 30 days after the comment period, SNI would hold the land in "restricted fee status." *Id.* The imposition of a restriction on alienation on as-yet unidentified land, distinctly non-Indian in character, located anywhere within such a vast expanse, without the purpose of protecting Indians residing there, is not a federal set-aside consistent with *Venetie* or the precedents upon which it relied. Simply stated, it is ludicrous to suggest that Congress intended to create a dependent Indian community within the City of Buffalo, New York State's second largest city that had been under the State's sovereign control for two centuries, such that New York law would no longer apply. What Congress intended to be a benign non-controversial piece of legislation passed by voice vote to remedy a local problem 65 miles distant from the City of Buffalo evolved into a jurisdictional nightmare as a result of the circuit court's failure to adhere to fundamental rules of statutory construction.

The Second Circuit, however, used the same element to satisfy both requirements – the federal set-aside and federal superintendence – of the dependent Indian community analysis. In the cases establishing the dependent Indian community category, the U.S. did not simply restrict alienation, but rather by statute expressly assumed jurisdiction and control over virtually all facets of the Indian community to supervise, protect and sustain the Indians living there. *See McGowan*, 302 U.S. at 537-39 (U.S.

retained title to land to protect Indians living there); *Pelican*, 232 U.S. at 447 (allotments were "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians"); *Sandoval*, 231 U.S. at 37 n.1 (federal statute placed Pueblo lands under the "absolute jurisdiction and control of the Congress of the United States"). As this Court explained in *Venetie*, the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the federal government that it and the tribe, rather than the state, are to exercise primary jurisdiction over the land. 522 U.S. at 527 n.1. The requisite federal superintendence and resulting tribal dependence is completely lacking in the Buffalo Parcel.

In *Venetie*, the U.S. exercised a degree of protection over the lands by exempting them from real property taxes, adverse possession claims, and certain other judgments, *see* 43 U.S.C. § 1636(d). Nevertheless, the unanimous Court concluded, "[t]hese protections, if they can be called that, simply do not approach the level of superintendence over the Indians that existed in our prior cases," in which the U.S. "actively controlled the lands in question, effectively acting as a guardian for the Indians." 522 U.S. at 533. So too here, the minimal protections resulting from the restriction on alienation and associated property tax exemption fall far short of the level of superintendence over the Indians and their lands in the precedents establishing the dependent Indian community category of Indian country. The appellate court's misreading of *Venetie* is an open

invitation to Congress to erode state sovereignty elsewhere – whether to advance Indian gambling or any other enterprise. Review is necessary to correct the error.

D. The Second Circuit's Ruling Conflicts with this Court's Precedents Recognizing State Jurisdiction to Regulate Conduct in Indian Country within Its Borders

In asserting that New York will "not have jurisdiction if [the Buffalo Parcel] . . . [is] 'Indian country'" leaving no room for state regulation, and then concluding that the Buffalo Parcel is Indian country, the Second Circuit's ruling conflicts with more than 150 years of authority recognizing that a state has jurisdiction over Indian country within its borders.

As early as 1859, in *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 370 (1859), the Court recognized New York's authority to enact statutes protecting Indians on their tribal lands from intrusion by others. The New York Indian Law, codified at Chapter 26 of the Consolidated Laws (L. 1909, ch. 31), contains many provisions regarding the State's powers in its dealings with the Indians, including the establishment of a peacemakers' court to hear and determine questions involving title to real estate on the reservation. *See, e.g.,* N.Y. Indian Law § 46. In *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13 (1925), the Court recognized that New York, "at the request of the Indians, assumed governmental control

of them and their property … and that Congress has never undertaken to interfere with this situation or to assume control." *Id.* at 16-17.

The principle that a state has jurisdiction on Indian reservations, and thus in "Indian country," is firmly recognized in, but by no means limited to, New York. In *United States v. McBratney*, 104 U.S. 621 (1882), the Court held that the Colorado state courts, not the federal courts, had jurisdiction to prosecute the murder of one non-Indian by another on an Indian reservation. The Act of Congress admitting Colorado into the Union placed it "upon an equal footing with the original states,"[2] so Colorado had criminal jurisdiction over non-Indians "throughout the whole of the territory within its limits, including the Ute Reservation," and the United States no longer had "sole and exclusive jurisdiction" over the reservation, except to the extent necessary to carry out treaties. *Id.* at 623-24; *see Draper v. United States*, 164 U.S. 240 (1896) (Montana had power to punish non-Indian for

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[2] The State Enabling Acts of other western states, in contrast, include language excluding Indian lands from the State's territorial jurisdiction. *See, e.g.*, Act of May 30, 1854, ch. 59, 10 Stat. 277 (Kansas and Nebraska); Act of Feb. 22, 1884, ch. 180, § 4, 25 Stat. 676 (North Dakota, South Dakota, Montana, and Washington); Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 3335, 34 Stat. 267 (Oklahoma); Act of June 20, 1910, ch. 310, §§ 2, 20, 36 Stat. 557 (New Mexico and Arizona); Act of July 7, 1958, Pub. L. 85-508, § 4, 72 Stat. 339, *as amended* by Pub. L. 86-70, § 2(a), 73 Stat. 141 (1959) (Alaska). Idaho and Wyoming, both admitted to statehood in 1890 without prior Enabling Acts, inserted disclaimers in their State Constitutions. *See* Idaho Const., Art. 21, § 19 (1890); Wyo. Const., Art. 21, § 26 (1890).

