12-376

Supreme Court, U.S.
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No. 12-

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Justice Brandeis' opinion in *Turner v. United States*, 248 U.S. 354 (1919) support the concept of tribal sovereign immunity or should that accidental doctrine, questioned in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), be revised and discarded, at least in the context of tribal alcoholic beverage commercial activities?

2. Do Title 18 U.S.C. § 1161 and *Rice v. Rehner*, 463 U.S. 713 (1983), exclude tribal alcoholic beverage endeavors from sovereign immunity protection?

3. Does tribal sovereign immunity preclude a suit against an Indian Tribe which has obtained a state liquor license and has operated an alcoholic beverage facility pursuant to that liquor license and in the process has violated state law subjecting a license holder to liability?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John V. Furry petitions this Court to grant certiorari and address the important questions raised regarding the application of the doctrine of tribal sovereign immunity.

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals is reported as *John V. Furry v. Miccosukee Tribe of Indians, et al.*, 685 F.3d 1224 (11th Cir. 2012). The decision of the United States District Court for the Southern District of Florida is reported at 2011 WL 2747666 (S.D. Fla. 2011). Both decisions are at Appendix 1a and 27a, respectively.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its decision on June 29, 2012. The Eleventh Circuit Court of Appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1161 provides:

The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

25 U.S.C. § 1747(b)(2)(A) provides:

The laws of Florida relating to alcoholic beverages (chapters 561, 562, 563, 564 and 565, Florida Statutes), gambling (chapter 849, Florida Statutes) sale of cigarettes (chapter 210, Florida Statutes), and their successor laws, shall have the same force and effect within said transferred lands as they have elsewhere within the State and the State shall have jurisdiction over said offenses committed elsewhere within the State.

Florida Statute § 285.16(2) provides:

The civil and criminal laws of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere than that state.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Court of Appeals statement of the facts in this case is accurate and succinct. Because the Complaint was dismissed, the District Court and the Court of Appeals accepted as true the facts alleged in the Complaint with its attached exhibits. The Court of Appeals wrote:

> On the night of January 20, 2009, and into the early morning hours of January 21, Tatiana Furry was at the Miccosukee Resort & Gaming, a gambling and resort facility in Miami-Dade County owned and operated by the tribal defendants. Miccosukee Resort & Gaming also includes several bars and restaurants that sell or serve alcoholic beverages on the premises. Pursuant to 18 U.S.C. § 1161, the tribal defendants applied for and received a license from the State of Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages & Tobacco to sell and furnish alcohol.
>
> According to the complaint, the tribal defendants and their employees "furnished Tatiana [Furry] with a substantial amount of alcoholic beverages." They did so "despite knowing that she was habitually addicted to the use of any or all alcoholic beverages." The defendants knew of Ms. Furry's habitual addiction to alcohol because, prior to the night

in question, they "had served Tatiana a substantial amount of alcohol on multiple occasions on their premises." At some point in the early morning hours of January 21, employees of the defendants witnessed Ms. Furry get in her car and leave the premises "in an obviously intoxicated condition."

A short time later, Ms. Furry was involved in a head-on collision with another vehicle on U.S. Route 41 (the Tamiami Trail). Ms. Furry was killed as a result of the collision. After the accident, Ms. Furry's blood alcohol level was measured at .32, four times Florida's legal limit of .08.

On December 17, 2010, Ms. Furry's father, John Furry, filed an eight-count complaint in the United States District Court for the Southern District of Florida, alleging violations of 18 U.S.C. § 1161 and Florida's dram shop act, codified at Fla. Stat. § 768.1254, as well as various state law negligence claims. The Miccosukee Tribe answered by filing a motion to dismiss, contending, among other things, that the district court lacked subject matter jurisdiction due to tribal sovereign immunity. After full briefing, the district court entered an order dismissing Furry's complaint based on a lack of subject matter jurisdiction because the Miccosukee Tribe was immune from suit.

App. 3a (footnotes omitted).

II. PROCEEDINGS BELOW

On appeal, the Eleventh Circuit canvassed this Court's decisions regarding tribal sovereign immunity, recognizing the Court's concerns about the antecedents of the doctrine and the reasons "to doubt the wisdom of perpetuating the doctrine." App. 8a. However, given this Court's conclusion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), that "[t]he capacity of the legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area" (*id.* at 759), the Court of Appeals, understandably, deferred to *Kiowa's* cautious approach to the concerns about tribal immunity:

> We share these concerns about the broad scope of tribal sovereign immunity, but at the end of the day, notwithstanding the Supreme Court's reservations about the tenuous origins of the tribal immunity doctrine and the wisdom of the doctrine's current breadth (both points that Furry emphasizes heavily), the Court could not have been clearer about placing the ball in Congress' court going forward: "[W]e decline to revisit our case law and choose to defer to congress." *Id.* [citing *Kiowa*] at 760.

App. 10a.

Then the court below concluded that the Tribe's arguments were unavailing; that Title 18 U.S.C. § 1161, which authorized state regulation of tribal liquor transactions, and the *Rice v. Rehner*,

463 U.S. 713 (1983) statement that "'there is no tradition of sovereign immunity that favors the Indians [in liquor transactions]'" and that the "'State has an unquestionable interest in the liquor traffic that occurs within its borders'" [463 U.S. at 724-725] "is not sufficient to cast aside a tribe's immunity." The Court of Appeals cited *Kiowa* for its conclusion. App. 14a.

The court below concluded that 18 U.S.C. § 1161 did not demonstrate an "unmistakably clear" intention to subject the Indian Tribes to private suits (*id.* at 17a), and rejected an Oklahoma Supreme Court decision that read § 1161 and *Rice v. Rehner* in a way that came to the opposite conclusion. *Id.* at 20a, n. 7.

Finally, the court below rejected the contention that the Miccosukee Tribe waived its sovereign immunity and subjected itself to liability under Florida's Dram Shop Act by applying for and receiving a state liquor license. App 21-24a.

***

This Petition seeks review of that decision for the reasons that are set forth below.

REASONS FOR GRANTING THE PETITION

1. This case presents an important but unanswered question about the continued need for, and availability of the doctrine of tribal sovereign immunity, especially in the context of tribal state-licensed alcohol beverage sales.

The "reasons to doubt the wisdom of perpetuating the doctrine [of tribal sovereign immunity]" voiced by the Court in *Kiowa*, 523 U.S. at 758, have multiplied greatly since that 1998 decision. Indian Tribal Gaming produced $26.5 billion in revenues in 2010. See Report of National Indian Gaming Commission (NIGC), Gaming Revenue Reports, 2010 Report, *available at* http:www.nigc.gov/Gaming_Revenue_Reports.aspx. The admonition that "[i]n our independent 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" (*id.*), is especially apt now. The passage of time since *Kiowa* has not provided any basis for failing to address the doubts expressed in *Kiowa*: "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." *Id.* at 758; see also *id.* at 766 (Stevens, J. dissenting) (broad application of tribal immunity "unjust" and "especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity").

In addition, the fact that the Court has recognized that tribal sovereign immunity is an accidental outgrowth of Justice Brandeis' opinion in *Turner v. United States*, 248 U.S. 354 (1919) and "is but a slender reed for supporting the principle of tribal sovereign immunity" and that later cases, with little analysis simply "reiterated the doctrine" (*id.* at 757), buttresses the need for accepting review. A principle of law which lacks a firm

foundation and which creates an unjust harm to unaware patrons of tribal businesses calls out for consideration by the Court. Review should be granted.

2. A second reason for granting certiorari is that this case presents an important but unanswered question of tribal sovereign immunity in the context of Title 18 U.S.C. § 1161, which mandates, on the one hand, that tribal alcoholic beverage activities must be "in conformity with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register," and, on the other, allows for no remedy when an Indian tribe fails to comply with those liquor laws.

Rice v. Rehner, 463 U.S. 713 (1983) saw §1161 as the vehicle for removing prohibition in Indian country, and said "that Congress intended that state laws should apply of their own force to govern tribal liquor transactions as long as the tribe itself approved these transactions by enacting an ordinance." *Id.* at 726. Thus, the unanswered question is whether private citizens can seek relief against a tribe that fails to follow state law.

Here that issue is centered on Florida Statute § 768.125 which creates liability for injuries resulting from injuries caused by serving alcohol to alcoholics. Title 25 U.S.C. § 1747(b)(2) and Florida Statute § 285.16(b), made clear that Florida's beverage laws apply to Indian country. See p. 2, supra.

The Court of Appeals acknowledged that "federal courts have not weighed in on the precise issue of whether §1161 abrogates tribal immunity from private tort suits based on state dram shop acts or other tort law. . . ." App. 19a. Clearly this Court has not addressed that important issue.

Several state courts have addressed the issue with mixed results. *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008) held that § 1161 and *Rice v. Rehner,* read together, abrogated tribal immunity. Three intermediate state appellate courts have come to a different conclusion. See, *Foxworthy v. Puyallup Tribe of Indians Ass'n.*, 169 P.3d 53 (Wash. Ct. App. 2007); *Filer v. Tohono O'Odham National Gaming Enterprise*, 129 P.3d 78 (Ariz. Ct. App. 2006); *Holguin v. Ysleta del Sur Pueblo*, 954 S.W.2d 843 (Tex. App. 1997).

Thus there is conflict among state courts regarding the effect of 18 U.S.C. § 1161 and *Rice v. Rehner* on tribal sovereign immunity in the context of private enforcement of state alcoholic beverage laws. The admixture of important but unanswered questions in federal courts, and the conflict among state courts, supports the granting of certiorari where, as here, an Indian tribe has expressly applied for and obtained a state liquor license and should be bound by that license to obey state laws.

CONCLUSION

For the reasons stated above, this Court should grant review of the decision below.

Respectfully submitted,

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