murder committed on reservation or Indian lands). In *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), the Court applied *McBratney* – which it found "in harmony with general principles governing this subject," *id.* at 499 n.4 (citations omitted) – to uphold New York's jurisdiction to prosecute the murder of a non-Indian committed by another non-Indian on the SNI's Allegany Reservation in New York. "In the absence of a limiting treaty obligation or Congressional enactment," the Court stated, "each state had a right to exercise jurisdiction over Indian reservations within its boundaries." *Id.* at 499.

In the 1940s, Congress permitted several states to assert criminal jurisdiction, and sometimes civil jurisdiction as well, over certain Indian reservations. *See, e.g.*, Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of July 2, 1948, ch. 809, 62 Stat. 1229; Act of Sept. 13, 1950, ch. 917, 64 Stat. 845; Act of Oct. 5, 1949, ch. 604, 63 Stat. 705. In 1948 and 1950, Congress granted jurisdiction to New York, with limited exceptions, over offenses committed by or against Indians on Indian reservations in New York, and over actions between Indians or involving an Indian and any other person. 25 U.S.C. §§ 232, 233; *see Oneida Nation of N.Y. v. County of Oneida*, 414 U.S. 661 (1974) (referring to 25 U.S.C. §§ 232 and 233 as a congressional "grant of civil jurisdiction to the State of New York with the indicated exceptions"). Beginning in 1953, Congress granted to several other states, subject to limited exceptions, full civil and criminal jurisdiction over Indian reservations. 18 U.S.C. § 1162 (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin); 28 U.S.C. § 1360

(same); *see Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) ("even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law").

More recent cases continue to recognize the rights of states, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border."); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) (state jurisdiction over relations between reservation Indians and non-Indians may be permitted unless the application of state laws "would interfere with reservation self-government or impair a right granted or reserved by federal law").

The Second Circuit, however, with the stroke of a pen, stripped New York of authority over the Buffalo Parcel. This ruling will create confusion across the Nation as to the reach of a state's civil and criminal jurisdiction in Indian country.

E. The Second Circuit's Mistaken Inference that the Mere Designation by Congress of the Buffalo Parcel as "Restricted Fee" Implied an Intent to Transfer Governmental Power Raises Wide-Ranging and Significant Issues

The issues in this case, though arising in the discrete context of a specific Indian settlement act, have wide applicability to other Indian tribes located throughout the Nation. This is because the Indian Nonintercourse Act, 25 U.S.C. § 177, which creates restricted fee land, applies by its terms to any "purchase, grant, lease, or other conveyance of land" from an Indian nation or tribe. Its only purpose was to ensure that the land would not be subject to taxation in order to ensure that the Tribe got the full benefit of the bargain it had struck pursuant to SNSA. The appellate court's ruling, however, creates a roadmap for other Indian tribes to assert that they have purchased land which they hold in restricted fee and over which, under the appellate court's reasoning, they can exercise governmental power, including (but not limited to) gambling, on the theory that IGRA's prohibition against gambling on after-acquired land would not apply to restricted fee land. This could open the floodgates to extensive shifts in sovereignty in communities throughout the United States.

It would also render the land-into-trust process under the Indian Reorganization Act, 25 U.S.C. § 465 ("IRA"), largely superfluous. The IRA permits the Secretary, after an extensive process that takes into account the interests of others with stakes in the

area's governance and well-being, to take land into trust for the benefit of an Indian tribe. In *Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220-21 (2005), the Court stated that "Section 465 provides the proper avenue" for an Indian tribe to reestablish sovereign authority over territory. Under IGRA, newly acquired trust land is subject to the after acquired land prohibition, unless a statutory exception applies. If an Indian tribe can circumvent the after-acquired land prohibition by acquiring land subject to the Indian Nonintercourse Act and thereby divest the state of sovereignty, "little would prevent [tribes across the nation] from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *See Sherrill,* 544 U.S. at 220; *see also Felix v. Patrick*, 145 U.S. 317, 335 (1892). The issues are of national importance, implicating allocations of authority and sovereignty between states and tribes.

The consequences of a loss of sovereignty cannot be overestimated. They include the loss of state authority to regulate not only gambling, but also local zoning, the environmental public health and safety. The loss of sovereignty can open the land to unregulated gasoline stations, cigarette (and marijuana) manufacturing facilities, payday loans and other pollutants and noxious consequences which are irreversible and which state and local governments have no authority to control.

This Court's review is warranted to avoid such significant and unintended effects.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

December 14, 2015
Respectfully submitted,

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